

## THIS WEEK:

- Sufficiency of the Evidence; First Degree Forgery
- Transfer Orders; Rule 404 (b)
- Breath Tests; Field Sobriety Evaluations
- Incomplete Record; Transcripts
- Search & Seizure; Police Officer Jurisdiction

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### Sufficiency of the Evidence; First Degree Forgery

*Rogers v. State, A22A0206 (5/2/22)*

Appellant was convicted of two counts of first-degree forgery and one count of third-degree forgery. The evidence showed that appellant made two payments using fraudulent money orders that displayed the routing number of the Federal Reserve Bank of Atlanta. The recipients of the fraudulent payments grew suspicious and informed the police. When appellant was arrested, he had in his possession a checkbook containing multiple checks, including one made out to Liberty National that purported to draw from an account at the Federal Reserve Bank of Atlanta. Appellant did not have an account at the Federal Reserve Bank of Atlanta, and he did not have authority to use its routing number. Also, the Bank does not distribute personal checks to individuals.

Appellant contended that the State did not prove every essential element of first-degree forgery because it did not prove he used a fictitious name. The Court disagreed.

The Court found that appellant's sufficiency claim failed because the use of a fictitious name is not an essential element of forgery in the first degree. The offense is defined as “knowingly mak[ing], alter[ing], or possess[ing] any writing, other than a check, in a fictitious name *or* in such manner that the writing as made ... purports to have been made ... by authority of one who did not give such authority and utters or delivers such writing.” OCGA § 16-9-1 (b) (emphasis added). Here, the fraudulent orders used the Bank's routing number, and a Bank employee testified that appellant had no authority to use the Bank's routing number. That evidence authorized a conviction for first-degree forgery based on appellant's possession and delivery of fraudulent money orders that “purport[ed] to have been made ... by authority of” the Federal Reserve Bank of Atlanta without the Bank having “give[n] such authority.” See OCGA § 16-9-1 (b).

### Transfer Orders; Rule 404 (b)

*In re A. G., A22A0459 (5/2/22)*

The State appealed the order of a juvenile court denying its motion to transfer the case to superior court. The evidence, briefly stated, showed that Winn began dating A. G.'s mother in 2014, and, not long thereafter, moved in with her and her five children (including A. G.). At the time Winn moved in with the family, A. G. was 16 years old, had dropped out

# *Prosecuting Attorneys' Council of Georgia* **CaseLaw** UPDATE

WEEK ENDING JULY 8, 2022

Issue 27-22

of school, and did not get along with Winn. Eventually, A. G.'s home life deteriorated to the point that, on October 26, 2020 (after a dispute with his mother about his curfew), he ran away from home—allegedly staying with either his grandmother or friends. A. G. came over to his mother's house on November 2, 2020, to pick up a package of clothes he had ordered online. Winn was not home at the time. A. G. asked to come in and take a shower. His mother refused. A. G. began kicking at the door, significantly damaging it. The mother then called Winn and demanded he come home. Over the next fifteen minutes, A. G. remained on the front porch in an agitated state. Then, nearly 20 minutes after A. G.'s mother's call for help, Winn arrived and parked his vehicle in the driveway. As he exited the vehicle and walked toward the porch, A. G. drew a handgun and fired seven shots at Winn, all of which struck him. And while Winn lay on the ground, A. G. reloaded the handgun, walked closer, and ultimately fired three more shots at him.

Subsequently, the State filed a petition of delinquency in the juvenile court, charging A. G. with acts that—if committed by an adult—would constitute attempted murder, aggravated assault, aggravated battery, cruelty to children, and criminal trespass. Several months later, the State filed a motion to transfer the case to the superior court, arguing that the seriousness of the crimes, *inter alia*, warranted trying A. G. as an adult. Thereafter, A. G. filed a notice of intent to introduce evidence of Winn's prior act of violence—specifically, a domestic abuse incident involving A. G.'s mother. In addition, A. G. filed a motion to preclude the State from introducing a prior bad act he allegedly committed, arguing, *inter alia*, that the State failed to provide proper notice of its intent to introduce such evidence. After an evidentiary hearing, the juvenile court denied the motion to transfer, and the State appealed.

The State contended that the juvenile court erred in excluding evidence of A. G.'s prior bad acts. The juvenile court found that the State failed to provide sufficient notice to A. G. regarding its Rule 404 (b) motion. The State argued the notice provision does not apply to transfer hearings. But, the Court noted, OCGA § 24-1-2 (b) provides that “[t]he rules of evidence shall apply generally to all nonjury trials and other fact-finding proceedings of any court in this state subject to the limitations set forth in subsections (c) and (d) of this Code section.” And, in construing that statute, our Supreme Court has held that under our Evidence Code, unless a fact-finding proceeding involves one of the twelve situations enumerated in OCGA § 24-1-2 (c) and (d), the rules of evidence fully apply. Here, the Court found, it was undisputed that a transfer hearing is a fact-finding proceeding and none of the limitations outlined in OCGA § 24-1-2 (c) and (d) are applicable. Given these circumstances, the Court determined that the juvenile court did not abuse its discretion by excluding this prior act evidence.

Next, the State contended that the juvenile court erred in admitting evidence of Winn's prior act of domestic violence. However, the Court stated, even if the court erred in admitting Winn's prior act of domestic violence, such an error did not warrant reversal of the court's ruling to deny the State's transfer order. Indeed, under OCGA § 24-1-103 (a), “[e]rror shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.” In fact, the Court found, even assuming that transferring the case implicated a “substantial right” held by the State, here, the juvenile court's order denying the motion to transfer only briefly mentioned Winn's prior domestic abuse and, instead, focused on the evidence—supported by the psychologist's report—that A. G. was capable of being rehabilitated—particularly because he was only 16 years old at the time of the incident, had no prior history with the juvenile court system or prior charges, and had never previously been provided rehabilitative services. Thus, the Court found it highly unlikely that the exclusion of Winn's prior act of domestic violence perpetrated against A. G.'s mother and subsequent arrest would have resulted in the juvenile court granting the State's motion to transfer the matter to the superior court. Accordingly,

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the juvenile court did not commit reversible error in this regard, and consequently, the Court affirmed the denial of the State's motion.

## Breath Tests; Field Sobriety Evaluations

*State v. Ortiz, A22A0474 (5/4/22)*

The State appealed from an order suppressing Ortiz's breath test and field sobriety evaluations. The evidence, briefly stated, showed that an officer who had been trained in DUI detection and field sobriety evaluations, assisted on a traffic stop. The officer was told that Ortiz was "kind of hard to understand." The officer observed this, along with Ortiz's Spanish accent and his slow and slurred speech. Eventually, after asking Ortiz numerous times, Ortiz did some field sobriety evaluations and agreed to a state-administered breath test.

As to the breath test, the State argued that the trial court focused exclusively on Ortiz's language barrier to determine whether his consent was voluntary and failed to consider the totality of the circumstances. Specifically, the State argued that 1) Ortiz's consent should have been found voluntary because the totality of the circumstances showed that the officers did not use fear, intimidation, threat of physical punishment, or lengthy detention to obtain consent; and 2) "[t]here was . . . no direct evidence in front of the court to determine [Ortiz's] proficiency in English." However, the Court stated, it is not aware of any requirement that the trial court expressly address each relevant factor in its order, particularly when the State did not present evidence on each of the factors. Moreover, the trial court's order specifically states that the court considered "Defendant's motion, oral arguments by the State and Defendant, evidence presented, all matters of record[,] and the applicable and controlling law" "[i]n examining the totality of the circumstances." Furthermore, the Court stated, it is the State's burden to prove that Ortiz gave his consent freely and voluntarily. Accordingly, the Court determined that it could not say the trial court failed to consider all the circumstances as presented by the evidence and directed by *Olevik*.

Nevertheless, the State, citing *Rodriguez v. State*, 275 Ga. 283, 287-288 (3) (2002) and *Furcal-Peguero v. State*, 255 Ga. App. 729, 732-733 (2002), contended that officers are not required to read the Georgia implied consent notice in the DUI suspect's native language or ensure that the accused understands the notice. But the Court stated, these decisions pre-date the Supreme Court of Georgia's adoption of the "actual consent" test based on the "totality of the circumstances" analysis to determine whether a DUI suspect's consent to perform testing was voluntary. Consequently, the decisions in *Rodriguez* and *Furcal-Peguero* did not control the outcome in this case. Rather, whether a DUI suspect was read the implied consent notice in his native language or otherwise understood the implied consent notice are simply proper factors to be considered in determining whether the suspect gave actual consent under all the circumstances. Therefore, since the trial court considered the totality of the circumstances, the Court concluded that the trial court did not err when it granted the motion to suppress the results of Ortiz's state-administered breath test.

Next, the State argued that the trial court erred in suppressing Ortiz's field sobriety evaluation results because Ortiz was not coerced or forced to perform the tests. The Court noted that the issue — as with Ortiz's state-administered breath test — is whether Ortiz was compelled to perform the field sobriety evaluations in violation of the Georgia Constitution's guaranty that "[n]o person shall be compelled to give testimony tending in any manner to be self-incriminating." Ga. Const. of 1983, Art. I, Sec. I, Par. XVI. The term "testimony" in this constitutional provision includes doing an act against an individual's will which is incriminating in its nature. This includes performing field sobriety evaluations.

And here, the Court found, the trial court, after "examining the totality of the circumstances," granted Ortiz's motion to suppress the field sobriety evaluations, finding, as it did with the state-administered breath test, that Ortiz did not give actual, voluntary consent based on the language barrier. Although the State offered evidence that Ortiz was not threatened or coerced to submit to the evaluations and understood some English because he appeared to properly perform the field sobriety tests and respond affirmatively to the officer's request that he submit to the evaluations, there also was evidence that there were a number of police officers at the scene, the officer requesting permission to perform the field sobriety evaluations did not ensure that Ortiz could speak English or advise him that he could refuse to perform the field tests, Ortiz spoke with a heavy Spanish accent and was difficult to understand, Ortiz repeatedly had difficulty understanding and appropriately responding to the officer's questions, the officer asked Ortiz numerous times whether he would submit to field sobriety evaluations without receiving Ortiz's consent, and another officer gestured for Ortiz to exit the car and asked him two more times if he would perform the field sobriety evaluations before Ortiz finally moved his head in apparent acquiescence.

Thus, the Court concluded, the totality of the evidence supported the trial court's findings, and the record did not demand a finding contrary to the judge's determination that Ortiz did not give actual, voluntary consent to perform the field sobriety evaluations due to the language barrier. Accordingly, the trial court did not err when it granted Ortiz's motion to suppress the results of his field sobriety evaluations.

## **Incomplete Record; Transcripts**

*Matta v. State, A22A0415 (5/5/22)*

Appellant was convicted of aggravated sodomy, aggravated child molestation, and three counts of child molestation. Appellant contended that he was entitled to a new trial because the transcript was incomplete. The Court disagreed.

The record showed that the court reporter produced a 212-page transcript of appellant's trial, which included the testimony of nine witnesses. In the "Certificate of Reporter," the court reporter certified all pages of the transcript except for one, which contained the following statement: "As to page number 120 of the within proceedings, the undersigned is unable to certify the completeness of only that page as it relates to the testimony of State's witness Teresa Wright, and the matters set out in reporters hand-written notes quoted in italics on the foregoing page 120 for the reasons stated therein." Page 120 of the transcript contained the following "Reporter's Note": "Due to reporter error, the examination of witness Teresa Wright was unintentionally recorded over. The following uncertified notes are the reporter's hand-written notes of the testimony. . . ." The court reporter's notes indicated that Wright's testimony began at 2:45 p.m. and ended at 4:20 p.m. According to the court reporter's notes, defense counsel did not cross-examine Wright. During Wright's ninety-five-minute testimony, the jury took a twenty-minute break, and the approximately one-hour video of the forensic interview of the victim by Thomas was played.

At the motion for new trial hearing, the court reporter testified that she had apparently mistakenly recorded over Thomas's testimony. According to the court reporter, excluding the twenty-minute break and the one-hour video, Wright's testimony lasted approximately fifteen minutes. Appellant's trial counsel testified at the hearing that he had no specific recollection about Wright's testimony and that he had "no reason to dispute any of [the court reporter's] notes."

The prosecutor also testified, explaining that because appellant's trial was her first child molestation prosecution, she typed out her examination questions in complete sentences and asked them "virtually in the exact order that they . . . are typed out [in the notes]." According to the prosecutor's notes, which were admitted into evidence, Wright conducted the forensic interview of the victim. The prosecutor testified at that hearing that Wright was not "a substantial witness as far as information," and the "main purpose" of her testimony "was to provide information about the [child advocacy center] and how interviews were done and, specifically, how this interview was done and to be able to tender in both the forensic interview and the diagrams at that time." The prosecutor also recalled asking Wright "some general questions about delayed disclosure issues"; she did not ask Wright "anything about specifically what happened in the [forensic] interview [of the victim]." Following the hearing, the trial court denied the motion for new trial, finding that based on the evidence and testimony produced at the hearing, "the trial transcript in this case is correct and complete."

The Court stated that a defendant who is tried and convicted has a right to appeal and a right to a transcript of the trial to use in bringing that appeal, and an appellant who is deprived of an adequate trial transcript has effectively been denied his right to appeal. Although the State has a duty to file a correct and complete transcript if requested by the defendant, failure to fulfill that duty does not automatically entitle the defendant to a new trial. Instead, OCGA § 5-6-41 (f) and (g) allow any party who contends that the record does not truly or fully disclose what transpired in the trial court to have the record completed either by stipulation of the parties or, if the parties cannot agree, by the decision of the trial court.

In this regard, the Court noted, Subsections (f) and (g) of OCGA § 5-6-41, construed together, provide for the reconstruction of a missing transcript of the proceedings regardless of whether the parties agree as to the contents. And while the correctness of such transcript, as determined by the trial judge, is final and not subject to review, OCGA § 5-6-41 (g), whether the transcript is complete pursuant to OCGA § 5-6-41 (f) is reviewable on appeal.

Where all or an important portion of the original verbatim transcript of a trial is lost and the transcript reconstructed pursuant to OCGA § 5-6-41 (f) and (g) is manifestly inadequate, an appellant is not required to specify how he has been harmed by a particular error that may have occurred at trial but is now buried in unrecorded history. But where, as here, an otherwise verbatim transcript is missing only one or a few parts of the trial, the appellant is not entitled to a new trial unless he alleges that he has been harmed by some specified error involving the omitted part and shows that the omission prevents proper appellate review of that error.

And here, the Court found, appellant failed to produce any evidence in support of his argument that the recreated record was incomplete, nor did he raise any specific objection with the reconstructed testimony. Furthermore, he did not allege that he was harmed by any error involving Wright's testimony. Accordingly, the Court concluded, the trial court did not err by denying appellant's motion for new trial.

## **Search & Seizure; Police Officer Jurisdiction**

*State v. Middleton, A22A0422 (5/6/22)*

A municipal police officer stopped a vehicle on the interstate when she observed the vehicle fail to maintain its lane. A subsequent search of the vehicle led to charges against Middleton, the driver of the vehicle, for VGCSA. Middleton filed a motion to suppress alleging that because his vehicle was stopped by the officer outside of the municipality, the stop was

illegal. At the hearing, the State stipulated that the traffic violation and subsequent stop occurred in an unincorporated part of the county, and thus, outside the city limits. The trial court granted the motion and the State appealed.

The State contended that the trial court erred in concluding that because the officer initiated the traffic stop of Middleton's vehicle outside the city limits, she had no jurisdiction and, thus, was not engaged in the lawful discharge of her official duties at the time of the search and subsequent arrest. The Court agreed.

OCGA § 40-13-30 provides that “[o]fficers of the Georgia State Patrol and any other officer of this state or of any county or municipality thereof having authority to arrest for a criminal offense of the grade of misdemeanor shall have authority to prefer charges and bring offenders to trial under this article, provided that *officers of an incorporated municipality shall have no power to make arrests beyond the corporate limits of such municipality unless such jurisdiction is given by local or other law.*” (Emphasis added). And here, the officer testified that she was deputized by the county sheriff's office several years prior to the subject traffic stop. And importantly, county police—including the county sheriff—have general police power to investigate and make arrests. Furthermore, a deputy sheriff is an agent of the sheriff and in effecting the proper discharge of his duties is empowered with the same duties and powers.

In so holding, the Court noted that the trial court acknowledged that the officer had been deputized but noted that it was not persuaded of the officer's deputization because State failed to introduce evidence as to the scope and/or content of said deputization. But, the Court found, the trial court's statement was belied by the record, as the officer explicitly testified—and without contradiction—that, having been deputized, she was authorized to make arrests within the county. As a result, the Court concluded, the court's finding that the State “failed to introduce evidence” as to the scope of deputization was clearly erroneous.

Nevertheless, Middleton argued, the traffic stop was unlawful because the officer was not working with the sheriff's office at the particular moment of his stop and arrest. However, the Court stated, all law enforcement officers have the general duty to enforce the law and maintain the peace, and they carry this duty twenty-four hours a day, on and off duty. So, given these circumstances, the officer was authorized to initiate a traffic stop when she observed Middleton's vehicle failing to maintain its lane of travel. Accordingly, the Court held that the trial court erred in granting Middleton's motion to suppress evidence obtained as a result of the traffic stop, and therefore, it reversed that ruling.