

THIS WEEK:

- Courtroom Safety; Handcuffing
- Identifications; Photo Arrays
- Search & Seizure; Determination of Witness Credibility
- Prolonged Traffic Stops; Detection of Smell of Marijuana
- Rule 413; Rule 609

Courtroom Safety; Handcuffing

Nicholas v. State, A22A0667 (5/11/22)

Appellant was convicted of aggravated assault and other offenses. Briefly stated, the record showed that on the third day of trial, appellant told a deputy "If I act out in court, just shoot me in the head." The deputy reported the comment which prompted a bench conference. The court noted that in determining how to address the comment, it was considering the charges against appellant — which included aggravated assault against an officer — as well as "some of the upset that occurred . . . with counsel" at a previous proceeding, and [appellant]'s "agitation" during the presentation of evidence the day before. The trial court decided to have appellant handcuffed during the trial and took steps to make sure that the jury would not be able to see that appellant was handcuffed.

Appellant contended that the trial court erred by requiring him to be handcuffed during a portion of the trial. The Court stated that it is well established that no person should be tried while shackled except as a last resort. Yet, it is not necessarily an error of constitutional dimensions for an accused to appear in court wearing restraining devices. When, in the discretion of the trial judge, the use of restraining devices is necessary for preventing disruptive or dangerous behavior by the accused or for securing the safety of those in the courtroom, or of the general public, the decision to implement such measures is within the court's discretion.

And here, the Court found, the trial court made case-specific findings supporting its decision to handcuff appellant. In doing so, it considered appellant's comment in light of the charges against him and his previous behavior in the courtroom and concluded that the comment caused "sufficient concern for the safety of everyone in the courtroom." Moreover, the trial court also made efforts to balance its need for security measures with appellant's constitutional rights by considering less visible measures, and even granted defense counsel's request to remove appellant's belly chain to make the restraints less conspicuous.

Nevertheless, appellant argued, the handcuffs impeded his right to participate in the trial by restricting his ability to write notes or point at documents. The Court noted, however, that there was no evidence of this in the record, and appellant never raised that objection at trial. A party cannot during the trial ignore what he thinks to be an injustice, take his chance

on a favorable verdict, and complain later. Thus, under these circumstances, the trial court did not abuse its discretion in handcuffing appellant.

Finally, the Court stated, even if an unconstitutional shackling occurred, any error in the trial court's decision was harmless beyond a reasonable doubt. The evidence of appellant's guilt was overwhelming. Further, there was no evidence that the jury ever saw appellant's handcuffs, or even knew that he was restrained. Therefore, the Court concluded, given the overwhelming evidence and the jury's lack of knowledge concerning appellant's handcuffs, his shackling did not contribute to the verdict.

Identifications; Photo Arrays

State v. Wooten, A22A0562 (5/17/22)

Wooten was convicted of aggravated assault, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. The incident that led to the charges occurred on Oct. 28, 2020. An investigator did not interview the victim until Jan. 19, 2021. The victim speaks English as second language. The victim communicated with the investigator without the assistance of an interpreter and described the assailant. Based on this description, the investigator created a photo line-up. The victim picked Wooten out of the array as his assailant.

Wooten moved to suppress the photo line-up as impermissibly suggestive which resulted in a substantial likelihood of misidentification. After a hearing, the trial court agreed and suppressed the evidence. The State appealed.

The State argued that the trial court erred in finding that the lineup was impermissibly suggestive and that there was a substantial likelihood of irreparable misidentification. The Court noted that the State bears the burden of showing the out-of-court identification was not impermissibly suggestive. To meet its burden here, the State proffered the testimony of both the investigator and the victim, each of whom confirmed that there was no hint or suggestion that prompted the victim to identify Wooten. In concluding that the photo array was impermissibly suggestive, the Court noted that the trial court focused on the absence of any video recording of the interview and identification, as well as the fact that the interpreter was not present when the investigator showed the victim the photos.

But, the Court stated, neither of these factors are relevant to the determination of whether the identification was impermissibly suggestive. First, although the victim testified at the hearing through an interpreter, he confirmed that he can speak and understand English. Additionally, he did not require the assistance of an interpreter at the interview, and a review of the audio recording confirms that the victim was able to clearly communicate with the investigator in English and did not rely on the interpreter. Moreover, the interpreter testified that there was no language barrier, and that the victim did not need any assistance to communicate with the investigator. Furthermore, the Court found, the trial court made no finding that these witnesses lacked credibility, and in any case, their testimony was supported by the audio recording of the interview, in which the victim can be heard clearly answering the investigator's questions, detailing the attack, and describing the suspect.

Second, the Court stated that it is pure speculation that something improper occurred during the interview simply because there is no video record showing otherwise. This was especially true here where the investigator and the victim both

confirmed that no suggestion was made, and the trial court did not reject this testimony. And where it is clear from the recording that there was no improper suggestion, the Court stated, it is not bound by the trial court's factual finding to the contrary.

Third, the fact that the copy of the photo array admitted at the hearing was of poor quality did not equate to an impermissibly suggestive identification, especially given the testimony and other evidence in the record. The officer testified that the array shown to the victim was of better quality, and the victim confirmed that he was able to identify the suspect in the photos from his memory. But even if there were some differences in the photos, that would not require a finding that the lineup was impermissibly suggestive.

Accordingly, the Court reversed the trial court's order excluding the out-of-court identification. And because it concluded that the lineup was not impermissibly suggestive, the Court stated that it did need to address whether there was a substantial likelihood of misidentification.

Search & Seizure; Determination of Witness Credibility

State v. Johnson, A22A0522 (5/25/22)

Johnson was indicted for possession of marijuana with intent to distribute, possession of a firearm during the commission of a felony and other offenses. The evidence showed that an officer on patrol saw Johnson stop the car he was driving a few feet past the stop line at a red traffic signal. When the light turned green, Johnson drove to the next red light where the officer again saw him stop his car a few feet past the stop line. The officer then pulled Johnson over for failing to stop the car at the stop lines of two consecutive traffic lights. When the officer approached the car, Johnson rolled down the driver's side window. The officer testified that upon approaching the open car window, he smelled the odor of green marijuana. A subsequent search of the vehicle revealed the contraband and a gun.

Johnson filed a motion to suppress. After an evidentiary hearing, the trial court granted the motion, finding that the traffic stop was unlawful because the arresting officer did not have articulable suspicion to make the stop and that even if the stop was lawful, the officer did not have probable cause to search the vehicle based on the odor of marijuana alone. The State appealed.

The State argued that the trial court erred in granting the motion to suppress based on its finding that the traffic stop was unlawful. The Court agreed. Here, the officer observed Johnson fail to stop his car at the stop lines of two red traffic lights. OCGA § 40-6-20 (a) requires drivers to obey the instructions of traffic-control devices. The code section provides that “[t]he driver of any vehicle shall obey the instructions of an official traffic-control device” and that “[a] violation of this subsection shall be a misdemeanor[.]” OCGA § 40-6-20 (a). In the next code section, OCGA § 40-6-21 (a) (3) defines the meaning of traffic signals and instructs that a driver facing a red light “shall stop at a clearly marked stop line.” Thus, the Court found, because the officer observed Johnson fail to stop at the marked stop lines of two red traffic lights, the officer was clearly authorized to stop the vehicle and investigate these apparent violations of the traffic laws requiring drivers to obey traffic signal instructions. Accordingly, the Court concluded, the traffic stop was lawful, and the trial court erred in granting the motion to suppress on this ground.

Next, the State contended that the trial court also erred in granting the motion to suppress based on its alternative finding that even if the stop was lawful, the officer did not have probable cause to search the vehicle. The Court stated that a police officer has probable cause to search when that officer, through training or experience, detects the smell of marijuana. Here, the officer testified at the suppression hearing that he knows what marijuana smells like from his experience in seizing it on multiple occasions and from a certification course, that he detected the strong odor of marijuana when he approached the open window of Johnson's car, and that he searched the car based on that odor of marijuana. Thus, the Court stated, the trial court could have found, based on the testimony presented at the suppression hearing, that the officer had the training and experience to recognize the smell of marijuana and that, during the stop, the officer detected just such an odor emanating from the vehicle, which provided probable cause, authorizing the search. Alternatively, the trial court was not required to accept the officer's testimony on these issues, even though it was not contradicted.

The Court noted that generally, its obligation to view the evidentiary record in the light most favorable to the findings and judgment of the trial court requires it to assume that the trial court rejected the credibility of the officer to the extent that the officer's testimony was inconsistent with the court's decision. But here, the trial court made no findings as to the officer's testimony about his training or experience or detection of the odor of marijuana, and instead premised its decision on the legally erroneous finding that the odor of marijuana alone could not provide probable cause for the search. Therefore, the Court vacated the portion of the trial court's order finding insufficient probable cause for a search and remanded the case with direction that the trial court determine the credibility of the officer's testimony; make findings of fact as to his training, experience, and detection of the odor of marijuana; and then determine whether there was sufficient probable cause to authorize the warrantless search of the vehicle.

Prolonged Traffic Stops; Detection of Smell of Marijuana

State v. Mathews, A22A0460 (5/25/22)

Mathews was charged with possession of marijuana with intent to distribute and possession of a firearm during the commission of a felony. The evidence, briefly stated, showed that an officer stopped Mathews' vehicle for failure to maintain lane. The officer approached the vehicle, asked Mathews for his identification and registration, and told him why he had been stopped. Then, prompted by his belief that he had smelled the odor of unburnt marijuana, the officer asked another officer with a drug dog to come to the scene, and when the drug dog arrived, it alerted to the presence of marijuana. Law enforcement officers then searched Mathews' vehicle without his consent, finding marijuana and handgun.

Mathews moved to suppress the evidence, arguing that the officer unlawfully prolonged the stop. The trial court agreed. The State was not authorized to convert the traffic stop into a drug investigation, the trial court concluded, because it had not satisfied its burden of showing reasonable articulable suspicion. It had not satisfied that burden because the officer's "belief that he smelled the odor of unburnt marijuana [was] not supported by the evidence." That belief was unsupported because there was no convincing evidence that, before the date of the traffic stop, the officer had received training on detecting the odor of marijuana. The State appealed.

The State argued that the officer did not unlawfully prolong the traffic stop because the traffic stop was ongoing when the drug dog arrived at the scene and alerted to Mathews' vehicle. But, the Court noted, the trial court expressly found that the officer began the drug investigation as soon as he approached the vehicle and smelled what he believed to be marijuana,

and the officer admitted as much at the hearing. Consequently, the Court stated, it could not reverse on the basis that the trial court could have construed the evidence to find that the traffic stop was ongoing when the dog alerted to Mathews' car.

The State also contended that the officer had the reasonable articulable suspicion needed to conduct a broader drug investigation because he detected the odor of marijuana when he approached Mathews' vehicle. The Court agreed with the State's assertion that an officer's detection of the odor of marijuana may establish reasonable suspicion of illicit activity. But, the Court noted, an officer's testimony that he smelled marijuana will not support a reasonable suspicion unless the State establishes a foundation for the officer's ability to detect the odor of marijuana.

An officer's training and experience are a part of the totality of facts and circumstances known to the officer from which the officer may reasonably suspect criminal activity. In granting Mathews' motion to suppress, the trial court relied on a statement in *In the Interest of C. B.*, 353 Ga. App. 383, 385-386 (2019) that "the lack of evidence of the officer's training and experience is fatal" to a claim that the officer had reasonable articulable suspicion of illicit activity based on smelling marijuana. The Court determined that the trial court construed *In the Interest of C. B.* to hold, essentially, that the State must show the officer had both training and experience in detecting the odor of marijuana.

However, the Court stated, *In the Interest of C. B.* does not address a situation where there is evidence of training but not experience, or vice versa. Moreover, in *Caffee v. State*, 303 Ga. 557, 562 (2) (b) (2018), the Supreme Court held that "[m]any appellate courts, this one included, have concluded that a police officer has probable cause to search when that officer, through training or experience, detects the smell of marijuana." (Emphasis supplied.) Therefore, the Court declined to read *In the Interest of C. B.* to require evidence of both training and experience to establish the necessary foundation for an officer to testify that he or she detected the odor of marijuana; depending on the circumstances, one or the other may suffice.

Accordingly, the Court concluded that the trial court erred when she based her suppression ruling on the State's failure to show that the officer had been trained in detecting the odor of marijuana, without considering the officer's experience in detecting that odor. The officer testified that he had such experience, but the trial court made no express findings on that issue. Even though Mathews did not challenge the officer's testimony about his experience, the Court stated it could not consider that testimony in reviewing the order on appeal. And without express findings about the officer's experience in detecting the odor of marijuana, the Court stated, it lacked sufficient detail to permit meaningful appellate review of the trial court's conclusion that the officer lacked reasonable articulable suspicion to convert the traffic stop to a criminal investigation. Consequently, the Court vacated the trial court's order and remanded the case for further findings.

Rule 413; Rule 609

Johnson v. State, A22A0463 (5/25/22)

Appellant was convicted of rape and aggravated assault which occurred in February 2015. He argued that the trial court abused its discretion in admitting evidence of a previous sexual assault under OCGA § 24-4-413 because the State failed to prove that appellant committed the prior assault. The Court disagreed.

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

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At trial, S. H., the other acts victim, testified that, in 2002, she was forced into a car and raped. She was not able to remember many details about the event and did not identify appellant as the perpetrator, either at the time of the offense or at trial. The investigating detective also testified. During an interview with S. H., she told the detective that a man had forced her into a van at gunpoint and forced her to have sex with him. The police arrested appellant for this offense. The State charged appellant with rape, and appellant ultimately pled guilty to the lesser included offense of aggravated assault. Thus, the Court concluded, given this evidence — especially appellant's guilty plea — the jury could have concluded by a preponderance of the evidence that appellant committed the acts described by S. H. Accordingly, the Court held, the trial court did not abuse its discretion in admitting this evidence.

Appellant also contended that the trial court abused its discretion in admitting two other prior convictions as impeachment evidence under OCGA § 24-6-609 because the convictions were over ten years old. Specifically, he contended that the trial court failed to “make any specific findings on the record supporting its legal conclusion.”

The Court noted that appellant testified in his own defense and denied raping the victim. As impeachment evidence, the State sought to introduce two prior convictions: a 2004 conviction pursuant to an *Alford* plea for aggravated assault, as a lesser included offense of rape; and a 2007 conviction pursuant to an *Alford* plea for false imprisonment, simple battery, and hindering a person making an emergency telephone call. Over appellant's objection that the convictions were old and too remote in time to be relevant to appellant's credibility, the trial court found the convictions were admissible under OCGA § 24-6-609. The Court reasoned that because appellant had “decided to subject himself to cross-examination and to provide his own testimony,” he put himself in the same boat as a general witness, and, thus, can be impeached by a prior conviction.”

Under OCGA § 24-9-609 (b), evidence of a prior conviction used for impeachment purposes “shall not be admissible if a period of more than ten years has elapsed since the date of the conviction ... unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” The Court stated that in considering this issue under former OCGA § 24-9-84.1 (b), the virtually identical predecessor provision to OCGA § 24-6-609 (b) that was modeled after Federal Rule 609 (b), our Supreme Court listed a non-exhaustive set of factors that a trial court should consider in analyzing this issue: (1) the nature, i.e., impeachment value of the crime; (2) the time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime, so that admitting the prior conviction does not create an unacceptable risk that the jury will consider it as evidence that the defendant committed the crime for which he is on trial; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue.

Pursuant to the statutory provision, the trial court must make this determination supported by specific facts and circumstances and must make an on-the-record finding of the specific facts and circumstances upon which it relies in determining that the probative value of a prior conviction that is more than ten years old substantially outweighs its prejudicial effect before admitting evidence of the conviction for impeachment purposes.

And here, the trial court did not make express findings supported by specific facts and circumstances either at trial or in its order denying appellant's motion for new trial. Accordingly, the Court remanded the case to the trial court to enter express findings on the record as to whether, in the interest of justice, the probative value of appellant's prior felony

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convictions at issue substantially outweighed their prejudicial effect, based on the above factors and any other facts and circumstances the trial court may deem relevant.

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