Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING MAY 29, 2020
Issue 22-20

THIS WEEK:

- **Self-Incrimination; Right to Testify**
- **DUI; Breath Tests**
- **Motions for New Trial; General Grounds**
- **DUI; Jury Charges**
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Self-Incrimination; Right to Testify

Thomas v. State, A20A0686 (4/1/20)

After his first trial ended in a mistrial due to a hung jury, appellant was tried and convicted of rape and two counts of aggravated child molestation. Appellant elected to testify in his first trial but not in his second trial. Appellant contended that the trial court erred in allowing the State to introduce, as part of his trial testimony from the first trial, his colloquy with the trial court in which the court advised him of his right to testify or not testify and his election to do so in that trial. Specifically, appellant argued that the admission of the colloquy from the first trial highlighted to the jury his decision not to testify in the second trial. Appellant acknowledged that admission of the colloquy "was not a direct, explicit comment on [his] invocation of silence at the second trial," but he argued that its admission nevertheless violated his rights under the Fifth Amendment to the United States Constitution and Article I, Section I, Paragraph XVI of the Georgia Constitution because it enabled the jury to unfavorably contrast his election to testify at his first trial with his election not to do so at the second trial.

As an initial matter, the Court found that appellant did not raise this specific objection at trial and therefore, its review of this issue was limited to whether the admission of the colloquy amounted to plain error. The Court found that it did not.

The Court noted that while appellant contended that admission of the colloquy violated his constitutional rights because it enabled the jury to negatively contrast his election to testify at his first trial with his election not to do so at his second trial, he cited no legal authority that supported his novel argument, and Court found none. And, here, the trial court specifically instructed the jury in the second trial that "[i]f the Defendant chooses not to testify, you may not consider in any way that decision in making your decision," and it is presumed that the jury follows the trial court's instructions. Furthermore, for an error to be obvious for purposes of plain error review, it must be plain under controlling precedent or in view of the unequivocally clear words of a statute or rule," which was not the case in this instance. Accordingly, the Court concluded that appellant failed to show plain error in the admission of the colloquy at his second trial.

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Appellant also contended that his trial counsel rendered ineffective assistance by failing to raise a specific constitutional objection to the admission of the colloquy from the first trial. However, the Court found, a trial counsel's failure to raise a novel legal argument does not amount to ineffective assistance of counsel. Furthermore, such a constitutional objection would have been meritless in light of the jury charge that was given, and the failure to raise a meritless objection cannot support a finding of ineffective assistance.

DUI; Breath Tests

Melton v. State, A20A0457 (4/2/20)

Appellant was accused of DUI (less safe). The trial court denied his motion to suppress his breath test, but granted him a certificate of immediate review. The Court granted his petition for interlocutory appeal.

Appellant contended that the trial court erred (1) by failing to apply the totality of the circumstances test to determine whether he voluntarily consented to the breath test and (2) by failing to find that a portion of Georgia's implied consent notice was unconstitutionally misleading and coercive in violation of the Georgia Constitution.

Citing *Elliott v. State*, 305 Ga. 179 (2019) and *Olevik v. State*, 302 Ga. 228 (2017), the Court stated that the protection against compelled self-incrimination provided by Article I, Section I, Paragraph XVI of the Georgia Constitution affords a DUI suspect the right to refuse a state-administered breath test and that this state constitutional right prohibits admission of evidence that a DUI suspect refused a breath test. Although OCGA § 40-5-67.1 (b) is not per se coercive, the fact that an officer reads a suspect the implied consent notice and otherwise complies with implied consent procedures does not mean that the suspect gives actual and voluntary consent to a particular test for Fourth Amendment purposes. When a defendant challenges the voluntariness of his consent to a breath test, the trial court must examine the totality of the circumstances surrounding the consent. Determining the voluntariness of (or lack of compulsion surrounding) a defendant's consent to a breath test involves considerations similar to those employed in determining whether a defendant voluntarily consented to a search, including such factors as the age of the accused, his education, his intelligence, the length of detention, whether the accused was advised of his constitutional rights, the prolonged nature of questioning, the use of physical punishment, and the psychological impact of all these factors on the accused. In determining voluntariness, no single factor is controlling.

And here, the Court found, appellant challenged the voluntariness of his consent to the breath test under the totality of the circumstances, including his contention that he was uncomfortable and in pain when the implied consent notice was read to him and that the implied consent notice contained the misleading, coercive threat that his refusal to submit to the breath test could be used as evidence at trial. But the trial court's order failed to address the issue of voluntariness in accordance with the totality of the circumstances test. Under these circumstances, the Court remanded the case to the trial court for the entry of findings and a conclusion addressing the voluntariness issue.

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Motions for New Trial; General Grounds

Gresham v. State, A20A0279 (4/3/20)

Appellant was convicted of kidnapping with bodily injury, home invasion, two counts of aggravated assault, two counts of armed robbery, burglary, theft by receiving, two counts of false imprisonment, and possession of a firearm during the commission of a felony. He argued that the trial court failed to conduct a "thirteenth juror" review when—with the exception of the kidnapping conviction in Count 2—it denied his motion for new trial. The Court agreed.

The Court found that appellant explicitly argued in his motion for new trial that the jury's verdict was contrary to the principles of justice and equity and was strongly against the weight of the evidence. Thus, the trial court had an affirmative duty to exercise its discretion and weigh the evidence to determine whether a new trial as to his convictions was warranted. But while the trial court cursorily noted in its order that appellant asserted the "standard grounds" in his motion for new trial, nothing in the order indicated that the trial court performed its duty to exercise its discretion and weighed the evidence in its consideration of the general grounds. And, the Court noted, although the trial court's lengthy order addressed in significant detail all of appellant's other arguments, including his argument that the evidence was insufficient to support his two separate kidnapping convictions, it made no further reference to the general grounds, gave no indication that the trial court had considered or reweighed the evidence presented at trial, and did not suggest that the trial court had exercised its discretion under OCGA §§ 5-5-20 and 5-5-21.

Thus, the Court concluded, under these circumstances, the trial court failed to apply the proper standard in assessing the weight of the evidence as requested by appellant in his motion for new trial. Accordingly, the Court vacated the trial court's denial of the motion for new trial, and remanded for the trial court to apply the proper standard to the general grounds and to exercise its discretion to sit as a 'thirteenth juror' under OCGA §§ 5-5-20 and 5-5-21.

DUI; Jury Charges

Hinton v. State, A20A0736 (4/9/20)

Appellant was convicted of DUI (less safe) and related traffic offenses. The evidence showed that after being arrested and read the proper implied consent warnings, appellant refused a blood test. The trial court charged the jury as follows: "A person accused of driving under the influence to the extent that he was less safe has the right to refuse to submit to chemical tests of his blood requested by the law enforcement officer. Should you find that the defendant refused to take the requested test, you may infer that the test would have shown the presence of drugs, though not that the drugs impaired his driving. Whether or not you draw such an inference is for you to determine. The inference may be rebutted. The inference alone is not sufficient to convict the defendant."

Citing to *Elliott v. State*, 305 Ga. 179 (2019), appellant argued that the charge instructing that the jury could infer by his refusal to submit to a blood test that such test would have shown the presence of drugs violated his right against self-incrimination. The Court disagreed.

In *Elliot*, our Supreme Court acknowledged its prior holding in *Olevik v. State*, 302 Ga. 228 (2017), which relied on Paragraph XVI of the Bill of Rights of the Georgia Constitution to find that the Georgia Constitution's right against

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compelled self-incrimination prevents the State from forcing someone to submit to a chemical *breath* test. In light of the recognition of the constitutional right to refuse State-administered breath tests, our Supreme Court in *Elliott* held that the exercise of this constitutional right could not be admitted as evidence against a defendant.

However, the Court noted, in *State v. Johnson*, ___ Ga. App. ___ (1) (b) (A19A2320, decided March 12, 2020), it decided that the admission of a refusal to consent to *blood* testing did not implicate the right against self-incrimination. The *Johnson* Court concluded that although *Olevik* and *Elliott* make clear that evidence of a defendant's invocation of the right against self-incrimination by refusing to consent to a State-administered breath test is inadmissible, neither the United States nor Georgia Supreme Courts have found admission of a refusal to consent to blood testing to implicate the right against self-incrimination. Accordingly, because such evidence is not constitutionally inadmissible, the trial court's jury instruction correctly charged that appellant's failure to submit to a blood test could be used as evidence against him at trial.

Search & Seizure; Ineffective Assistance of Counsel

Ferguson v. State, A20A0190 (4/16/20)

Appellant, Tyrin Ferguson, was convicted of possession of more than an ounce of marijuana, possession of a firearm in the commission of a felony, possession of a firearm by a convicted felon and other offenses. He contended that his trial counsel rendered ineffective assistance by failing to particularize a general motion to suppress and then abandoning the motion. Specifically, he contended that the evidence found on his person should have been excluded because it was the fruit of a search pursuant to a search warrant that was not valid because the magistrate lacked probable cause to issue it.

The record showed that the affiant officer used a confidential informant to make a controlled buy at appellant's home and then used that information to obtain a search warrant. The officer stated in his affidavit that the confidential informant was "conducting a controlled buy" when he observed the person named "Todd" with marijuana. The officer further stated that the confidential informant was under surveillance at the time and was being monitored with a recording device "throughout the incident."

Appellant argued that this information did not corroborate the confidential informant's reliability because the officer did not state that contraband was actually exchanged or that the controlled buy was "successful." But, the Court stated, the magistrate could reasonably infer from the language of the affidavit that a controlled buy occurred. Thus, the magistrate was authorized to determine that probable cause existed for the issuance of the search warrant.

Appellant also contended that the affiant officer admitted at trial to providing untrue information to the magistrate in the warrant affidavit. Specifically, he challenged the officer's statement in the affidavit that the person the confidential informant saw with drugs was "known to me as 'Todd,'" arguing that the statement was untrue because at trial the officer testified that he did not know that person but merely was told his name by the confidential informant. But, the Court noted, the officer further explained: "At the time that the confidential informant told me that the person named was Todd, that person was known to me as Todd." Therefore, the Court found ,the explanation supported the trial court's conclusion, in his order denying appellant's motion for new trial, that there was "nothing inaccurate or misleading" about the officer's statement in his affidavit.

Consequently, the Court held, appellant failed to make a strong showing that his trial counsel would have succeeded in suppressing the evidence had he pursued a motion, and thus, failed to show that his trial counsel rendered deficient performance.

Motions for Mistrial; Preservation of Objection in the Record

Brenner v. State, A20A0584 (4/16/20)

Appellant was convicted of driving on a suspended license. He contended that he was entitled to a mistrial when the arresting officer testified that Brenner's license had been suspended three times.

The Court found that appellant did not preserve on the record or in the transcript the basis for his objection to the officer's testimony or the trial court's ruling, which presumably occurred during an off-the-record bench conference. To preserve the objection for appellate review, steps should have been taken to ensure that the court reporter took down the bench conference or the objection restated into the record after this conference. Alternatively, since the transcript did not fully disclose what transpired at trial, appellant could have had the record completed in the trial court under the provisions of OCGA § 5-6-41 (f). But, appellant did not ensure that the basis of his objection was reflected on the record. Nor did he have the record completed under OCGA § 5-6-41 (f) to reflect what occurred at the bench conference. Therefore, the Court concluded, the objection was not preserved for review, and, in the absence of either record or transcript, the Court must presume the correctness of the ruling by the trial court.

Child Molestation; Other Acts Evidence

Sturgis v. State, A20A0615 (4/17/20)

Appellant was convicted of child molestation and aggravated child molestation. The victim was around 14 or 15 years old at the time of the offenses. Appellant contended that the trial court erred in permitting the State to introduce the testimony of two prior victims of appellant as other acts evidence. The Court disagreed.

Appellant argued that the evidence was inadmissible under OCGA § 24-4-404 (b). But, the Court stated, the provisions of OCGA §§ 24-4-413 (evidence of similar transaction crimes in sexual assault cases) and 24-4-414 (evidence of similar transaction crimes in child molestation cases), where applicable, supersede the provisions of OCGA § 24-4-404 (b). In fact, Rule 414 creates a rule of inclusion, thus providing a strong presumption in favor of admissibility by explaining that such evidence "shall be admissible." And the State can seek to admit evidence under this provision for any relevant purpose, including propensity. However, evidence that is admissible under this rule may still be excluded under OCGA § 24-4-403, if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Appellant argued that the evidence was very remote in time from the charged offenses and the acts were dissimilar, with no signature mode or style of commission, much less specific points of commonality. However, the Court found, the acts of inappropriate sexual contact with minor girls he knew and had spent time with, one of whom was the victim's sister, were similar enough to the incidents involving the victim to aid the jury in determining whether appellant committed the charged crimes because sex crimes against children require a unique bent of mind.

Furthermore, the Court found, there was no concern with relevancy or reliability. Appellant's prior acts against the two other acts victims were relevant and probative regarding his intent and propensity to commit the charged crimes against the victim. Also, there was no showing either on direct or cross-examination that the witnesses' memories were at issue. Thus, the fact that the acts against two other acts victims were committed about 22 years and 10 years before the acts against the victim did not demand a different ruling. Accordingly, the Court concluded, under the circumstances, the trial court did not abuse its discretion in admitting the two other acts pursuant to Rule 414.

Right to Counsel; Knowing and Intelligent Waivers

Leggett v. State, A20A0173 (4/20/20)

Appellant was convicted of two counts of DUI after a bench trial. He argued, and the State conceded, that appellant was denied his constitutional right to counsel and, specifically, that the record did not reflect that he knowingly and intelligently waived this right. The Court agreed.

The record, briefly stated, showed that on May 21, 2018 appellant, represented by court-appointed counsel, appeared for a calendar call, at which time the trial court reset the case for appellant to investigate the ramification of losing his driver's license and ultimately enter a plea. Nine days later, rather than entering the anticipated plea, appellant expressed dissatisfaction with his appointed attorney who was then allowed to withdraw as counsel.

Appellant appeared at trial without counsel. He agreed to have his originally appointed lawyer sit behind him in an advisory capacity, but counsel opposed the idea, given appellant's complaints regarding his former representation. Appellant asked for new appointed counsel, but the court denied his request, stating, "You don't get to pick and choose. You can hire whoever you want to. … But they better be ready in the next 10 or 15 minutes." During jury selection, appellant requested a bench trial. After determining that appellant freely and voluntarily was waiving his right to a trial by jury, the court reset the case for the next day. Appellant was thereafter convicted.

The Court found that there was no evidence that appellant was adequately informed of the nature of the charges against him, the possible punishments he faced, the dangers of proceeding pro se, and other circumstances that might affect his ability to adequately represent himself. A criminal defendant has both a constitutional right to self-representation and to counsel in any prosecution that could result in imprisonment. An unequivocal assertion of the right to represent oneself, made prior to trial, should be followed by a hearing to ensure that the defendant knowingly and intelligently waives the right to counsel and understands the disadvantages of self-representation. The record should reflect a finding on the part of the trial court that a defendant chose to waive his right to counsel after being made aware of his right to counsel and the dangers of proceeding pro se. The State has the burden of demonstrating from the record that the defendant received sufficient information and guidance to make a knowing and intelligent decision whether to proceed pro se.

Thus, the Court concluded, because the record did not demonstrate that appellant knowingly and intelligently waived his right to counsel, appellant's convictions were vacated and the case remanded for further proceedings.