

THIS WEEK:

- **Search & Seizure; Obstruction**
- **Double Jeopardy; Judicial Misconduct**
- **Search & Seizure; Inevitable Discovery**
- **Sufficiency of the Evidence; Effect of Cumulative Errors**
- **Courtroom Closures; OCGA § 17-8-54**

Search & Seizure; Obstruction

State v. Bizzard, A20A1212, A20A1213 (10/23/20)

Bizzard was indicted on charges of possession of a controlled substance with intent to distribute, possession of a firearm during the commission of a felony, theft by receiving stolen property (the firearm), and possession of a firearm by a convicted felon during the commission of a crime. He moved to suppress evidence of the drugs and a firearm found on or near him during his arrest, contending that officers lacked reasonable, articulable suspicion to stop him and that they arrested him without probable cause. The trial court granted the motion to suppress the drug evidence, but denied the motion as to the gun evidence. The State appealed from the suppression of the drug evidence and appellant appealed from the failure to suppress the gun evidence.

At the motion to suppress, the State called only one witness, a police officer (the “agent”). The evidence, very briefly stated, showed that the agent, working undercover as part of a task force aimed to curb violent crime, heard over the radio that a crowd of people had gathered in front of the specified addresses, and he was asked to drive by the area. The agent drove by in an unmarked vehicle. He saw one person standing in the middle of the street which he believed was for surveillance and a group of people who appeared to be involved in “shooting dice” which is a form of illegal gambling. The agent could not identify Bizzard as the person standing in the middle of the street or the one person standing who appeared to be rolling the dice. When the agent drove back to the area, he observed Bizzard being “picked up” and “assisted off the ground” by police officers, who then escorted Bizzard to a police car. The agent saw a firearm in “practically the same spot” where Bizzard “was taken off the ground.” The agent “came up and detained [Bizzard] on his left” arm, while another officer “had him on one side.” The other officer searched Bizzard, finding a pill bottle containing heroin in Bizzard's pocket. The agent noted that while the evidence was being recovered from Bizzard, he was “being disorderly.”

The State contended that the trial court erred by applying a standard of “beyond a reasonable doubt,” rather than “probable cause,” in deciding whether Bizzard's arrest for obstruction was lawful. However, the Court found, the trial court did not state that it was applying a “beyond a reasonable doubt” standard to the motion to suppress. Rather, it properly concluded that the State failed to present evidence that probable cause existed to arrest Bizzard. Specifically, when the agent arrived on the scene, Bizzard was being restrained by officers and moved to a police car. The trial court determined that Bizzard was already under arrest for obstruction at that point, and the Court agreed that a reasonable person in Bizzard's position would have thought that the detention was not temporary. The State, therefore, had to demonstrate that probable cause

to arrest existed *before* the agent arrived. But other than Bizzard's statement that he was "just walking up the street," the record was devoid of any facts regarding Bizzard's pre-arrest conduct or the officers' interactions with him. But, no one other than the agent testified. Thus, the Court stated, it was unclear what Bizzard was doing when officers first entered the area, how Bizzard responded to the officers, or whether those officers had reasonable grounds to believe that Bizzard was engaging in obstruction.

Nevertheless, the State argued, the agent observed Bizzard struggling with officers after the agent arrived. But, the Court found, this post-arrest conduct, could not support a finding of obstruction where the initial arrest lacked probable cause. Accordingly, Bizzard's effort to resist the initial arrest could not, itself, give police officers probable cause to arrest him. Therefore, the Court concluded, the State failed to demonstrate probable cause for Bizzard's arrest. And because of this failure, the search of Bizzard's person following the arrest was unlawful and the trial court properly suppressed the evidence discovered during the search.

Bizzard contended that the trial court improperly denied his motion to suppress evidence of the firearm based on standing. The Court agreed because even assuming *arguendo* Bizzard had lacked standing to contest the legality of the seizure, he nevertheless was subjected to an unlawful arrest which resulted in, and tainted the seizure of the firearm, and the sanction in such circumstances is that of evidence suppression. Consequently, the trial court erred by not suppressing evidence of the firearm found during an arrest that was not supported by probable cause.

Double Jeopardy; Judicial Misconduct

Woody v. State, A20A1534 (10/27/20)

Appellant and a codefendant were indicted for VGCSA. Briefly stated, the record showed that the State's first witness was a narcotics investigator. During cross-examination, the judge took a break lasting 20 minutes. During the break, the judge apparently told the investigator not to forget to establish chain of custody. Immediately after the break, appellant's counsel moved for a mistrial based on the court's statement to the investigator. The court granted the mistrial.

Several months later, appellant filed a plea in bar. He alleged that the judicial comments to the investigator goaded him into moving for a mistrial and therefore his retrial was barred by double jeopardy. The court denied the motion.

Appellant argued that the trial court erred in denying his plea in bar. Premitting whether a trial judge's improper communications with a witness could either be imputed to the prosecution or constitute an independent basis for barring retrial after the declaration of a mistrial, the Court agreed with the State that appellant failed to show the "only relevant intent" - the intent to terminate the trial, not the intent for the prosecution to prevail at trial by impermissible means. In so concluding, the Court rejected appellant's claim that three circumstances illustrated that the "[trial judge] did not wish for the prosecution to continue to a verdict." Appellant cited first that when his counsel raised a "couple of motions in limine," the trial judge became upset and asked, "Why weren't they addressed earlier?" Second, appellant cited that when the trial judge was next apprised that no hearing had been conducted on the State's motion to present evidence of prior bad acts, the trial judge suggested, "If you are going to file that motion, have it here before trial." Appellant represented that there were no orders requiring motions in limine to be filed before trial, and that it was standard practice for trial

counsel to bring up evidentiary matters in limine at the outset of trials. Third, Appellant argued that the trial judge "sua sponte" declared the break, during which he impermissibly communicated with the witness/investigator.

But, the Court found, none of these circumstances, either alone or collectively, demonstrated that the trial judge intended for his communications at issue to bring the trial to an end. Actions constituting even intentional misconduct do not raise the bar of double jeopardy, notwithstanding the fact that the defendant was thereby deprived of due process of law, unless the actions were intended to subvert the protections afforded by the Double Jeopardy Clause. Thus, because the record did not show that the conduct complained of was for the purpose of aborting the trial and securing an opportunity to retry the case, the trial court properly concluded that double jeopardy does not bar appellant's retrial

Search & Seizure; Inevitable Discovery

Edwards v. State, A20A0888 (10/27/20)

Appellant was convicted of obstruction of an officer. The evidence, very briefly stated, showed that officers answered a domestic call that a person named Neal pulled a gun on the mother of his child. Neal was not there when the officers arrived. The mother opined that Neal probably went to his apartment or to appellant's house. After checking the apartment, the officers continued to appellant's house. The officers were told that Neal was a convicted felon and that he was driving appellant's car. Upon arrival at appellant's house, the car was not there. The officers knock on the door; appellant greeted them. The officers tell appellant Neal is driving her vehicle; she denied this. The officers then stated they smell marijuana and that appellant has two choices: consent to a search or the officers will get a search warrant. Appellant says get a search warrant. The officers announce they need to make a protective sweep of the house and ask if anyone else is inside. Appellant says yes and another female exits the house. The officers go inside and find Neal. It was undisputed that the officers never attempted to obtain a search warrant for the house or an arrest warrant for Neal.

Appellant contended that the trial court erred in denying her motion to suppress. Specifically, she contended that the inevitable discovery doctrine did not apply because the officers were not "actively pursuing" a search warrant before entering and searching her home. The Court agreed.

Assuming without deciding that the officers had the requisite probable cause to obtain a warrant based on the odor of marijuana, there was no evidence that the officers had applied for a warrant or even were preparing an application for a warrant prior to entering and searching appellant's home. Accordingly, the State failed to lay an evidentiary foundation for the application of the inevitable discovery exception.

Nevertheless, the State argued, the officers were justified in entering appellant's home to conduct a protective sweep. The Court stated that a protective sweep is a limited search of the premises primarily to ensure officer safety by detecting the presence of other occupants. Officers are authorized to perform a protective sweep in connection with an in-home arrest when they possess articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. But here, the Court found there was no "in-home" arrest, which would have justified the sweep, as no one had been arrested at the time the sweep occurred. Instead, the undisputed evidence showed that the officers' entry into and search of the residence preceded Neal's discovery and arrest. Also, the State failed to show that the officers possessed

articulable facts that would warrant a reasonably prudent officer in believing that appellant's home harbored an individual posing a danger to them. There was no evidence that appellant's car, allegedly being driven by Neal, was at appellant's home when the officers arrived. Nothing connected Neal to appellant's home apart from the victim's tip that Neal might be found at either his apartment or appellant's house, and the officers were not sure that Neal was not in his apartment when they entered appellant's house. A mere inchoate and unparticularized suspicion or hunch that the home may harbor an individual posing a danger to the officers is insufficient to support a warrantless sweep. Accordingly, the evidence supported the trial court's finding that the officers were not authorized in entering appellant's home to conduct a protective sweep

Next, the State argued that the officers were justified in entering the home to prevent imminent destruction of evidence. But the Court found, the evidence did not support this contention. Exigent circumstances may be found where an officer reasonably fears the imminent destruction of evidence if entry into the residence is not immediately effected. However, the presence of contraband inside a residence without more does not give rise to exigent circumstances. And here, the record lacked any evidence that contraband was in immediate danger of destruction such that the officers were authorized to enter appellant's home without a search warrant.

Accordingly, the Court concluded, the trial court should have granted the motion to suppress. Consequently, appellant's conviction was reversed, and the case remanded to the trial court with direction to grant her motion to suppress.

Sufficiency of the Evidence; Effect of Cumulative Errors

Bully v. State, A20A0882 (10/28/20)

Appellant was convicted on multiple counts of rape and other crimes, including five counts of sexual assault on a probationer by an agent of a probation office under former OCGA § 16-6-5.1 (b) (2). The evidence showed that in 2014, appellant owned and operated Rise Above Recovery (hereinafter "RAR"), an in-patient drug rehabilitation facility. Criminal defendants, particularly those convicted of drug crimes, were often required to complete a drug rehabilitation program as a condition of probation, and RAR provided such program. RAR was not accredited by an industry association, and was not otherwise licensed by the State to provide such services. Appellant used his position to make sexual advances towards women in the RAR program, including probationers. He repeatedly threatened to expel or report probation violations on female probationers unless the probationer agreed to engage in sexual activities with him. For those probationers who agreed to have sexual relations with him, he would often reduce account charges or offer some other financial exchange.

He contended that the evidence was insufficient to convict him on the five counts of sexual assault on a probationer under the version of OCGA § 16-6-5.1 (b) (2) in effect at the time of the underlying events. Specifically, he argued that the evidence was insufficient to establish that he was an employee or agent of any probation or parole office. The Court agreed.

The Court found the record established that there was no agency relationship between RAR and/or appellant and any probation office. The record was devoid of evidence of a written or oral agreement between RAR and/or appellant and any probation office or any state agency; devoid of evidence that any probation office ever expressly requested that RAR and/or appellant perform a service or function on its behalf; devoid of evidence that RAR and/or appellant operated according to

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any state-issued guidelines; and devoid of evidence that any probation office gave direction or instruction to RAR and/or appellant in any way as to how to run the drug rehabilitation program, treat the probationers, or determine when a probation violation had occurred. Rather, the only relevant evidence showed the opposite. A probation officer who supervised two of the probationers at RAR testified that she had never visited RAR, never communicated with appellant, and never instructed RAR and/or appellant as to any expectations of them on behalf of the probation office. None of the other probation officers testified to the contrary. Thus, the State failed to present any evidence that RAR and/or appellant were authorized to act as an agent for any probation office.

Nevertheless, in support of its position that appellant was an agent of a probation office subject to OCGA § 16-6-5.1 (b) (2), the State relied on the fact the probation offices received reports from RAR about the status of its probationers in the program, and their compliance with the RAR recovery program. The probation officers testified that they relied on and trusted these reports. But, the Court found, the State did not present any evidence that probation offices instructed RAR to produce such reports, and regardless, such reporting alone does not determine agency. Moreover, in the event that RAR did report that a probationer had failed to comply with its program, RAR and/or appellant lacked the authority to address the violation outside of RAR's own program requirements. The probation officer and the court, not RAR or appellant, would determine what, if any, action should be taken with respect to the probationer's probation status. Several probation officers also testified that they have some discretion in determining whether a reported violation will trigger the officer to seek a revocation of probation. Thus, although RAR and/or appellant had authority to control the RAR program, there was no evidence that RAR was required — or authorized — to enforce or implement any rules or instructions dictated by any probation office. Accordingly, the Court concluded, the evidence was insufficient to establish that appellant was the agent of any probation office. Thus, the evidence failed to establish that appellant committed the crime of sexual assault on a probationer by an agent of a probation office under former OCGA § 16-6-5.1 (b) (2).

Appellant also contended that his trial counsel rendered ineffective assistance in a number of ways. The Court again agreed. Specifically, counsel rendered defective performance by: (1) failing to object to and eliciting evidence that appellant had a criminal history, including three felony convictions; (2) failing to object to evidence of the hearsay portions of appellant's wife's statements in a telephone call; and (3) eliciting, opening the door, and failing to object to evidence suggesting that appellant was engaged in sex trafficking/prostitution.

Appellant contended that the trial court erred in admitting extrinsic evidence of other crimes of sexual assault under OCGA § 24-4-413 (a) ("Rule 413"). The trial court allowed evidence from four women who were clients of a predecessor to RAR run by appellant. The Court found that the evidence was sufficient to establish by a preponderance of the evidence that appellant committed an offense of sexual assault on two of these witnesses by intimidation and fear of being reported for a probation violation leading to possible incarceration, but insufficient to show that he committed such an offense on the other two witnesses.

The Court noted that under the recent case of *State v. Lane*, 308 Ga. 10, 14 (1) (2020), Georgia courts considering whether a criminal defendant is entitled to a new trial should consider collectively the prejudicial effect of trial court errors and any deficient performance by counsel - at least where those errors by the court and counsel involve evidentiary issues. With regard to the admission of Rule 413 evidence, given that there were four other prior-act witnesses to similar behavior by appellant, any possible error in the admission of the two witnesses' sexual encounters with appellant was cumulative of other admissible evidence, and therefore, any error in its admission was deemed harmless beyond a reasonable doubt.

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As to the ineffective assistance claims, the Court found that the admission of appellant's prior criminal history led directly to appellant admitting on the stand that he intentionally pointed a firearm at another person in order to put that person in fear of his or her life. Appellant's wife's comments to the effect that he could not reign in his sexual desires was prejudicial, although it was cumulative of other testimony, including appellant's own admissions that he had a wife and a girlfriend and had sex with two of the victims and two of the Rule 413 witnesses. The evidence suggesting that appellant was engaged in sex trafficking/prostitution was highly prejudicial in that it suggested he was involved in a larger criminal enterprise, not just sexual crimes against individual women.

Nevertheless, the Court also found that the evidence against appellant that he committed the charged crimes was strong. The evidence was overwhelming that appellant had sexual contact with numerous female probationers at RAR. Thus, the principle issue remaining was whether appellant's sexual contact with the victims resulted from force or appellant's pattern of threatening and intimidating the victims, or whether the victims consented to the sexual contact. The State presented an abundance of evidence that appellant asserted authority and control over the female probationers at RAR, through both his financial power, and through threatening and intimidating behavior that included threats to report probation violations in order to coerce the victims into sexual acts. Appellant also exploited the probationers' weaknesses for taking drugs. In addition, the testimony of five victims and the four properly admitted Rule 413 witnesses showed appellant's consistent practice of using RAR clients to satisfy his sexual desires through the use of force and intimidation. Although appellant claimed that sex with at least two of the victims was consensual, his credibility was impeached with evidence that he lied to investigators and lied under oath to a federal agent, and that he had threatened a co-employee's children because the co-employee was cooperating with the investigation. Therefore, the Court concluded, based on the exceedingly strong evidence presented by the State, there was no reasonable probability that, but for the above-referenced errors by counsel, the result of the proceeding would have been different.

Courtroom Closures; OCGA § 17-8-54

Spires v. State, A20A1079 (10/28/20)

Appellant was convicted of aggravated child molestation, incest, sexual exploitation of children, and three counts of child molestation. Appellant contended that the trial court erred in closing the courtroom when the victim testified and then again during deliberations when the jury asked to re-watch the videos depicting the sexual abuse.

The record showed that during a pre-trial hearing, the State made a motion under OCGA § 17-8-54 to have the courtroom closed while the victim testified. In response, appellant speculated that the trial court had little discretion under the statute, but objected on the basis that his trial was a "public forum." The trial court did not immediately rule on the motion but, instead, took the matter under advisement. At the start of trial two weeks later, the trial court announced its decision to close the courtroom during the victim's trial testimony. Appellant argued that the trial court failed to properly weigh the competing interests in closing the courtroom and that this failure violated his Sixth Amendment right to a public trial.

The Court stated that OCGA § 17-8-54 is based upon a legislative determination that there is a compelling state interest in protecting children while they are testifying concerning a sex offense. Here, the partial closure of the courtroom —

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which allowed members of the press, among others, to remain in the courtroom — was permitted under this code section and did not violate appellant's constitutional right to a public trial.

However, the Court found, while OCGA § 17-8-54 may have justified the partial closure of the courtroom during the victim's testimony, it is inapplicable to the trial court's closure of the courtroom while the jury re-watched the sexual-abuse videos during its deliberations. Nevertheless, the Court noted, the trial court twice announced its intention to close the courtroom while the video was played for the jury, and appellant did not object in either instance. In fact, appellant appeared to have acquiesced to the trial court's decision to bring the jury back into the courtroom to re-watch the video with the courtroom closed. Accordingly, the Court found this part of appellant's argument was waived.

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