

THIS WEEK:

- **Field Sobriety Tests; *Miranda* Warnings**
- **Right to Self-Representation; Midtrial Requests**
- **Rule 404 (b); Influencing a Juror**
- **Prosecutorial Misconduct; Due Process**
- **Meaningful Access to the Courts; Due Process**
- **Ineffective Assistance of Counsel; Plea Colloquy Statements**

Field Sobriety Tests; *Miranda* Warnings

Licata v. State, S18G0563 (3/11/19)

Appellant was arrested for DUI and other offenses. The evidence showed that appellant's vehicle was stopped by police because it matched the description of a vehicle that had recently been in an accident and had significant front-end damage. Prior to the stop, sparks were coming off the asphalt as appellant had been driving on the vehicle's rims. The police officer who ultimately arrested appellant approached appellant and confirmed that appellant had been involved in an accident. The arresting officer told appellant that he wanted to discuss the accident but he wanted to read *Miranda* warnings to him first. After doing so, the arresting officer asked appellant several questions about the accident and then asked appellant to perform field sobriety tests. Appellant complied and failed the tests. Following his arrest, appellant refused a breath test.

The trial court granted appellant's motion to suppress, concluding that the field sobriety evaluations were inadmissible because appellant was in custody and was not informed that he had a right to refuse to perform incriminating acts, a right protected by Paragraph XVI. The Court of Appeals reversed. It found that under *Price v. State*, 269 Ga. 222 (1998), *Miranda* warnings must precede a request to perform a field sobriety test only when the suspect is in custody. However, the Court of Appeals did not address whether appellant was in custody but held that the trial court erred in concluding that Paragraph XVI requires police to give a warning that suspects have a right not to incriminate themselves through an affirmative act. The Court grant certiorari.

The Court stated that generally, mere roadside questioning during a traffic stop does not constitute a custodial situation. First, the detention attendant to a traffic stop is usually temporary and brief, with most drivers expecting to answer a few questions and maybe receive a citation before being allowed to continue on their way, while a stationhouse interrogation, in comparison, is often prolonged and the detainee usually knows the questioning will not cease until he provides sufficient information to the police. Second, because traffic stops are conducted in public and usually only by one or two police officers, there is less risk that “unscrupulous [officers] will use illegitimate means to elicit self-incriminating statements” and the driver's vulnerability or fear of abuse is dampened. Because of these two features, a person detained as a result of a traffic stop is not in *Miranda* custody because such detention does not sufficiently impair the detained person's free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.

And here, the Court found, appellant was not in police custody when he was asked to undergo the field sobriety tests. It was undisputed that appellant was not handcuffed when the arresting officer asked him to undergo field sobriety tests. The trial court found, and the record confirmed, that the arresting officer had not conveyed to appellant that he was going to arrest appellant. The video recording also showed that the police officer did not act in a hostile or coercive manner, did not draw his weapon, or issue threats

The fact that the arresting officer read *Miranda* warnings to appellant did not make the detention a custodial one in the absence of other factors. The arresting officer gave the *Miranda* warnings soon after making the initial contact with appellant, and the entire duration of that officer's encounter with him was short. According to the trial court, the arresting officer approached appellant at about 9:41 p.m., at which point the *Miranda* warning was given, and appellant was arrested and read the implied consent notice about 10 minutes later. And there was no significant restraint of appellant's freedom of movement during this encounter. Thus, the Court concluded, these circumstances fell short of establishing that appellant was in custody.

Accordingly, because appellant was not in custody, *Price* did not apply, and the police were not required to give any *Miranda* warning, much less one tailored to cover Paragraph XVI rights, before asking appellant to undergo the field sobriety tests. Therefore, although the Court disagreed with the Court of Appeals' rationale, it affirmed its reversal of the trial court's suppression of appellant's field sobriety tests.

Right to Self-Representation; Midtrial Requests

Coast v. State, S19A0180 (3/11/19)

Appellant was convicted of malice murder. The record, briefly stated, showed that appellant asserted his right to represent himself near the end of the State's case-in-chief, when he disagreed with defense counsel about certain evidence. Essentially, during cross-examination of the State's eighteenth, and last witness, appellant disagreed with his counsel about the admission of evidence that defense counsel had successfully excluded in a pretrial motion in limine. The prosecutor sought to admit it, arguing that the defense had "opened the door" to it. Appellant decided he wanted it to come in, but the prosecutor did not pursue the matter. Nevertheless, appellant, even after the jury was being brought in, insisted the evidence come in.

The State rested and the jury retired to the jury room. At this point, appellant asked the judge if he could fire his lawyer. Then, a few minutes later during a discussion concerning appellant's desire to testify on his own behalf, appellant again requested to fire his lawyer. The court denied his request. Then, just before recessing for the day, defense counsel advised the court that appellant told him that appellant wanted to fire him and asked the court to "perfect the record." After some discussion, the court told appellant to talk it over with his counsel and they would discuss it the next day. Appellant responded that he wanted counsel to handle motions (no motion for directed verdict had yet been made) and questioning during his own testimony and then he wanted to do his own closing argument. The court said that was not proper. After recessing for the day, appellant sent his counsel a letter saying that he wanted to immediately terminate the attorney-client relationship and that he was requesting new counsel. Then, at the beginning of the next day, appellant requested that his

counsel be terminated and he represent himself for the rest of the trial. The court said no. Thereafter, appellant's counsel continued to the conclusion of the trial.

Appellant contended that the trial court erred in denying his request to represent himself because his requests were unequivocal and not frivolous. The Court disagreed. The Court found that the requests were equivocal. Appellant initially proposed a form of hybrid representation, in which he would act much like a co-counsel. Such a request is not an unequivocal assertion of the right to represent oneself, and a trial court is not required to grant such a request. Appellant's equivocation was compounded when, in his letter purporting to terminate counsel's representation, he stated he was requesting new counsel — not that he wanted to represent himself. In addition, the record showed that appellant exhibited disruptive behavior at several points during the trial, including a number of outbursts in the presence of the jury. Given that appellant equivocated about self-representation, engaged in a pattern of disruptive behavior during trial, and decided to proceed pro se because of his disagreement with his counsel's strategy about the cross-examination of the State's final witness, the record showed that appellant's decision to change his mind about counsel midstream was, at best, a frivolous response to the omission of evidence that he thought would help the defense. Therefore, the Court concluded, under the circumstances, the trial court did not violate appellant's right to represent himself, and the denial of his mid-trial request to proceed pro se provided no basis for the reversal of his criminal convictions.

Rule 404 (b); Influencing a Juror

West v. State, S18A1467 (3/11/19)

Appellant was convicted of malice murder and other offenses arising out of a home invasion. He contended that the trial court erred in admitting evidence that he conspired and attempted to improperly influence a juror in his trial. The record, briefly stated, showed that at the beginning of the second week of trial, and before the jury was brought in, the prosecutor notified the court of potential jury tampering. A detective testified that he had been monitoring appellant's jail phone calls. After the detective realized that appellant and Kemp, appellant's podmate, had been calling certain phone numbers in common, he began to monitor Kemp's phone calls as well. The detective listened to the recordings of two phone conversations, occurring two days ago, between Kemp and Angella Hodges, Kemp's mother, after which the detective alerted the prosecutor.

The two phone calls at issue, which were played for the trial court and later admitted into evidence, showed the following. In the first phone call, Hodges asked Kemp about appellant, and Kemp responded that appellant was next to him. Kemp directed Hodges to create a “fake” Facebook page, using false information and a photograph of another person, and then message “please don't send my son to prison” to a 20-year-old female juror in appellant's trial. Kemp explained that appellant and the juror had been “silent talking.” In a second phone call later that day, Kemp gave Hodges the name of the juror, and he spelled out the name based on information that was apparently being relayed to him from a nearby, unidentified third person.

Outside the presence of the jury, the court heard testimony from Hodges, who denied creating a fake Facebook account, and the juror. The juror denied any contact by anyone and stated only that she noticed appellant making eye contact with her. The court found the juror credible, but excused her out of concern she could not be fair and impartial at this point.

The trial court then questioned the other jurors, who each denied having been contacted improperly regarding his or her service as a juror, or having witnessed or been made aware of anyone attempting to contact another juror.

Appellant argued that the phone calls were evidence of extrinsic acts, specifically, attempt to commit the crime of embracery and conspiracy to commit the crime of embracery, and that the evidence improperly placed his character into evidence, was irrelevant to the issues being tried, and that its probative value, if any, was substantially outweighed by its prejudicial effect.

The Court held that the admissibility of the evidence must be assessed under the three part test of Rule 404 (b). First, the Court found that the jury could conclude by a preponderance of the evidence that appellant, Kemp's podmate, who Kemp stated was next to him during the phone call in which Kemp asked Hodges to influence a juror in appellant's trial, was part of a conspiracy to influence the juror. The evidence was relevant as it tended to show appellant's consciousness of guilt. Thus, the first and third prongs of the three-part test were met.

As to the second part of the test, this required a balancing under Rule 403. The Court found that evidence of appellant's consciousness of guilt was of more than marginal value to the State, which sought to establish beyond a reasonable doubt that appellant was a party to the crime of malice murder and other offenses, and not merely present at the scene. As to the danger of unfair prejudice, the evidence was pertinent to appellant's consciousness of guilt *in this case*, and the potential for prejudice, to that extent, arises from its probative value.

Nevertheless, appellant contended, he was unfairly prejudiced in that his guilt or innocence was to be determined by jurors already seated in the case, while the extrinsic act showed a plan to contact and influence "one of their own." However, the Court found, the evidence did not suggest that any of the other jurors were actual or potential targets of the conspiracy, nor was the nature of the scheme, which was based on subterfuge and an apparent assessment by appellant that he had established a link, through "silent talking," with one juror, of a nature likely to inflame the remaining jurors. Accordingly, as a matter of law, it could not be said that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Accordingly, the Court concluded that the trial court did not abuse its discretion in its admission of this evidence.

Prosecutorial Misconduct; Due Process

Brooks v. State, S18A1282 (3/11/19)

Appellant was convicted of malice murder and other crimes. The evidence, briefly stated, showed that appellant, his female acquaintance, Williamson, and her friend, Cossette, whom appellant met earlier that day, decided to rob Colleps. Around 4:30 a.m., appellant and Cossette broke into Colleps' trailer and during the encounter, the Cossette shot and killed the victim.

Appellant did not testify at trial. Relying primarily on his interview, the defense theory was that Cossette had coerced appellant into participating in the crimes. During direct examination of one of the police investigators who interviewed appellant, the State tendered the original, over-two-hour-long video recording of the interview, which was admitted into evidence without objection. When the prosecutor asked the trial court's permission to play the recording for the jury, the

court called the attorneys to the bench, and the prosecutor explained that he planned to play an edited version of the video that was about an hour and 15 minutes long. The prosecutor told the court that the State had redacted parts of the recording that referenced appellant's prior criminal record, probation status, and other "objectionable" content. When appellant's counsel told the court that she had not seen the redacted video, the prosecutor explained that the State was not able to get the recording redacted and to the defense before the trial began. Appellant's counsel agreed to watch the edited recording over a lunch recess. After lunch, the prosecutor played the redacted version of the interview for the jury, and appellant's attorney did not object. Neither the original nor the redacted recording was given to the jury during its deliberations. Additionally, Cossette and Williamson both testified that Cossette never threatened appellant and never pointed his pistol at appellant.

Appellant contended that the prosecutor committed misconduct by using the edited version of the interview recording. Specifically, appellant argued that the State removed "crucial" statements in the interview that provided important context and that the various "jumping" and "fading" transitions between sections of the recording highlighted changes in appellant's mood during the interview. The Court disagreed.

The Court stated that when a defendant alleges a factually specific claim of prosecutorial misconduct, the defendant must show actual misconduct and demonstrable prejudice to his right to a fair trial in order to reverse his conviction. Premitting whether the prosecutor acted altogether properly, the Court found that appellant did not demonstrate prejudice. A comparison of the original recording of his interview and the edited version showed that many of the edits omitted references to other bad acts or crimes that appellant had committed. Additional edits cut several minutes during which appellant sat quietly alone in the interview room or brief periods of time when the interview was interrupted while investigators addressed unrelated matters. And although it was less clear why the State redacted other sections of the recording, the omitted statements and reactions by appellant that were relevant to his defense were repeated in other parts of the recording.

For example, the Court noted, the edited version omitted a few brief segments during which appellant cried and said that he was afraid. But the jury saw numerous other instances during the recording in which appellant repeatedly cried and said that he was afraid of Cossette. And although the State unaccountably edited appellant's statement, "If I had a pistol I would have shot that motherf**ker for pointing a gun at me and telling me I had to do something," in such a way that the jury heard "If I had a pistol I would have shot that," the jurors surely inferred that appellant was talking about shooting Cossette for allegedly coercing him. Minutes earlier in the recording, the jury heard appellant tell investigators, "If I had a pistol, I would have f**king shot [Cossette]. I don't know whether that's incriminating or not, but I would have, just because [Cossette] forced me to do something I didn't want to do." As for appellant's assertion that the various transitions between edited sections of the recording highlighted his shifts in mood, the Court found that the original recording of the interview showed that appellant's demeanor quickly changed from angry to depressed to relieved as he recounted his story that Cossette forced him at gunpoint to commit the crimes.

Therefore, the Court concluded, under these circumstances, appellant failed to prove his claim of prosecutorial misconduct. He also did not demonstrate that the State violated his right to due process through the knowing presentation of materially false evidence, or the concealment of materially exculpatory evidence.

Meaningful Access to the Courts; Due Process

Blaine v. State, S19A0430 (3/11/19)

Appellant was convicted of malice murder, felony murder and numerous other crimes. He contended that he was denied his rights to due process and access to the courts when he was allegedly denied access to his legal papers and other legal resources on the eve of trial. The record showed that, on the first day of trial, defense counsel filed a “Motion to Enjoin the State from Violating [Appellant’s] Rights,” wherein he claimed that appellant’s constitutional rights had been violated after he was “placed in ‘the hole’ at the county jail [the week prior to trial] without any notice or due process,” and without “access to his attorneys, legal papers, hygiene products, etc.” At a pre-trial hearing, the State informed the trial court that the Sheriff’s office placed appellant in solitary confinement prior to trial because he was considered a security risk to the State’s witnesses. After hearing arguments from the parties, the trial court found no constitutional violations had occurred, yet ordered that all law enforcement agencies housing appellant ensure that he had reasonable access to his attorneys, legal papers, notes, personal grooming products, and food.

At the hearing on appellant’s motion for new trial, the State presented evidence that, as an inmate held in solitary confinement, appellant could still send and receive letters, retain his legal papers and books, and have access to his attorney. At the same hearing, defense counsel testified as follows: he reviewed the State’s discovery with appellant prior to trial; appellant was able to look at counsel’s trial file whenever he wanted; counsel gave appellant copies of all documents and appellant was familiar with the case and the discovery; to the extent appellant was denied access to his legal documents, it was for a very short period of time in relation to the length of time the case had been pending; counsel could not recall a time where he was denied access to his client; and that he filed the pre-trial motion based solely upon what appellant told him and not based upon any independent confirmation or corroboration of appellant’s claims.

The Court stated that meaningful access to the courts means that state authorities must ensure that inmates have a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts. This requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. Any restriction on a prisoner’s access to the courts must be clearly warranted by the particular circumstances of each case.

Applying these legal principles to the facts of this case, the Court concluded that appellant was given meaningful access to the courts and suffered no deprivation of due process. Specifically, the record showed that, despite being placed in solitary confinement prior to trial, appellant was given numerous opportunities to have his claims filed in, heard by, and ruled upon by the trial court. Moreover, as found by the motion for new trial court, appellant failed to substantiate his claims with any credible testimony or evidence. Accordingly, appellant could not show that he was denied access to the courts or denied the right to due process.

Ineffective Assistance of Counsel; Plea Colloquy Statements

Esprit v. State, S18A1074. S18A1075 (3/11/19)

Esprit and Jones were tried together. Esprit was convicted of felony murder, Jones was convicted of malice murder, and both were convicted of a firearm offense in connection with the shooting death of Stevenson. The evidence, briefly stated,

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showed that Esprit and Stevenson drove to Robateau's house to pick up Jones. Stevenson was driving and stayed in the car. Robateau, Esprit and Jones went into the backyard where Esprit told Jones that Stevenson was carrying \$3000.00 and that the two of them should rob him. Esprit gave Jones a gun. Shortly after the two of them got back in the car, Jones shot Stevenson and then Esprit and Jones got out of the car and ran away.

Esprit contended that his trial counsel provided ineffective assistance by failing to properly seek admission of statements that Jones made when he attempted to plead guilty on the first day of the joint trial. The record showed Jones agreed to plead guilty and in exchange for a lesser sentence, to testify truthfully against Esprit. However, after the prosecutor made a proffer of the evidence, he asked Jones if the facts as stated, were accurate. Jones said, "No ma'am." Instead, Jones said, "I committed the crime and Esprit ain't had nothing to do with it." Jones asserted that Esprit had not given him the pistol he used to shoot Stevenson; that he never had a conversation with Esprit about robbing Stevenson; that instead he wanted to buy some crack from Stevenson but did not have any money; and that he told Stevenson to "give up the drugs" and when Stevenson refused, he shot Stevenson. At this point, the State withdrew its plea offer.

Esprit argued that his counsel should have asked the trial court allow the admissibility of Jones's plea-hearing statements after Robateau testified on direct examination that after the shooting, Jones told him that it was Esprit's plan to rob Stevenson, that Jones and Esprit tried to rob Stevenson, and that Jones thought Esprit had the \$3,000. Esprit contended that the plea-hearing statements were admissible to impeach those statements from Jones to Robateau. The Court disagreed.

The Court stated that Georgia law has long allowed "impeachment of the hearsay declarant." Under the old and the new Evidence Code, however, a hearsay declarant like Jones could only be impeached in the same manner that in-court testimony may be impeached, that is, by the introduction of relevant evidence which would be admissible for impeachment purposes if the declarant was in court. Thus, Jones's plea-hearing statements would have been admissible to impeach his prior statements to Robateau only if they would have been admissible to impeach Jones, had he chosen to testify at the joint trial. And, the Court stressed, that is a crucial "if." Esprit cited no Georgia precedent that clearly and directly would have required the trial court to admit Jones's plea-hearing statements after Robateau testified, had Esprit's trial counsel tried to admit that evidence at that point. Instead, the Court noted, to support an argument that the plea-hearing statements were admissible for the purpose of impeaching Jones's statements to Robateau, Esprit's trial counsel would have had to string together several novel theories.

But, the Court stated, a criminal defense attorney does not perform deficiently when he fails to advance a legal theory that would require "an extension of existing precedents and the adoption of an unproven theory of law. Thus, in light of the novel theory that Esprit's trial counsel would have had to develop to seek the admission of Jones's plea-hearing statements during the trial, the limited probative force of that declarant-impeachment-only evidence, and the strong challenges to Robateau's testimony that trial counsel raised using other evidence, it was clear that — even if trial counsel subjectively would have liked to also use the plea-hearing statements — he did not perform deficiently in an objectively unreasonable way.

Nevertheless, Esprit argued, his trial counsel should have sought admission of the plea-hearing statements under the due process rationale of *Chambers v. Mississippi*, 410 U. S. 284 (93 SCt 1038, 35 LE2d 297) (1986), because the statements bore "persuasive assurances of trustworthiness" and were "critical to [Esprit's] defense." The Court again disagreed.

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The Court noted that in its order denying Esprit's motion for new trial, the trial court determined that Jones's plea-hearing statements were not reliable, pointing to his inconsistent and nonsensical explanation as to how Robateau knew that Stevenson had been carrying \$3,000. Although Jones made the statements under oath before the trial court, those statements were not "unquestionably against" his interest, because he only attempted to exonerate Esprit after he thought he had secured his own plea deal. In addition, the statements were made not spontaneously but years after the crimes, and Jones was unavailable as a witness at the joint trial, so the State could not cross-examine him fully about the statements. Accordingly, the Court concluded, the trial court would have been well within its discretion to reject an argument that the exceptional circumstances of *Chambers* applied here.