Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING AUGUST 28, 2020
Issue 35-20

THIS WEEK:

- **Public Defenders; Conflict-Free Counsel**
- **Search & Seizure; Prolonged Traffic Stops**
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- **Residual Hearsay Exception; Medical Treatment Hearsay Exception**
- **Successive Prosecutions; OCGA § 16-1-8 (c)**

Public Defenders; Conflict-Free Counsel

Tucker v. State, A20A0715 (6/24/20)

Appellant was convicted of statutory rape in 2012. He contended that he was denied the right to conflict-free counsel because his trial counsel previously worked in the same public defender's office where appellate counsel worked.

The Court stated that the Georgia Rules of Professional Conduct provide that while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by other Bar Rules. And *In re Formal Advisory Opinion 10-1*, 293 Ga. 397, 398 (1) (2013) stated that "[u]nder a plain reading of [Bar] Rule 1.10 (a) and the comments thereto, circuit public defenders working in the circuit public defender office of the same judicial circuit are akin to lawyers working in the same unit of a legal services organization and each judicial circuit's public defender's office is a 'firm' as the term is used in the rule."

The Court found that the lengthy delay in the prosecution of appellant's motion for new trial, which contained claims of ineffective assistance of trial counsel, created a novel question. The record showed that appellant was tried in 2012, his trial counsel stopped working in the Public Defender's Office in August 2013 due to military service, and then resigned from the office in January 2015. Although a motion for new trial was filed by trial counsel in 2012, a particularized motion was not filed until July 2019, long after trial counsel had left the office. Appellant's trial counsel and his appellate counsel did not work for the office at the same time. Thus, the Court stated, it had to decide whether, on these facts, trial counsel's conflict was imputed to his current appellate counsel.

The Court found no reason to stray from the scope of the Bar Rule's application of imputed conflict. Appellant's trial counsel was no longer employed at the public defender's office at the time the motion for new trial was litigated or appealed, and trial counsel was not employed at the public defender's office at the same time as appellant's appellate counsel. Thus, the Court held, no conflict was imputed to appellate counsel from the same office and the trial court did not err in refusing to appoint appellant different counsel.

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Search & Seizure; Prolonged Traffic Stops

State v. Drake, A20A0248 (6/24/20)

Drake was charged with VGCSA. The evidence showed that a police sergeant stopped a vehicle driven by Drake after witnessing an improper lane change. While speaking with Drake at the outset of the traffic stop, the sergeant thought he smelled a faint odor of alcohol, indicating Drake may have been drinking. When a second officer arrived at the scene, the sergeant asked that officer to speak with Drake to determine if she could smell alcohol. A police officer came to the scene while the sergeant was writing a warning citation for Drake. At the sergeant's request, the third officer asked Drake if he would consent to a search of his car, and Drake agreed. The third officer then took over the process of writing the traffic citation as the sergeant and the second officer searched Drake's vehicle. Approximately nine minutes after the traffic stop began, and as the search of the car was being conducted, the third officer finished writing Drake's warning ticket. None of the officers, however, provided that citation to Drake.

During the search of the car, officers located a container of alcohol that was approximately one half full, as well as a white substance that, in the sergeant's opinion, resembled crack cocaine. The sergeant conducted a field test on the white substance, which did not produce a positive result for cocaine. Both the field test and the search of Drake's car were completed no more than 14 minutes into the traffic stop. At that time, however, the sergeant did not provide the traffic citation to Drake but instead asked for permission to search his person. Drake agreed and, at the sergeant's direction, emptied the contents of his pants pockets onto the trunk of his car. The sergeant then inquired about a bulge in a cargo pocket on the side of Drake's pant leg and then reached into the pocket, grabbing a small bottle that Drake acknowledged contained oxycodone and morphine.

Appellant filed a motion to suppress. At the hearing, appellant testified that he did not consent to a search of his car and although he agreed to the search of his person, he did not feel that he had a choice, as he had not been told he was free to leave and he did not understand why he was being detained. Additionally, the sergeant stated that at the time he requested permission to search Drake's person, Drake was not free to leave the scene. The court found that the search of the vehicle was consensual, but not the search of Drake's person and granted that part of the motion. The State appealed.

The Court found that the traffic citation had been written and therefore the purpose of the stop completed at least five to six minutes before police finished their search of Drake's vehicle. By seeking Drake's permission to conduct a second search after that time (and at least seven minutes after the completion of the traffic citation), the State exceeded the scope of a permissible investigation of the initial traffic stop.

Nevertheless, the State argued, because Drake agreed to extend the traffic stop to allow for the search of his car, and because the consent to search Drake's person came shortly after the conclusion of the vehicle search, the traffic stop was not impermissibly prolonged. But, the Court stated, this argument ignored the trial court's factual finding that Drake's consent to the search of his person was neither freely nor voluntarily given. Furthermore, the Court found, Drake's consent to the search of his vehicle at the outset of the traffic stop did not demonstrate that he agreed to be detained further, after that search was completed. Under these circumstances, once the search of the vehicle was completed, the traffic stop was at an end and the sergeant could not thereafter detain Drake and ask for permission to conduct a second search unless the sergeant had a particularized reason to suspect that Drake was engaged in some other criminal activity. In the absence of

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such reasonable suspicion of criminal activity, the sergeant's continued detention of Drake exceeded the scope of the original traffic stop and was therefore constitutionally impermissible.

The State contended that the police had a reasonable basis for suspecting that Drake was involved in illegal narcotics activity based on the following facts: the sergeant thought he smelled alcohol on Drake; police recovered a partially-consumed container of alcohol in Drake's car; inside of Drake's car, police found a white substance that the sergeant believed resembled crack cocaine; and in response to police questions, Drake stated that he had previously gotten "in trouble" because of methamphetamine. The Court disagreed.

First, two of these factors related to alcohol, which is not an illegal substance. And although the sergeant stated he thought he smelled alcohol emanating from Drake, he further testified that he was not "100 percent sure" of that perception. Third, the sergeant testified that early in his interaction with Drake, he determined that Drake was not intoxicated. Specifically, the sergeant concluded that Drake may have had "a little bit to drink [,] but he [was] not . . . DUI." Furthermore, while the sergeant testified he believed the white substance found in Drake's car resembled crack cocaine, he also acknowledged that the field test on the substance did not indicate the presence of cocaine. Finally, the mere fact that a person admits that at some point in his past he "got in trouble" because of methamphetamine does not provide a basis for suspecting that the person is somehow currently involved in illegal narcotics activity. Accordingly, the Court agreed with the trial court that police did not have knowledge of any facts justifying an extension of the traffic stop. Therefore, the Court affirmed that portion of the trial court's order granting Drake's motion to suppress the items seized during the search of his person.

Search & Seizure; Loitering

Womack v. State, A20A0759 (6/24/20)

Appellant was convicted of misdemeanor possession of marijuana. He contended that the trial court erred in denying his motion to suppress. The Court agreed.

The evidence, as found by the trial court, showed that an officer observed appellant exit a tobacco shop. Appellant noticed the officer's patrol car and began to "power walk" in the opposite direction. The officer believed that this behavior, which occurred in a "high crime/high drug area," may have constituted loitering. The officer then approached appellant, asked to see appellant's identification, and asked for consent to search his person, which appellant gave. When the officer attempted to take off appellant's backpack in order to perform the search, appellant pulled away, and the officer grabbed his wrist. The court found that "simultaneously" appellant said, "wait, wait, there is marijuana in my backpack." Inside the backpack the officer found the marijuana.

The Court found that the evidence supported the trial court's finding that the officer did not detain or restrain appellant before asking him for his identification and consent to search. However, the Court found, the trial court clearly erred when it found that appellant was not detained when he confessed to the marijuana. Specifically, that the confession occurred "simultaneously" with the confession.

The Court found that the officer first testified generally that "at the time I grabbed his wrist and I was going to detain him and he said wait, wait, wait, there is marijuana in my backpack." Later, after referring to the police report of the incident

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that he prepared, the officer acknowledged that when he grabbed appellant's wrist, appellant said that there was "something" in the backpack that was not his. The officer then asked appellant what the something was. Only then did appellant state that there was marijuana in the backpack. Thus, the Court found, the correct order of the relevant events was this: the officer took hold of the backpack; appellant pulled away; the officer grabbed appellant's wrist; appellant said that there was something in his backpack; the officer asked what it was; appellant stated that it was marijuana. Accordingly, at the time that appellant confessed to the marijuana, he clearly was being detained.

Next, the Court addressed the trial court's findings that the detention was justified because appellant's behavior might have constituted loitering. Specifically, the trial court found appellant's demeanor, his attempt to avoid the officer, and his presence with a backpack in a high crime/high drug area gave the officer a particularized and objective basis for suspecting appellant was involved in criminal activity. The Court disagreed.

With regard to the suggestion that appellant was loitering, the Court stated that loitering requires a person to be in a place at a time or in a manner not usual for law-abiding individuals. And here, appellant was leaving a store that was open when the officer saw him. As for the remainder of the officer's testimony, the Court found that it amounted to nothing more than a hunch that "something was up" or that appellant was "committing some kind of crime," which is not an objective basis for conducting a tier-two stop.

The Court then addressed the trial court's finding that when appellant pulled away from the officer, the officer was justified in believing there was a weapon in the backpack. The Court agreed that the evidence in general, could have led the officer to think a weapon was present. But, the officer never testified that he grabbed appellant's wrist in an effort to protect himself, or in the name of officer safety, or because he feared that appellant was about to grab a weapon.

Thus, the Court concluded, appellant consented to only a search of his person, and a search of the backpack would exceed the scope of the search. Furthermore, because the officer and appellant were engaged in a consensual encounter, appellant was at all times free to terminate the search or walk away. Thus, it was reasonable for appellant to pull away when he noticed the officer had grabbed his backpack. Accordingly, the trial court erred by concluding that the officer had authority to grab appellant's wrist and detain him merely because appellant pulled away when the officer took hold of his backpack. And, because the officer was not legally authorized to detain appellant when he grabbed his wrist, the subsequent confession that there was marijuana in the backpack was a product of an illegal detention.

Residual Hearsay Exception; Medical Treatment Hearsay Exception

McEady v. State, A20A0185 (6/25/20)

Appellant was convicted of burglary, rape, and aggravated battery. The victim was 74 year-old E. A., the mother of Matchett, who had recently ended her relationship with appellant. At the time of trial, E. A. was bedridden and unavailable to testify.

Appellant contended that the trial court erred by admitting certain hearsay testimony from Matchett that E. A. told her one day after the attack that she recognized appellant's voice and identified him as the attacker. The Court disagreed.

The Court noted that the trial court purported to admit the evidence under a "necessity exception" but cited the current "residual exception" to hearsay under OCGA § 24-8-807. But, the necessity exception no longer applies and the residual exception contains new requirements not already in our case law before the adoption of the new Evidence Code. And here, the trial court did not engage in this new analysis nor did the parties cite to current case law elucidating its application. Nevertheless, the Court found that even if there was error, it was harmless in light of the fact that uncontroverted and unexplained evidence that seminal fluid and appellant's DNA was found in E. A.'s underwear immediately after the rape. Thus, the Court concluded, it was highly probable that an erroneous admission of E. A.'s hearsay identification did not contribute to the verdict.

Appellant also argued that the trial court erred in admitting the testimony of the sexual assault nurse examiner ("SANE") who performed a sexual assault exam of E. A. at the hospital. The Court stated that under OCGA § 24-8-803 (4), "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are excepted from exclusion as hearsay. And, in *United States v. Williams*, 578 Fed. Appx. 872, 876 (III) (11th Cir. 2014) (unpublished), the Eleventh Circuit Court of Appeals has applied Federal Rule 803, which is nearly identical to Rule 803 (4), to admit a victim's statement to treating medical staff describing "rape" as the cause of injuries. This is because such descriptions are admissible to the extent they relate to causation reasonably pertinent to purposes of diagnoses and treatment.

But here, the Court found, E. A. initially was seen by hospital emergency room medical staff. The treating emergency room physician testified that E. A. gave him sufficient information for him to provide medical treatment, and he made the decision to admit E. A. to the hospital's trauma service. The SANE was called in to perform a forensic examination because regular nursing staff are not qualified to perform such examinations, and the SANE testified that by the time she arrived, the decision had been made to admit E. A. The SANE explained the purpose of her interview questions as follows: "By listening to her story I can kind of gauge where I could potentially find evidence, so that would kind of lead me in the direction depending on what she says and where I should look for evidence." The SANE's physical exam was geared toward a head-to-toe documentation of injuries, including the collection of DNA evidence for analysis seeking the identity of any foreign DNA found. Thus, the Court found, based on this record — including the fact that hospital staff had independently evaluated E. A., had gathered enough information to make treatment decisions, and had made the decision to admit E. A. for trauma treatment independent of the SANE interview — it was questionable whether the hearsay elicited by the SANE interview was reasonably pertinent to diagnosis and treatment, as opposed to gathering evidence.

However, the Court again stated that it need not resolve this question of harm resulting from any error in admitting the SANE's testimony, because it would not warrant reversal. First, E. A. did not identify appellant during the SANE interview, and appellant's enumeration was predicated on an alleged hearsay identification of appellant. Second, to the extent that the challenged descriptions of the rape were violent, the SANE already had testified that E. A. disclosed violent injuries, she had not had sex in years, her attacker had held her down and threatened her, she was anxious and fearful, and there was nonconsensual genital contact. And, since appellant did not object to this hearsay testimony, it is considered legal evidence and admissible. Finally, the DNA evidence linking appellant to the rape was unexplained and appellant's supposed alibi was weak and ineffectual. Accordingly, the Court concluded, any error in the admission of this testimony was harmless.

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Successive Prosecutions; OCGA § 16-1-8 (c)

State v. Adams, A20A0050 (6/26/20)

In August of 2017, Adams was indicted in superior court on one count of trafficking of methamphetamine (more than 400 grams) (the "State Case"). In March of 2018, based on the same conduct underlying the state charges, Adams was indicted in federal court on one count of possession with intent to distribute methamphetamine and possession of a firearm by a convicted felon (the Federal Case). Adams subsequently plead guilty to the firearms charge in the Federal Case and the methamphetamine charge was dismissed by the federal court. Adams then filed a plea in bar in the State Case pursuant to OCGA § 16-1-8. Relying on *State v. Smith*, 185 Ga. App. 694 (1988), the trial court granted the motion. The court concluded that the federal prosecutor's dismissal of the drug charge in accordance with a plea agreement "acts as an acquittal and bars further prosecution under OCGA § 16-1-8 (c)." The State appealed.

The Court first noted that the Fifth Amendment does not bar the State from prosecuting Adams because of the Dual Sovereignty Doctrine. Nevertheless, Georgia statutory law provides protection against successive prosecutions that extends beyond that of the protection offered by constitutional double jeopardy. Those that involve successive federal and state prosecutions are governed by OCGA § 16-1-8 (c), which provides: "A prosecution is barred if the accused was formerly prosecuted in a district court of the United States for a crime which is within the concurrent jurisdiction of this state if such former prosecution resulted in either a conviction or an acquittal and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution or unless the crime was not consummated when the former trial began." Thus, in order for subsection (c) to act as a bar to a state prosecution, three elements must be met: (1) the crime must be within the State's concurrent jurisdiction; (2) the federal prosecution must have resulted in a conviction or acquittal; and (3) the state and federal prosecutions must be for the same conduct and must not require proof of a fact not required by the other (or the state crime must not have been complete at the time of the federal trial).

The Court noted that the State conceded the first and third statutory elements were met. Therefore, the only issue was whether, as the trial court held, the federal government's dismissal of the drug charge resulting from the plea agreement in the Federal Case amounted to an "acquittal" of that charge within the context of subsection (c). The Court held that it did not.

The Court then turned to the holding in *Smith* which implicitly held that a dismissal amounted to an "acquittal" under OCGA § 16-1-8 (b) (1). Like subsection (c), subsection (b) (1) bars a second prosecution when, among other things, the first prosecution "[r]esulted in either a conviction or an acquittal." First, the Court stated, a dismissal of a charge is not an "acquittal" on that charge. Second, the *Smith* Court relied on and perpetuated misguided precedent that conflates the concept of constitutional double jeopardy with the statutory protection afforded by OCGA § 16-1-8. Specifically, *Smith* predicated the application of OCGA § 16-1-8 (b) on a defendant having first been "placed in jeopardy," relying on case law that injected jeopardy into the definition of "prosecuted" for the purposes of the statute. But, the Court stated, nothing in the plain language of OCGA § 16-1-8 predicates the application of its provisions on the attachment of jeopardy. Rather, the bar is established if an accused was "formerly prosecuted" and, the prosecution resulted in "either a conviction or an acquittal." See OCGA § 16-1-8 (b) (1), (c). "Prosecution" is defined as "all legal proceedings by which a person's liability for a crime is determined," and a "conviction" includes "a final judgment of conviction entered … upon a plea of guilty."

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OCGA § 16-1-3 (4), (14). Consequently, jeopardy plays no part in the determination of whether a successive prosecution is statutorily barred by OCGA § 16-1-8.

Accordingly, the Court reversed the trial court's grant of the plea in bar. In so holding, the Court overruled *Smith* and its progeny to the extent that it can be read to stand for the proposition that the dismissal of a criminal charge amounts to an "acquittal" for the purposes of OCGA § 16-1-8, and further overruled *Smith*, its progeny, and the cases in which it has been cited for the proposition that jeopardy must attach before the statutory bar set forth in OCGA § 16-1-8 is triggered. See, e.g. *Goodwin v. State*, 341 Ga. App. 530 (2017); *State v. Jones*, 290 Ga. App. 879 (2008); *State v. Daniels*, 206 Ga. App. 443 (1992); *Geckles v. State*, 177 Ga. App. 70 (1985); *Cochran v. State*, 176 Ga. App. 58 (1985); and *Caldwell v. State*, 171 Ga. App. 680 (1984).