

THIS WEEK:

- ***Garrity*; Use and Derivative Use of Immunized Statements**
- **Traffic Stops; Justifications for Stop**
- **Statements; Voluntariness**
- **Jury Charges; Lesser Included Offenses**
- **Constitutional Right to a Speedy Trial; DUI**

***Garrity*; Use and Derivative Use of Immunized Statements**

Ward v. State, A19A1480 (10/31/19)

Appellant was convicted of child molestation and enticing a child for indecent purposes. The evidence showed that appellant was a police officer and that after the allegations were made, an Internal Affairs investigation was conducted by the police department simultaneously with the police department's investigation of the alleged criminal acts. Appellant contended that his trial counsel rendered ineffective assistance by failing to object to the State's possession and derivative use of his compelled/immunized statements pursuant to *Garrity v. New Jersey*, 385 U. S. 493, 500 (87 SCt 616 17 LE2d 562) (1967) and *Kastigar v. United States*, 406 U. S. 441, 453 (II) (92 SCt 1653, 32 LE2d 212) (1972).

The record showed that trial counsel filed a pretrial motion seeking to exclude from trial all evidence regarding the Internal Affairs investigation. The trial court excluded appellant's compelled statements made during the Internal Affairs interview. Nevertheless, appellant argued that trial counsel was deficient in failing to object to the State's *possession* of the Internal Affairs file, which allowed the State to have derivative use of his compelled statements during its trial preparations. Appellant further argued that the trial court could not have properly found that counsel's error did not affect the result of the trial without conducting a proper hearing under *Kastigar* and requiring the State to discharge its burden to prove all the evidence introduced at trial was derived from legitimate sources, wholly independent of the compelled statements.

The Court noted that in *Kastigar*, the United States Supreme Court ruled that under the Fifth Amendment privilege against self-incrimination, the use in any criminal case of compelled testimony, or any information directly or indirectly derived from such testimony or other information, is prohibited. These constitutional protections not only forbid the use of the compelled testimony in future prosecutions, but also protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony. In other words, both direct use and derivative use of the compelled testimony and evidence is forbidden under the Fifth Amendment privilege.

The proper procedure and standard for addressing an alleged *Garrity* violation are set forth in *Kastigar*. Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to a prosecution, the State has the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence. This burden of proof is not limited to a negation of taint; rather, it imposes on the prosecution the

affirmative duty to prove that the evidence it used was derived from a legitimate source wholly independent of the compelled testimony.

But here, the Court found, the trial court failed to conduct an evidentiary hearing applying the *Kastigar* standard for evaluating the claim. Accordingly, the Court vacated the trial court's ruling on this issue and remanded the case to the trial court to conduct a *Kastigar* evidentiary hearing to address whether the State can demonstrate by a preponderance of the evidence that it did not make derivative use of the compelled statements. If there was a derivative use and tainted evidence was presented to the jury, the trial court must determine whether the use was harmless beyond a reasonable doubt.

Nevertheless, the Court recognized that it must give additional guidance to the trial court because there is a split in authority as to the interpretation of the scope of *Kastigar*'s prohibition against the derivative use of a compelled statement. Some courts have favored a broad interpretation of "use" that requires prosecuting authorities to show that there was no evidentiary, as well as non-evidentiary, derivative use of compelled statements to which the prosecutor had access. However, citing *United States v. Byrd*, 765 F2d 1524, 1531 (II) (11th Cir. 1985) and *United States v. Schmidgall*, 25 F3d 1523, 1530-1531 (II) (11th Cir. 1994), the Court adopted the Eleventh Circuit's more restrictive interpretation of *Kastigar*. These cases hold that the constitutional privilege prohibits only direct or indirect "evidentiary" uses of a compelled statement.

Thus, the Court concluded, upon remand, the trial court is instructed to conduct a *Kastigar* evidentiary hearing and determine whether a violation occurred based upon the standards of *Kastigar*, *Byrd* and *Schmidgall*. The trial court then must determine whether trial counsel was ineffective for failing to object on *Kastigar* grounds as Ward alleged.

Traffic Stops; Justifications for Stop

Shaw v. State, A19A1655 (11/8/19)

Shaw was charged with DUI. He moved to suppress, arguing that the officer lacked reasonable articulable suspicion to justify the stop of his vehicle. The trial court granted the motion and the State appealed.

The evidence, including a video from the arresting officer's vehicle showed that the officer was "pacing traffic" to provide safety to officers working on an accident up ahead. The officer activated his patrol car's blue lights and weaved from left to right over all three lanes of the road. Most cars stayed behind him. Three cars passed him, one using the right shoulder, one using the left lane, and one using the right lane. A fourth vehicle, Shaw's, passed the officer on the right about ten seconds after the third car and within view of the third car. As the police officer drifted back towards the far right lane, he came very close to Shaw's car. The officer then initiated a traffic stop on Shaw's car. The officer told Shaw that he had stopped the car because Shaw had not obeyed the officer's traffic directive to stay behind the patrol car.

The State argued that the officer had a reasonable articulable suspicion that Shaw illegally failed to obey an authorized person directing traffic, in violation of OCGA § 40-6-2, which provides that "no person shall fail or refuse to comply with any lawful order or direction of any police officer ... with authority to direct, control, or regulate traffic." The Court disagreed. The trial court found that the officer's manner of slowing down traffic, by slowly driving from left to right over three lanes with his lights on, did not constitute a clear police order to stay behind the officer's vehicle. Additionally, the

trial court determined that the officer's traffic directive was ambiguous because the officer allowed three cars to pass him. After independent review of the video, the Court found no clear error with these factual findings. Because the officer did not give a clear directive that cars must not pass him and even allowed three cars to pass him without stopping them, Shaw did not violate any clear directive by passing the patrol car. Additionally, there was no objective basis for the officer to reasonably believe that Shaw violated any such directive.

Nevertheless, the State contended, the officer could have cited Shaw for violating OCGA §§ 40-6-390, 40-6-74, and 40-6-48 based on the video and the officer's testimony. The Court again disagreed. First, as to OCGA § 40-6-390 (reckless driving), the video showed that the patrol car drifted towards Shaw's car, as Shaw drove past the patrol car in the far right lane. Thus, rather than Shaw almost striking the officer's vehicle, it was the officer who came close to Shaw's vehicle when he drove back across the lanes. And, Shaw safely passed the officer on the right. Based on independent review of the video, we discern no clear error with these factual findings. Accordingly, the Court found that this alleged violation did not provide a valid basis for Shaw's traffic stop.

Second, as to OCGA § 40-6-74 (a), the Court noted that this statute concerns a driver's failure to yield to emergency vehicles. To violate the statute, an individual must obstruct the roadway, thereby preventing an emergency vehicle from proceeding upon its route in pursuit of a fleeing suspect or other emergency. But here, the video showed that Shaw passed the patrol car in the far right lane, leaving two other empty lanes open for the patrol car to proceed forward unobstructed. Therefore, the Court found, Shaw did not obstruct the roadway and did not fail to yield the right-of-way to the officer. Accordingly, this alleged violation also did not provide a valid basis for the traffic stop of Shaw's car.

Finally, the Court noted that OCGA § 40-6-48 (1) requires a vehicle to "be driven as nearly as practicable entirely within a single lane and [that it] not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Here, it appeared that Shaw may have driven on the road's far right white line. However, as the trial court noted, it was not clear that Shaw's car went over the line and, even if he did drive over the white line, he appeared to do so to avoid the officer's patrol car, which was drifting into Shaw's lane. Thus, the Court found, because it was not entirely clear that Shaw violated OCGA § 40-6-48 (1) by failing to maintain his lane, it must defer to the trial court's finding that there was no reasonable articulable suspicion to justify the stop of Shaw's vehicle, including for failure to maintain a lane. Accordingly, the Court affirmed.

Statements; Voluntariness

Hudson v. State, A19A2108 (11/14/19)

Appellant was convicted of aggravated sexual battery, statutory rape, and aggravated child molestation. He contended that the trial court erred by denying his motion to suppress his incriminating statements. The Court disagreed.

The evidence showed that after receiving *Miranda* warnings, appellant made several statements to police. He initially denied any inappropriate conduct and asserted that he did not know the 13 year old victim. The following conversation then occurred: Officer: "Maybe you just didn't know [the victim] was young. Maybe she told you a lie, told you she was a different age. If that's what happened you just need to tell me that, so I know. But to tell me that you don't know her and you was never there, and I know that's a lie, then that's not helping." Hudson: "Ain't gonna help me neither sir if I go to

jail. If I tell you I messed with her like, I'm admitting the guilt.” Officer: “At least then I could tell them you cooperated instead of lying to me. Then denying it and them proving that you denied it and lied. They [will] throw the book at you.”

Appellant contended that the police coerced his confession by “saying they would throw the book at [him] if [he didn't] confess[.]” But, the Court stated, there is a material difference between a statement to a suspect that it would be better for him to tell the truth, and one wherein he is told that it would be better for him to make a confession. Mere exhortations that an accused should tell the truth do not render a confession involuntary because no hope of benefit springs from such an admonishment.

And here, the Court found, undoubtedly, the officer admonished appellant not to lie. But the officer did not tell appellant that he would be better off if he confessed, offer appellant any benefit in exchange for the confession, or threaten injury if appellant refused to cooperate with the police. And telling a suspect that truthful cooperation might be considered by others does not render a statement involuntary. Moreover, the officer's statements did not involve physical or mental torture, the hallmark of inducement by a fear of injury. Instead, the officer merely warned appellant of the consequences of lying to the police.

Accordingly, under the totality of these circumstance the Court found that the trial court was authorized to conclude that appellant confessed voluntarily.

Jury Charges; Lesser Included Offenses

Reason v. State, A19A2272 (11/15/19)

Appellant was convicted of burglary (2nd degree) and misdemeanor obstruction. He contended that the trial court committed plain error when it instructed the jury on how it should consider criminal trespass as a lesser included offense of burglary on the verdict form. The transcript showed that the trial court instructed that jury as follows: “Now, we will provide you the verdict form, and Count One reads: We, the jury, find the Defendant Richard Reason, it's not guilty or guilty. Now, if you find him guilty in burglary in the second degree, you do not consider whether or not he's guilty of criminal trespass. You would leave both blank, you would leave both lines blank on it, it's the next, criminal trespass. If you check “Not guilty” for burglary in the second degree, then you should consider whether he is guilty or not guilty of criminal trespass.”

The Court stated that a trial court is authorized to instruct a jury to consider a greater offense before it considers a lesser included offense, so long as the court does not go further and require the jury to reach a unanimous verdict on the greater offense before considering the lesser offense. Thus, a trial court is entitled to instruct a jury that it should not consider a lesser offense unless the defendant be found not guilty of the greater offense so long as the court does not insist upon unanimity and is willing to accept a verdict on the lesser offense.

And here, the Court found, the instruction was a sequential charge that instructed the jury to first consider the greater offense of burglary and then consider the lesser offense of criminal trespass if it found appellant not guilty of the greater offense. Citing various precedent, the Court found that the jury instruction was consistent with instructions upheld in

these previous cases and therefore, the trial court did not commit plain error in its instruction on how to consider the lesser included offense of criminal trespass.

Constitutional Right to a Speedy Trial; DUI

Jung v. State, A19A2411 (11/25/19)

Appellant appealed from the denial of his motion to dismiss based on his contention that his right to a speedy trial on Sixth Amendment grounds was violated. The procedural history, very briefly stated, showed that appellant was arrested in October 2014 and accused in February 2015 of DUI (two counts) and following too closely. The trial court granted appellant's motion to suppress his breath test results and the Court of Appeals affirmed. *State v. Jung*, 337 Ga. App. 799 (2016). The remittitur was in July 2016.

The case did not reappear on a trial calendar until February 2, 2017, and was then set on five consecutive calendars from February through June 2017. Appellant announced ready or appeared at all five calendars. Beginning in April 2017, the State filed a motion in limine and then a year later filed a motion to reconsider the suppression order. The trial court heard the motions in September 2018 and denied them the following month. In January, 2019, appellant filed his motion to dismiss, which the trial court denied three weeks later following a hearing.

Appellant contended that the trial court abused its discretion in denying his motion to dismiss. The Court disagreed, finding that the trial court's balancing of the four-factor test under *Barker v. Wingo*, 407 U.S. 514, 530 (IV) (92 SCt 2182, 33 LE2d 101) (1972) was not an abuse of discretion.

As to the length of the delay, the trial court found that this factor "weighed against the State" without further analysis. The Court stated that although appellant was not charged with the most complex of crimes, the case did present a tricky evidentiary issue that resulted in a published decision from the Court and thus, found that it was not an abuse of discretion insofar as the trial court declined to weigh this factor "heavily" against the State.

Appellant contended that the reasons for the delay should have been weighed heavily against the State. The trial court noted that both parties filed multiple motions, which led to periods of time during which the trial court took those motions under advisement, and that the delay was also accounted for by an appeal, motions for reconsideration, requests for continuance, and leaves of absence. Although the trial court also found much of the delay was attributable to the State, it also found that none of the delays were deliberately imposed to hamper the defense and thus, it did not weigh this delay heavily against the State. The Court found this analysis by the trial court was also not an abuse of discretion.

As to the assertion of the right to a speedy trial, the trial court noted that appellant did not assert his speedy trial right until approximately four years after his arraignment. Although appellant did file a demand for a jury trial in April 2015 just after the accusation was filed, the trial court correctly noted that the filing of a demand for a jury trial does not also invoke a defendant's constitutional right to a speedy trial. In addition, the fact that appellant appeared ready for trial at various points in the proceedings also did not constitute an assertion of his right to a speedy trial. Thus, the Court found, the trial court properly weighed the third factor heavily against appellant because he did not raise his constitutional right to a speedy trial until four years after his arraignment.

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 17, 2020

Issue 3-20

Appellant contended that as to the last factor, the trial court should have presumed prejudice given the length of the delay, which he maintained was “egregious.” The Court noted that although none of the three charges by their nature were particularly complex, the case did present an evidentiary issue that eventually resulted in a successful suppression of the breath test result, a crucial piece of evidence in this case. Because of this suppression, the State had to change the course of its prosecution after its appeal, as evidenced by the number of motions that were filed afterwards. The Court stated that the State did not unreasonably abandoned its pursuit of the charges against appellant, and so it could not conclude that the trial court abused its discretion in not finding a presumption of actual prejudice based on the length of the delay.

Nevertheless, appellant argued, the record showed that he suffered actual prejudice by the delay in that he lost multiple business opportunities due to the pending charges. The Court disagreed. The types of prejudice that may result from an unreasonable delay before trial include oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence. Here, appellant did not argue that he suffered an oppressive pretrial incarceration. Likewise, he did not argue that he suffered any demonstrable impairment to his defense as a result of the pretrial delay. Instead, he argued that he was prejudiced as a result of anxiety and concern because the pending charges against him interfered with his business expansion plans. However, the Court found, the record contained no testimony from appellant regarding any purported anxiety he might have suffered, nor does it contain any other evidence supporting his contentions on this issue. In any event, appellant chose not to alleviate his anxiety and concern by waiting over four years to assert his speedy trial demand. Accordingly, the Court concluded that the trial court did not err in concluding that appellant did not show any unusual or particular anxiety or concern.

Thus, the Court found, the trial court did not abuse its discretion when it weighed the four *Barker v. Wingo* factors and concluded that appellant’s right to a speedy trial was not violated.