Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING DECEMBER 25, 2020
Issue 51-20

THIS WEEK:

- **Rule of Lenity; False Report of a Crime**
- **District Attorneys' Offices; Capacity to be Sued**
- **Retroactive First Offender Status; Record Restriction**
- **DUI; Urine Tests**
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Rule of Lenity; False Report of a Crime

Towns v. State, A20A1206 (10/19/20)

Appellant was convicted of the felony offense of making a false statement. The stipulated facts showed that in 2016, appellant called the police to report his car had been stolen. The police investigated and found the report to be false. Appellant was invited to come to the station to file a report. When he did so, he was arrested for making false statements and making a false report of a crime.

He was subsequently indicted in 2019 on one count of making a false statement under OCGA § 16-10-20. Appellant filed a general demurrer and plea in bar based on the rule of lenity and the statute of limitations. After a hearing, the trial court denied appellant's general demurrer and plea in bar. After a stipulated bench trial, the trial court convicted appellant of making a false statement. The State conceded that the rule of lenity applied for purposes of sentencing and recommended a misdemeanor sentence, which the trial court adopted.

Appellant argued that the trial court erred in denying his plea in bar. Specifically, he argued that the rule of lenity made his conduct a misdemeanor and therefore, he was indicted outside the applicable two-year statute of limitations. The Court agreed.

The Court noted that the indictment charged appellant with committing the felony offense of making a false statement by "knowingly and willfully [making] a false statement to [the officer] in regards to a matter within the jurisdiction of the … Sheriff's Office, a department of the ….County government, to wit: the accused did write a witness statement reporting to law enforcement that said accused's vehicle had been stolen, in violation of O.C.G.A. § 16-10-20[.]"

After reviewing the two statutes, OCGA § 16-10-20 (false statements) and OCGA § 16-10-26 (false report of a crime), the Court found that while there are many ways that the crime of making a false statement may be committed, appellant's conduct, as charged, subjected him to prosecution and sentencing under both OCGA §§ 16-10-20 and 16-10-26. Here, appellant willfully and knowingly made a false statement to a law enforcement officer by falsely reporting to that officer a crime that he alleged to have occurred in his jurisdiction. Thus, because these two statutes provide different grades of punishment for the same criminal conduct, appellant was entitled to the rule of lenity. Consequently, appellant could not properly be prosecuted for or convicted of making a false statement under OCGA § 16-10-20.

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District Attorneys' Offices; Capacity to be Sued

Myers v. Clayton County DA's Office, A20A1382 (10/20/20)

Appellant filed a pro se lawsuit alleging malicious prosecution, violations of 42 U. S. C. § 1983 and other claims against the Clayton County District Attorney's office, the Clayton County Police Department, and individual officers. The DA's Office and the Police Department filed motions to dismiss which the trial court granted.

Appellant contended that the trial court erred in finding that both the district attorney's office and the police department were entitled to qualified and official immunity. But, the Court stated, the trial court did not address whether either of these entities was entitled to immunity. Instead, it dismissed appellant's claims against the district attorney's office and the police department because it found that neither was capable of being sued.

Georgia law recognizes only three classes of legal entities with the inherent power to sue and be sued: (1) natural persons; (2) an artificial person (a corporation); and (3) such quasi-artificial persons as the law recognizes as being capable to sue. No Georgia appellate court has addressed directly the question of whether a county district attorney's office or police department are considered legal entities subject to suit. The Eleventh Circuit and federal district courts, however, have applied Georgia law to find that neither a county's district attorney's office nor its police department may be sued directly.

The Court found that with respect to police departments, the basis for these holdings is that under Georgia law, every county is a "body corporate," headed by a governing body and capable of suing and being sued. Georgia law also empowers a county's governing body to create, abolish, and control a county police department. The net result is that, under Georgia law, the county police department is the vehicle through which a county fulfills its policing functions. Thus, while a county is subject to suit, police departments, as mere arms of such governments, are not generally considered legal entities capable of being sued.

The Court further found that this same logic applies with respect to the office of the county district attorney. Although the position of district attorney is provided for in the Georgia Constitution, neither the Georgia Code nor the Georgia Constitution establishes the office of district attorney as a separate legal entity capable of suing or being sued. Accordingly, the Court concluded that the trial court did not err in dismissing appellant's claims against both the Clayton County Police Department and the Clayton County District Attorney's Office.

Retroactive First Offender Status; Record Restriction

Doe v. Vaughn, A20A1431 (10/20/20)

In 2011, appellant was charged with affray in municipal court. The court apparently accepted her plea based on a bond forfeiture of $254.50. In 2015, the municipal court was abolished and all cases were dismissed. In 2019, appellant filed in superior court a petition to modify her 2011 sentence to provide for retroactive first offender status pursuant to OCGA § 42-8-66 (a) (1) and to seal her record related thereto pursuant to OCGA § 42-8-62.1 (c). She alleged that she qualified for first offender status and that the chief assistant district attorney consented to the filing of the petition in a telephone call with appellant's counsel. At the hearing, however, the State, which was represented by the District Attorney, responded:

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"The State doesn't consent to anything. And, you know, we don't tell who to file and who not to file things. And we certainly don't consent to any aspect of this petition." Thereafter, the superior court dismissed the petition, concluding that 1) because she was not sentenced by the superior court, it had no authority to consider her request; and 2) "the lack of objection" by the chief assistant "does not satisfy the [threshold] requirement that the prosecuting attorney consent to the petition in this instance."

Appellant argued that the court erred by dismissing her petition on the basis that it lacked authority to modify her sentence because it was not the sentencing court. The Court noted that the superior courts of this State have concurrent jurisdiction with municipal courts over misdemeanors. And here, the municipal court was abolished in 2015, at which time all cases were dismissed. Therefore, because the municipal court abandoned prosecution of appellant's 2011 charges, the superior court regained the right to exercise its concurrent jurisdiction to consider her petition to modify her 2011 sentence to provide for first offender status pursuant to OCGA § 42-8-66 (a) (1). Accordingly, the court erred by dismissing the petition on the ground that it lacked the authority and jurisdiction to grant the relief sought.

Appellant also contended that the superior court erred by finding that she did not meet the "threshold requirement" that the State consent to the petition. The Court found that at the hearing on her petition, appellant's counsel advised the superior court that the chief assistant told him on a phone call "that he did not object to [appellant] filing the petition." The District Attorney did not offer evidence to contradict this representation, nor did he deny that it occurred. Instead, he stated that "the State doesn't consent to anything. And, you know, we don't tell who to file and who not to file things. And we certainly don't consent to any aspect of this petition."

The Court held that OCGA § 42-8-66 (a) (1) does not require that the petitioner obtain the written consent of the prosecuting attorney, and it declined to impose such a requirement in the absence of a statutory mandate. Thus, given the State's failure to file any pleading objecting to appellant's filing of the petition or to deny her attorney's representation in the petition and at the hearing that the chief assistant District Attorney received a copy of the petition and did not object to her filing it, the Court concluded that the superior court erred by dismissing the petition on the basis that it was filed without the consent of the prosecuting attorney. Accordingly, the Court reversed and remanded for the court to determine whether to grant appellant retroactive first offender treatment and discharge her pursuant to OCGA § 42-8-66 (d).

DUI; Urine Tests

State v. Awad, A20A1490 (10/20/20)

Awad was charged with DUI. He filed a motion to suppress evidence that he refused to submit to a urine test following his arrest. The court granted the motion and the State appealed.

Relying on *Green v. State*, 260 Ga. 625, 626 (2) (1990), the Court stated that although the Georgia Constitution provides broader protection against self-incrimination than the federal constitution, the Supreme Court of Georgia has established that use of a suspect's urine sample does not violate the suspect's right against self-incrimination under Paragraph XVI. Furthermore, the holding in *Green* was not impacted by two recent decisions of *Elliott* and *Olevik*. Thus, it was bound by the ruling in *Green*. Moreover, the Court noted, even if it were to attempt to apply *Olevik*'s analysis — of whether compelling a suspect to submit to a breath test violated Paragraph XVI's right against self-incrimination — to this urine-

test case, it could not proceed because, as the Supreme Court explained in *Olevik*, the analysis depends on the details of the test and here, no details were presented in the trial court regarding the proposed urine test. Accordingly, the trial court erred by concluding that refusing to submit to a urine test was inadmissible under the theory that it would violate his privilege against self-incrimination under Paragraph XVI of the Georgia Constitution.

Nevertheless, Awad argued, the trial court's order should be upheld as right for any reason because allowing evidence of his refusal to submit to a urine test would violate his rights under the federal constitution. Specifically, he contended that a urine test is a search under the Fourth Amendment and that using a refusal to submit to such a search as evidence of guilt would violate his right against self- incrimination under the Fifth Amendment. But, the Court stated, the production of bodily fluid samples is not communicative or testimonial in nature and thus does not implicate a defendant's privilege against self-incrimination under the Fifth Amendment. Accordingly, Awad's argument under the federal constitution provided no basis for affirming based on the right-for-any-reason rule and therefore, the Court reversed the trial court's grant of Awad's motion to suppress.

Jury Charges; Lesser Included Offenses

Landell v. State, A20A0874 (10/20/20)

Appellant was convicted of second-degree felony murder based on the death of his child due to his failure to provide adequate nutrition. He contended that the trial court erred by failing to give his written request to charge the jury on involuntary manslaughter based on misdemeanor reckless conduct as a lesser-included offense to felony murder based on cruelty to children. Relying on its recent decision in *Castro-Moran v. State*, A20A0450 (June 23, 2020), the Court agreed.

Appellant testified that he loved his child and was merely following his religious faith by relying on prayer to resolve his baby's feeding and health issues. When he told his wife to add water to her breast milk, he explained that he thought, "it's just water, no harm can come from water[.] … I wanted to make sure that … the baby was full and make sure she was drinking good." According to appellant, he had a sincere if ultimately misguided belief that his child did not require medical intervention. This evidence warranted a charge on involuntary manslaughter based on reckless conduct because, as in *Castro-Moran*, a rational trier of fact could find that instead of criminal negligence, appellant displayed a conscious disregard of an unjustifiable and substantial risk of harm due to his failure to adequately feed his baby and seek medical care after she showed signs of malnutrition.

Nevertheless, the State argued, such a conclusion ignored the legal analysis in *Drinkard v. Walker*, which established the test for determining whether an offense is included in another for purposes of merger at sentencing. Applying that test, the State contended that each offense at issue here — cruelty to children and reckless conduct — contains an element that the other does not, so the two offenses are not included in one another. The Court, however, stated that it did not need to address this argument because the State also conceded that the Supreme Court in *Shah v. State*, 300 Ga. 14 (2016) addressed a similar felony murder/cruelty to children conviction based on lack of feeding and care for a baby and reiterated that reckless conduct may be a lesser-included offense of cruelty to children, if the harm to the child resulted from criminal negligence rather than malicious or willful conduct. In *Shah*, the Supreme Court held that a lesser-included charge was required because of evidence supporting a finding of criminal negligence rather than malicious conduct. Recognizing this, the State argued that *Shah* should be overruled. But, the Court stated, it lacks authority to do so.

Accordingly, in light of the evidence in this case as well as the precedent in *Shah* and "sound reasoning in *Castro-Moran*" the Court concluded that the trial court erred by not instructing the jury on the lesser-included charge of involuntary manslaughter based on reckless conduct. The Court also found that the error was not harmless because if a properly instructed jury concluded that appellant committed the misdemeanor of reckless conduct instead of the charged felony of cruelty to children based on deprivation of food or medical care, the jury could not rationally conclude that appellant was guilty of felony murder predicated on the same alleged cruelty to children felony. Nevertheless, because the evidence was constitutionally sufficient to support the guilty verdict, the State may elect to retry him.