

THIS WEEK:

- **Oral Pronouncements of Sentence; Recidivist Sentencing**
- **Ineffective Assistance of Counsel; Demurrers**
- **Self-Incrimination; Tattoos**
- **Implied Consent Rights; *Elliot***
- **Recusals; Public Records**

Oral Pronouncements of Sentence; Recidivist Sentencing

Caldwell v. State, A20A0747 (6/18/20)

Appellant entered a non-negotiated plea to aggravated assault, aggravated assault with a deadly weapon, aggravated battery, criminal damage to property in the first degree, possession of a firearm during the commission of a felony, cruelty to children in the third degree, reckless conduct, and possession of a firearm by a convicted felon. The State sought recidivist sentencing. The trial court adopted the State's recommendation and orally sentenced appellant to 20 years in prison, followed by 10 years probation and a 5-year suspended sentence. The trial court did not impose a recidivist sentence, nor did it execute a sentencing sheet denoting that appellant was sentenced as a recidivist at that time.

The trial court held another hearing five days later. Appellant objected to being sentenced as a recidivist and argued that the trial court would improperly increase the oral sentence because he had already begun to serve that sentence. The trial court admitted the copies of appellant's prior convictions into evidence and sentenced appellant as a recidivist pursuant to OCGA § 17-10-7 (a) and (c).

Appellant argued that the trial court improperly increased his sentence by imposing a recidivist sentence under OCGA § 17-10-7. Specifically, he argued that his punishment was improperly increased because the sentence made him ineligible for parole under OCGA § 17-10-7 (c), and that he had already begun to serve the trial court's prior oral sentence. The Court agreed.

In general, an oral declaration as to what the sentence shall be is not the sentence of the court; the sentence signed by the judge is. And, an oral declaration of a sentence may not be increased after the defendant has begun to serve it. Judgments of a court are within its breast until the end of the term, and the sentence may be amended at any time during the term and before execution has begun. However, once a person has entered upon the execution of his sentence, the court is without power to change it by increasing the punishment. This is considered a violation of the Fifth Amendment prohibition against double punishment or jeopardy. A defendant has begun to serve a sentence where there is evidence that the defendant met with a probation officer, filled out probation paperwork, or payed a fine.

Here, the Court found, the record showed that the trial court first orally sentenced appellant to 20 years in prison, followed by 10 years probation and a 5-year suspended sentence. At the second hearing, a probation officer testified that she had

already met with appellant after the trial court's oral sentence, and that she had appellant fill out paperwork. Nevertheless, the trial court imposed a recidivist designation at the conclusion of the second hearing which made appellant ineligible for parole, and such designation constituted added punishment. While this designation did not lengthen the sentence itself, it constituted added punishment. Thus, the Court held, because the recidivist designation constituted added punishment from the prior oral sentence which appellant had already begun to serve, the trial court improperly increased the prior punishment by later imposing a recidivist sentence. Therefore, the Court reversed the sentence and remanded with direction that a sentence be entered which does not reflect an increase in punishment from the oral declaration of sentence.

Ineffective Assistance of Counsel; Demurrers

Stokes v. State, A20A0537 (6/18/20)

Appellant was convicted of conspiracy to commit robbery as part of a home invasion that occurred in 2014. He contended that his trial counsel rendered ineffective assistance by failing to file a general and a special demurrer to the indictment. The Court disagreed.

In relevant part, the indictment alleged that appellant “conspire[d] to commit a violation of OCGA [§] 16-8-40, the offense of Robbery, and one or more of the conspirators did perform one or more of the following overt acts, to wit locate the residence of [the victim], plan to forcibly enter said residence and take methamphetamine and United States currency from the presence of others, and drive to the residence[.]” Appellant argued that the indictment was subject to a general demurrer because the language “forcibly enter said residence and take methamphetamine and United States currency” failed to assert one of the essential elements of robbery—that the taking be done by force, by intimidation, or by sudden snatching.

However, the Court found, appellant's argument did not comport with the plain language of the indictment. In the relevant clause alleging that appellant did “forcibly enter said residence and take methamphetamine and United States currency,” the word “forcibly” modifies both the verbs “enter” and “take,” meaning that the indictment plainly alleged that the defendants conspired to take the drugs and cash by force. As such, appellant could not admit to all of the facts in this count of the indictment and still be innocent of conspiracy to commit robbery. Consequently, because the conspiracy count of the indictment was sufficient to survive a general demurrer, counsel's failure to file a general demurrer could not be deemed deficient performance.

Nevertheless, appellant argued, the indictment was subject to a special demurrer. The Court noted that the true test of the sufficiency of an indictment to withstand a special demurrer is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. The purpose of the indictment is to allow defendant to prepare his defense intelligently and to protect him from double jeopardy.

Here, the Court found, the plain language of the indictment specifically alleged that appellant and others conspired to take drugs and cash by force. Since the charge in the indictment contained the elements of the offenses intended to be charged and sufficiently apprised appellant of what he had to be prepared to meet, thereby allowing him to prepare a defense and

safeguarding him against double jeopardy, a timely-filed special demurrer would have been denied. Accordingly, appellant did not demonstrate that he received ineffective assistance of counsel in this regard either.

Self-Incrimination; Tattoos

Boynton v. State, A20A0578 (6/18/20)

Appellant was convicted of various offenses including armed robbery, aggravated battery, aggravated assault, hijacking of a motor vehicle, and possession of a firearm during the commission of a crime. He argued that the trial court erred by requiring him to stand and display his tattoos for the jury in violation of his right against self-incrimination. Specifically, he contended that the trial court compelled him to exhibit his tattoos for the jury, to stand for the jury, and to turn around to allow a witness to examine a tattoo on his neck.

The Court stated that the Georgia Constitution provides that no person shall be compelled to give testimony tending in any manner to be self-incriminating. However, unlike the Fifth Amendment of the United States Constitution, the Georgia Constitution protects individuals against being compelled to generate evidence against themselves through acts as well as statements. Although the scope of our right against compelled self-incrimination extends to acts, it is only compelled acts of the defendant that fall within the protections of our Constitution.

Here, while a victim testified about one of the robberies, the trial court required appellant to stand in front of the jury and unbutton his sleeves to display his tattoo for the jury. Appellant was also required to stand for another victim to assess his height and turn around to allow a third witness to examine a tattoo on his neck. Additionally, appellant was made to stand during a portion of the prosecutor's closing argument. The Court concluded that these actions violated appellant's right against self-incrimination. Nevertheless, the Court also concluded that such errors were harmless because the State presented other overwhelming evidence of appellant's guilt for the offenses. Therefore, the Court held, the violation of appellant's right against self-incrimination was harmless error.

Implied Consent Rights; *Elliott*

Kallon v. State, A20A0030 (6/18/20)

Appellant was convicted of DUI (less safe), DUI (per se) and failure to maintain lane. He contended that the trial court erred in denying his motions to suppress and in limine regarding his breath test. Specifically, he contended that his DUI convictions should be reversed because the "unconstitutional implied consent notice" which the officer read to him is inherently coercive when applied to a request for a breath sample. In essence, he argued that because a suspect's refusal to consent to a breath test can no longer be admitted into evidence in criminal proceedings under *Elliott v. State*, 305 Ga. 179 (2019), the former implied consent notice is inherently coercive because it provides that one's refusal "may be" so admitted.

However, the Court stated, the Supreme Court in *Elliott* never held that the former implied consent notice is unconstitutionally coercive. And if the Supreme Court in *Elliott* was careful to *deliberately* leave open the question of the impact of its decision on the validity of the implied consent notice, it would not take it upon itself to construe the Supreme

Court's decision as a ruling that the notice is unconstitutionally coercive. Therefore, the Court rejected appellant's argument that the implied consent notice which was read to him is unconstitutionally coercive.

Appellant also argued that the threat within the notice unlawfully coerced him into submitting to the State's breath test and that the State forced him to choose between waiving his Georgia constitutional right against self-incrimination and being incriminated by invoking it. The Court found that this claim directly implicated the *Elliott* decision.

Evaluating whether self-incrimination was compelled depends on the totality of the circumstances. The Court noted that in the trial court, appellant argued that he did not voluntarily submit to the breath test because he was misadvised of his rights when he was told that his exercise of his right against self-incrimination could be used against him at trial. Although the trial court determined that appellant's consent was voluntary under the totality of the circumstances, the trial court could not consider the implication of the *Elliott* decision because *Elliott* had not been decided at the time of the motion hearing or appellant's trial.

Therefore, the Court vacated the trial court's ruling on appellant's motion to suppress and motion in limine and remanded the case for the trial court to reconsider whether appellant's consent was voluntary under the totality of the circumstances in light of *Elliott*. In so doing, the Court noted that its opinion is not a determination that the trial court admitted the test results in error, and so the Court did not vacate appellant's convictions or order that he be granted a new trial. Instead, the trial court is free to order such relief upon remand if it determines that the breath test results should be suppressed.

Recusals; Public Records

Serdula v. State, A20A0258 (6/18/20)

Appellant was convicted of 19 counts of unlawful surveillance, 11 counts of aggravated sodomy, two counts of sexual assault against a person in custody, one count of child molestation, and one count of aggravated child molestation. Prior to trial, he filed a motion to recuse the assigned judge, Judge Green, who was, prior to his appointment to the superior court judge, an ADA for then District Attorney, Patrick Head, and that Head served as his campaign treasurer while Green was seeking election to the State Court. The record also showed that Judge Green's campaign for state court judge was short-lived because the Governor appointed him to the superior court not long after his campaign for state court began. Judge Green denied the motion, but on appeal after conviction, the Court of Appeals reversed for an evidentiary hearing. *Serdula v. State*, 344 Ga. App. 587 (2018). Similarly, in an unrelated case, the Supreme Court also vacated a judgment finding that a motion to recuse alleging similar facts justified an evidentiary hearing. See *Post v. State*, 298 Ga. 241 (2015).

On remand, the case was assigned to another judge who conducted an evidentiary hearing at which Head was the sole witness. Thereafter, the court denied the motion to recuse and reentered appellant's judgments of conviction.

Appellant contended that the trial court erred in denying his motion to recuse. The Court disagreed. The Court found that the evidence showed that while Head served as Green's campaign treasurer close in time to appellant's 2010 indictments and 2011 trial, Head had little to no involvement in the campaign. So, despite appellant's unsupported claim that Head was "directly and significantly involved" in Green's campaign, Head *repeatedly* testified that his name was listed as treasurer solely to show his support for the campaign. And while Head signed certain campaign disclosures, he did not

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work in preparing them. Indeed, Head only agreed to be Green's treasurer if the position did not require him to do any work. And importantly, Head testified that he did *not* have a close relationship with Green, nor did they socialize together.

Nevertheless, appellant contended, the exhibits he tendered at the recusal hearing, including campaign-disclosure statements with Head's signature on them, conclusively established that Head served a significant role in Green's campaign, and as a result, his recusal was warranted. But, the Court noted, Head *admitted* that he agreed to serve as the treasurer of Green's state-court campaign, albeit in name only. Additionally, Head acknowledged that—with the exception of one disclosure report which mistakenly suggested that he served as treasurer for Green's *superior court* campaign—he signed at least two campaign disclosures. So, even assuming that appellant accurately described the exhibits, which were not part of the record, the trial court apparently credited Head's testimony that he played no significant role in the campaign, did not prepare the disclosures, and signed the disclosures solely in reliance on someone else. Furthermore, if, as appellant contended, the sole fact that—close in time to his prosecution—Head served as treasurer of one of Green's campaigns warranted his recusal, the Supreme Court in *Post* and this Court in *Serdula I* would simply have remanded the case and ordered Green to recuse himself. But instead, both cases were remanded for an evidentiary hearing to determine the nature and scope of Green and Head's actual relationship. And as contemplated in *Post*, the actual evidence presented in this case supported the conclusion that Head “play[ed] no especially important role in an ongoing or recent campaign.” As a result, the Court concluded that it could not say that the trial court abused its discretion in denying appellant's motion to recuse Green from his case.

Appellant also contended that because the parties stipulated to the exhibits admitted at the recusal hearing and those exhibits are public records, the trial court was required to consider them accurate and reliable. But in the trial court's order, it concluded that one of appellant's exhibits—a print out from the Georgia Government Transparency and Campaign Finance Commission—“is clearly in error.” The court reached this conclusion because, “[w]hile it may say ‘Office Sought Judge Superior Court,’ the Committee Information is ‘Reuben Green for State Court Judge’ and lists the committee Judge Green had for his State Court Campaign.”

However, the Court noted, the exhibits presented at the recusal hearing were not included with the transcript in the record, and under such circumstances, it must accept the trial court's description of the exhibits as true. Moreover, the court's description of that exhibit as reporting, in substance, on Green's state court campaign is consistent with Head's testimony that—while he was treasurer of this campaign—he had no involvement in Green's pursuit of his current superior court seat. Furthermore, there was nothing in the appellate record indicating that the parties stipulated to the *accuracy* of these exhibits, as opposed to merely their admissibility.

The Court also noted that the campaign disclosure printout was admitted into evidence under OCGA § 24-8-803 (8), which provides that public records and reports “shall not be excluded by the hearsay rule, even though the declarant is available as a witness.” This hearsay exception closely tracks its federal counterpart, Fed. R. Evid. 803 (8), and is based on both the necessity for admitting such records and their inherent trustworthiness. Thus, the Court stated, generally speaking, a campaign-disclosure report is an inherently reliable source of information because the information contained in this document is provided by someone—here, Green—under a “legally imposed duty” and is “the subject of a reporting duty.” But, the Court stated, this hardly means that *every* public record is error free or immune from scrutiny once it is admitted into evidence. For example, OCGA § 24-8-806 provides that “[w]hen a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would

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be admissible for those purposes if the declarant had testified as a witness.” So, if instead of relying on Green's campaign-disclosure report to support his argument, appellant instead wanted to attack or question the veracity of the information contained in the report, Rule 806 would allow him to do so. But here, appellant attempted to preclude Head from explaining or clarifying obvious inconsistencies in Green's campaign-disclosure report (i.e., relevant evidence), which only served to undermine the truth-seeking process. And, appellant presented no legal authority suggesting that trial courts are *required* to accept the accuracy of public records even when, as here, the record itself is internally inconsistent and conflicts with witness testimony.

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