

## THIS WEEK:

- Search & Seizure; Prolonged Stops
- Rape Shield; Prior False Allegations of Abuse
- Ineffective Assistance of Counsel; Closing Arguments
- Constitutionally Excessive Bail; *Mullinax* Factors

### Search & Seizure; Prolonged Stops

*Gayton v. State, A21A0939 (11/3/21)*

Appellant was convicted of possession of a firearm by a first-offender probationer. He contended that the trial court erred in denying his motion to suppress. The Court agreed.

Briefly stated, the evidence showed officers Embrey, Glowcheski, and Sotor were fanned out in some woods in response to a BOLO. The suspect, whose name was provided to the officers, was described as a white man with dark hair wearing a white t-shirt and jeans. Only Glowcheski viewed a photograph of the suspect. Embrey saw appellant stand up in the woods approximately 15 to 30 yards away; Embrey immediately drew his weapon, pointed it at appellant, and ordered appellant to show his hands, and walk toward Embrey. Appellant complied. Although Embrey thought that appellant was their suspect, as appellant drew nearer, he saw that appellant wore a camouflage jacket and pants and had binoculars hanging around his neck. Knowing that the suspect was not wearing camouflage, and as the distance decreased between him and appellant, he determined that appellant was not the suspect. Embrey testified that, as appellant approached him, he recognized appellant's face but could not “recall from where.”

Hearing Embrey's orders, Sotor and Glowcheski went to his location; like Embrey, they determined that appellant was not the suspect. Glowcheski noticed a “bulge” on appellant's side, about which he inquired. Appellant identified the bulge as a handgun, and Glowcheski instructed appellant to keep his hands raised to allow Glowcheski to remove the loaded handgun from appellant's side. A few minutes later, Embrey asked appellant where he lived. Appellant pointed in the direction of a nearby road, at which point, Embrey “put two and two together” and recalled that “about a year, year and a half before that, when [he] was part of the SWAT team, [the team] had a call-out at a house that [appellant] was pointing towards.” Embrey concluded that he knew appellant from the call-out and “assumed that he probably was a convicted felon [and] shouldn't have [the] firearm.” Appellant was subsequently arrested after it was determined that he was in fact a felon.

The trial court found that the stop was justified at its inception by reasonable suspicion that appellant may have been the suspect and, therefore, that the officers were authorized to investigate that suspicion. Assuming without deciding that this finding was correct, the Court concluded that appellant's detention was unreasonably prolonged after the purpose of the stop was effected and, therefore, that the stop as a whole was unreasonable. Specifically, the noted that the purpose of the

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stop, as found by the trial court and supported by the record, was, at least initially, to determine whether appellant was the fleeing suspect. This purpose defines the proper scope of appellant's detention — verifying or dispelling the suspicion that he may have been the suspect. Notwithstanding the difference between appellant's appearance and that of the suspect, as well as its findings that the officers determined that appellant did not match the suspect's appearance, the trial court determined that the officers “were not required to dismiss [appellant] as the fleeing [suspect], outright, based on clothing alone.” However, the Court found, the record did not support the trial court's conclusion because the State did not produce evidence that established a basis for reasonable suspicion that appellant might have been the suspect in light of the difference in appearance. For example, nothing in the record showed that appellant resembled the suspect in any aspect besides race, gender, and hair color or that his behavior was otherwise suspicious. Nor did the State enter into evidence photographs of the suspect from which the trial court could determine that appellant resembled the suspect in other respects. Therefore, based on the record, the Court concluded that the obvious difference in attire, when viewed by an objective officer under the circumstances, dispelled any reasonable suspicion that appellant was the suspect, and the trial court erred by finding that the officers were justified in continuing the detention after determining that appellant's appearance did not match the suspect's.

Furthermore, the Court stated, even without reasonable suspicion that appellant may have been the suspect, the officers still would have been authorized to prolong the detention if good cause had appeared in the meantime to justify a continuation of the detention to pursue a different investigation. The trial court found that appellant's admission that he had been convicted of a felony justified the officers' pursuing an investigation of whether appellant was a felon-in-possession of a firearm. However, the admission was made, as the trial court found, “a few minutes” after the officers approached appellant and had an opportunity to determine that his appearance did not match the suspect's. It is axiomatic that reasonable suspicion to justify a detention may not be premised on facts discovered *after* the detention's initiation. In other words, reasonable suspicion to justify prolonging a detention to pursue an unrelated investigation may not be based on facts learned *after* the suspicion justifying the initial detention is dispelled. Thus, the Court determined, appellant's admission about his prior conviction could not establish the reasonable suspicion necessary to justify prolonging the detention because the admission was obtained as a result of the detention being prolonged after its purpose had concluded.

Moreover, the Court noted, the State offered no evidence that other good cause to justify prolonging the detention appeared before the initial suspicion had dissipated. As found by the trial court and shown by the record, by the time the officers determined that appellant did not match the suspect's description, they knew that he was a white man with dark hair wearing a camouflage jacket and pants with a pair of binoculars hanging from his neck; that he had been in the woods; that he complied with Embrey's commands; that Embrey recognized appellant's face but could not recall from where; and that there was a bulge on appellant's side. Taking into account the totality of the circumstances, the Court found that these facts did not establish reasonable suspicion of criminal activity because there was no objective manifestation that appellant had or was about to commit a crime.

And, the Court stated, Embrey's mere recognition of appellant's face did not establish reasonable suspicion justifying the prolonged detention. Though Embrey eventually determined that he recognized appellant from a previous SWAT call-out and, based on SWAT's involvement, believed the previous arrest was for a felony, such information was learned as a result of the investigation's prolongation and cannot serve as the basis for extending the detention. Even if Embrey had realized at the outset that he recognized appellant from a previous arrest, a past arrest for a crime, without more, is simply not

enough to provide reasonable, articulable suspicion that the person is currently committing the crime for which he was previously arrested. Likewise, wearing camouflage in the woods is not a crime, nor could that activity lead to an objective determination that appellant was about to be engaged in criminal activity.

Finally, the Court found, the presence of the “bulge” on appellant’s side, standing alone, did not provide a basis for reasonable suspicion that he was involved in criminal activity. The trial court reasoned that appellant “was in camouflage attire which, arguably, indicated that he may have been hunting thereby leading the officers to reasonably suspect that the bulge was, in fact, a concealed weapon,” but these facts supported, at best, a hunch that the bulge was a weapon and a hunch cannot establish reasonable suspicion of criminal activity. And while the presence of a suspected weapon, together with other circumstances, may provide reasonable suspicion of criminal activity to justify initiating or prolonging a detention, the Court found that the record did not show the existence of other facts and circumstances which would have provided grounds to detain appellant further. Accordingly, the Court held, appellant’s continued detention was not justified by reasonable suspicion that he was involved in criminal activity, and the trial court thus erred by denying his motion to suppress.

## **Rape Shield; Prior False Allegations of Abuse**

*Vallejo v. State, A21A1110 (11/3/21)*

Appellant was convicted of child molestation. The evidence showed that he molested the 15-year-old victim while he was living with the victim and her mother. Before trial, appellant filed a “Motion to Admit False Allegations of Sexual Misconduct by the Alleged Victim,” contending that when the victim was a 6-year-old, she and her mother falsely accused the victim’s father of child molestation. At a hearing on the motion, appellant presented the testimony of a former sheriff’s investigator and the victim’s former stepmother. After the hearing, the trial court denied appellant’s motion, finding that the evidence presented only “a possibility of falsehood as opposed to a reasonable probability of falsehood.” In the order denying appellant’s motion for new trial, the trial court again stated that it had considered the evidence presented at the hearing and found that appellant “had not carried his burden of showing a reasonable probability of falsity.”

Appellant contended that the trial court erred. Specifically, he contended that he presented sufficient evidence of falsity to allow the evidence to be admitted. A divided full Court disagreed.

The Court stated that in prosecutions for child molestation, Georgia’s Rape Shield Statute prohibits testimony regarding a complaining witness’s past sexual behavior, but it does not prohibit testimony regarding previous false allegations by the complaining witness. But, before such evidence can be admitted, the trial court must make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists. In this context, a reasonable probability is a probability sufficient to undermine confidence in the outcome. Defendants have the burden of coming forward with evidence at the hearing to establish a reasonable probability that the victim had made a prior false accusation of sexual misconduct.

And here, the Court noted, relying on what the Court characterized as “dubious inferences drawn from the investigator’s and former stepmother’s testimony,” appellant contended that the evidence showed that the victim’s mother had a motive to coach the victim into making false allegations against her father and that the victim was, in fact, coached. However, the

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Court stated, this argument goes to the credibility of the witnesses' testimony. In fact, appellant was effectively asserting that the trial court should have credited the stepmother's testimony over the investigator's testimony. But, after observing the witnesses' demeanor and considering their interests in the case, the trial court found the investigator's testimony to be credible and concluded that the stepmother's testimony "did not demand a finding of reasonable probability of falsity." And, the Court found, the testimony at the hearing supported the trial court's finding that falsity was not established by a reasonable probability.

In so holding, the Court disagreed with the dissent's assertion that in *State v. Burns*, 306 Ga. 117, 123 (2) (2019), the Supreme Court of Georgia rejected the rule established in *Smith v. State*, 259 Ga. 135, 137-138 (1) (1989), requiring the trial court to make a threshold determination that a reasonable probability of falsity exists before evidence of prior false allegations can be admitted.

Alternatively, appellant argued that the victim's prior allegation against her father was relevant to show the victim's knowledge of sexual acts and her comfort level with the process of prosecution. Specifically, prior to trial, appellant filed a notice of intent to introduce evidence of the victim's "prior sexual assault by her biological father" for the purpose of "inform[ing] the jury that the alleged victim and her mother ... have a 'fund of a knowledge' to make allegations - i.e. they have experience working with police, disclosing alleged abuse, and encouraging a prosecution of the same."

Relying on *Blackwell v. State*, 229 Ga. App. 452, 454 (2) (1997), the trial court observed that "Georgia courts recognize a 'long-standing rule barring introduction of evidence of prior unrelated molestation'" and that one of the few exceptions to this rule occurs "where the evidence is offered to show other possible causes for the victim's injuries or symptoms." The trial court therefore ruled that if the State offered evidence of the victim's injuries or symptoms allegedly caused by sexual abuse, appellant could offer evidence of the alleged prior sexual abuse to explain the injuries. Based on *Blackwell*, as well as OCGA §§ 24-4-401 and 24-4-403, the trial court barred the defense from offering evidence of the prior abuse "simply to explain" the victim's "vocabulary or 'fund of knowledge.'" However, the trial court allowed the defense to renew its request to offer evidence of the prior abuse if the State "opened the door to such evidence."

Appellant argued that the trial court erred by relying on the "long-standing rule" referred to in *Blackwell* because that rule is based on an application of the rules of evidence as they existed prior to January 1, 2013, well before appellant's trial. Appellant also argued that the evidence of the victim's prior allegation was admissible under the new Evidence Code. A divided Court again disagreed.

The Court stated that contrary to appellant's argument, evidence that the victim made an allegation of child molestation against her father at the age of six does not tend to (a) show how the victim, at the age of sixteen, would have the knowledge necessary to come up with a plan to falsely accuse appellant of molesting her or (b) otherwise call into question her credibility in that regard. Indeed, evidence that the victim had prior experience with the process of making an allegation of child molestation was wholly irrelevant to the issue of whether appellant committed the acts alleged by the victim and was thus properly excluded by the trial court. Furthermore, the Court stated, even if the evidence that the victim had made a prior allegation of child molestation arguably bore some minimal relevance to appellant's guilt, the trial court acted within its discretion in concluding that the minor probative value of any such evidence was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay [or]

waste of time,” which the trial court implicitly did by citing OCGA § 24-4-403 in its analysis. Consequently, the Court concluded, even assuming the dissent is correct that the Rape Shield Statute does not bar the admission of the prior allegation evidence, the trial court did not err in excluding the evidence under the applicable evidentiary rules.

## **Ineffective Assistance of Counsel; Closing Arguments**

*Jones v. State, A21A1372 (11/10/21)*

Appellant was convicted for hijacking a motor vehicle, armed robbery, and two counts of possession of a firearm during the commission of a felony. The evidence showed that the victim knew appellant from high school and used social media to arrange a meeting with appellant at a park in Savannah to purchase a gun from appellant. The victim drove his mother's car to the park, where he saw appellant sitting on a bench. Appellant got in the car, pointed a gun at the victim's face, and demanded “everything.” Appellant took the victim's wallet, his phone, and some cash. Appellant ordered the victim to get out of the car, and another man, who had been a passenger in a car parked nearby, got into the victim's mother's car. Appellant and the other man drove off, followed by the other car.

Appellant argued that trial counsel performed deficiently by failing to object to two instances where the prosecutor gave his opinion about the veracity of the victim and appellant. In the first instance, the prosecutor discussed the difference between direct and circumstantial evidence relating to appellant's fingerprint on the hood of the stolen car. After stating that the fingerprint was direct evidence, the prosecutor stated, “Circumstantially, you can draw the inference that that means that he possessed it and the fact that it was on the hood is likely that he had closed that hood after opening it and trying to remove that One Star or On-Star, that would — you know — identify where the vehicle was. That's an inference that you are allowed to make based on the circumstances, and I am asking you specifically to make that inference. *I believe that that's what happened. I believe that is why his hand was on the hood and why we found that fingerprint there.*”

The Court stated that while it is improper for counsel to state to the jury counsel's personal belief as to the veracity of a witness it is not improper for counsel to urge the jury to draw such a conclusion from the evidence. And here, the Court found, the prosecutor's comment that he believed the inference that he was asking the jury to draw — that appellant's handprint on the hood meant that appellant had possessed the car — was permissible since it was the conclusion the prosecutor wished the jury to draw from the evidence and not a statement of the prosecutor's personal belief as to the veracity of a witness.

The second instance occurred when the prosecutor responded to trial counsel's characterization of appellant's statement to police. In his statement to police, appellant denied being in Savannah at the time of the crime. In his closing argument, trial counsel conceded that appellant's denial of being in Savannah was untrue. But, he argued, “I think that's a normal denial that someone would do, that someone who is arrested or being interviewed would say, ‘No, I don't know nothing about it.’ I think that's a normal reaction. I think most every one of us would do it, whether we were guilty of something or not. We know that [the victim] and [appellant] met somewhere in Chatham County.”

In response, the prosecutor stated: “[Trial counsel] took all of [appellant]'s statement and wrapped it up and just pitched it aside with one statement: ‘I mean, of course, it's not a lie. It's a denial — you know — like everyone would do if they were being confronted or accused of a crime.’ *I don't believe that and I don't think you do, either.*”

Appellant argued that in the italicized sentence, the prosecutor improperly injected his personal views about the evidence and appellant's veracity. The Court disagreed. The Court found that the sentence did not comment on the evidence or appellant's veracity. Trial counsel had explained that appellant's falsely telling police he had not been in Savannah was a "normal denial" and that trial counsel thought "most every one of us would do it." The prosecutor's response in rebuttal — that he did not believe that — was directed to trial counsel's explanation, not to appellant's veracity (which trial counsel himself had conceded was absent from the particular statement). Thus, the Court concluded, the comment made in rebuttal did not constitute an opinion about appellant's veracity; it merely urged the jury to reject trial counsel's explanation and to make its own deduction about veracity from the undisputed fact that appellant had been untruthful about being in Savannah. Consequently, since the comment was not improper, trial counsel's performance was not deficient for failing to object to the prosecutor's argument.

## **Constitutionally Excessive Bail; *Mullinax* Factors**

*Colemon v. State*, A21A1259 (11/16/21)

Appellant was indicted on 35 charges, including criminal attempt to commit murder and numerous counts of aggravated battery (family violence), aggravated assault, and cruelty to children in the first degree. The record showed that the trial court initially set his bond at \$150,000.00, but after another bond hearing, reduced it to \$100,000.00. In an interlocutory appeal, appellant contended that the trial court erred in denying his motion to reduce bond. Specifically, the trial court failed to grant him an appropriate bond within his financial means, which resulted in cruel and unusual pretrial punishment solely based on his poverty. The Court disagreed.

Relying on *Mullinax v. State*, 271 Ga. 112 (2) (1999), the Court stated that for purposes of the Eighth Amendment, excessive bail is defined as bail set at an amount higher than an amount reasonably calculated to insure the presence of the defendant. When fixing bail in Georgia, a trial judge's *foremost consideration* is the probability that the accused, if freed, will appear at trial and *to a lesser extent* the accused's ability to pay, the seriousness of the offense, and the accused's character and reputation. A defendant who seeks release on bail has the burden of showing roots in the community, that the defendant does not pose a significant risk of fleeing, threatening the community, committing another crime, or intimidating a witness.

First, the Court found, the trial court evidently considered appellant's ability to pay the \$100,000 bond. Appellant represented to the court that his family has property valued at \$95,000, which they can post against the bond. During the second bond hearing, the trial court questioned appellant's counsel about the family's property, about whether appellant's family members would be able to take a loan against the property to post the bond, and about the amount of money that would be required to post the bond through a bonding company. Therefore, the Court concluded, it was apparent that the trial court accounted for appellant's financial ability, and thus, the Court rejected his contention to the contrary.

Appellant also argued that the bond was necessarily excessive because the trial court imposed various conditions to ensure his presence at trial and he was nevertheless unable to afford the bond. But, the Court stated, the amount of a bond as reasonable or excessive is not susceptible to objective measurement under bright line rules. Rather, it results upon a consideration of a range of factors. The gist of the problem confronting a court in setting the amount of bail is to place the

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amount high enough to reasonably assure the presence of the defendant when it is required, and at the same time to avoid a figure higher than that reasonably calculated to fulfill this purpose, and therefore excessive.

And here, the Court found, the bond amount reflected the trial judge's concern that the defendant's presence at trial be secured. The record showed that the trial court considered appellant's establishment in the community to ensure that he will appear for trial. In determining the amount of bond necessary for this foremost purpose, the trial court found that appellant had lived in four different counties; that he had not established ownership of a home in which he had an interest; that he did not have long-term employment; and that there had been no evidence that he had children who resided with him and were being schooled in the area. The trial court also considered that appellant faces "very serious charges" and severe punishment if convicted and that he has previously been convicted of a violent offense. Ultimately, the trial court ruled that the likelihood that appellant would appear for trial required bond in the amount of \$100,000 and that a lesser amount would not reasonably assure appellant's presence.

Nevertheless, the Court stated, it was not unmindful of the length of appellant's pretrial detention and the presumption of his innocence. However, the record showed that the trial court considered both of these factors, applied the *Mullinax* framework to the specific circumstances here, and rendered a reasoned decision regarding the bond amount. Accordingly, the Court concluded, the bond was not so excessive as to constitute a clear abuse of discretion.