

## THIS WEEK:

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### Ineffective Assistance of Counsel; Appropriate Remedies

*Scott v. State*, A22A0207 (6/13/22)

Appellant was convicted of two counts of armed robbery, three counts of aggravated assault, possession of a firearm during the commission of a felony, obstruction, and possession of a firearm by a convicted felon. The trial court sentenced him to an aggregate sentence of life plus five years to serve. Appellant moved for a new trial, contending that trial counsel rendered ineffective assistance by failing to advise him of the possibility of entering a non-negotiated plea when he expressed a desire to plead guilty after a witness identified him as the perpetrator at trial.

The trial court agreed that trial counsel rendered ineffective assistance. However, the court concluded, a new trial was not the proper remedy for this error. Instead, the court offered appellant the option of entering a non-negotiated guilty plea at that time "to be put in the same position" as if he had been informed of the option. On July 30, 2019, the trial court held that hearing. At the hearing, appellant again rejected the offer to take a non-negotiated plea in favor of filing an appeal.

The Court stated that a remedy for a violation of the Sixth Amendment should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. Thus, a properly tailored remedy will "neutralize the taint" of the constitutional violation without granting a windfall to a defendant or needlessly squandering the considerable resources the State properly invested in the criminal prosecution.

And here, the Court found, the trial court offered just such a remedy. Appellant contended that he would have sought a non-negotiated plea in the middle of trial had trial counsel let appellant know that he could do that. Therefore, his injury was a lost chance to have received, possibly, a lesser sentence by pleading guilty then, rather than the sentence he received after the jury convicted him. That injury was properly addressed by the trial court's offer of a non-negotiated plea. By contrast, a new trial would have both given appellant a significant "windfall"—a second chance to be acquitted—and needlessly squandered the considerable resources the State properly invested in the criminal prosecution.

Consequently, unlike the offer to seek a non-negotiated guilty plea, a new trial was not a remedy tailored to appellant's constitutional injury.

Nevertheless, appellant argued that a new trial was the only remedy available to him because the trial court lacked jurisdiction to resentence him under OCGA § 17-10-1 (f). The Court disagreed. That statute gives a court the power to correct or reduce a sentence and to suspend or probate all or any part of it "[w]ithin one year of the date upon which the sentence is imposed, or within 120 days after receipt by the sentencing court of the remittitur upon affirmance of the judgment after direct appeal, whichever is later." Assuming OCGA § 17-10-1 (f) even applies here, the trial court was acting within its time limits when the court offered appellant the chance to seek a non-negotiated plea. Had appellant taken the court up on its offer, the court would have had discretion to give him the same sentence he received at trial, or a lesser sentence. Therefore, that remedy was available and, again, properly tailored to his injury. A new trial was not so tailored, and thus, the court properly rejected a new trial as a remedy.

#### **Search & Seizure; Ineffective Assistance of Counsel**

*Williams v. State*, A22A0457, A22A0458 (6/14/22)

Williams and Rawls were convicted of trafficking in cocaine. The evidence, very briefly stated, showed that around 3:00 a.m., an officer on patrol saw a vehicle cross the center turn lane with the driver's side tires. Rawls was driving and Williams was the passenger. Believing the driver might be impaired, the officer conducted a stop. The officer noticed the smell of an alcoholic beverage when he requested Rawls's license and registration. Rawls stated that Williams had a mixed drink in the vehicle. The officer also noticed a small open liquor bottle in the passenger door cup holder.

The officer noticed that the passenger side seat was wet, after he asked both appellants to get out of the vehicle. He then advised them that he was going to search the vehicle for additional open containers based on his experience of having hidden open containers used by the driver concealed by a passenger in a vehicle. As he searched the center console, the officer discovered a work glove, which he removed from the console and which contained a plastic bag with a white powdery substance, later determined to be cocaine, located inside the glove. The officer testified that the plastic bag with the white powder was visible and sticking out of the glove when he opened the console.

Both appellants raised issues of ineffective assistance of counsel. Rawls contended that his defense counsel rendered ineffective assistance by failing to file a motion to suppress. The Court agreed.

The Court noted that the officer testified that the basis of probable cause for the warrantless search of the vehicle was to look for additional open containers of alcohol based on Rawls's and Williams's admission that Williams was drinking from an open container while riding in the passenger seat. There

was no indication that the officer felt fear for his safety, smelled any drug-related odors, or had probable cause to support a search for any contraband other than open containers of alcohol. The officer testified that he opened the center console of the vehicle to check for additional open containers of alcohol and immediately saw a plastic bag containing a white substance sticking out of a glove in the console. However, the Court found, the officer's body camera footage of the search established that this testimony was false, and that instead, the officer had to remove the glove from the console and shift the position of the glove opening to look inside the glove before being able to see the bag of cocaine.

The Court stated that the scope of a warrantless search of an automobile is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. And here, the Court found, as established by the video of the search, when the officer opened the center console it was apparent that no open containers of alcohol were inside because it was stuffed full of random items. Therefore, there was no probable cause for the officer to pull the glove from the console and investigate therein because the glove would not have contained an open container of alcohol. Furthermore, the Court stated, it is not illegal to have unopened bottles of alcohol in a vehicle, so there would be no reason for an officer to rummage through a console in this way to look for alcohol that was being consumed by the driver. In fact, the officer testified that he did not smell alcohol on Rawls and allowed Rawls to leave the scene and drive the vehicle after Williams was detained for possession of the cocaine.

Consequently, the Court found that because Rawls established that the evidence would have been suppressed had a motion to suppress been filed and given that without the search no contraband would have been found for which to charge the instant crime, Rawls established he received ineffective assistance of counsel. Accordingly, the judgment of conviction against Rawls was reversed, and because Williams's conviction was tainted by the same search, her judgment of conviction was likewise reversed.

### **Search & Seizure; De Facto Arrests**

*Williams v. State*, A22A0255 (6/15/22)

Appellant was charged with several violations of the Street Gang Terrorism and Prevention Act, several counts of theft by receiving stolen property, several counts of possession of a firearm during the commission of a felony, and a single count of possession of marijuana with intent to distribute. The evidence, very briefly stated, showed that in January 2019, at approximately 1:34 a.m., an officer was patrolling on I-20 East when he received a stolen tag notification from his vehicle's automated license plate reader. The alert came as three vehicles, seemingly traveling closely together, passed the officer while traveling in the center lane. The three vehicles, in order from back to front, were a red Kia Forte, a black Dodge Journey, and blue Volkswagen Passat. As the officer approached the vehicles to determine which one displayed the stolen tag, all three slowed from 70 to 51 miles per hour and switched from the

middle lane into the far-right lane. That observation, in addition to the fact that all three vehicles displayed Alabama tags, led the officer to believe that they were traveling together in tandem. The officer attempted to stop the Dodge. The Dodge started to pull over and the other two vehicles continued on the interstate. The Dodge then accelerated to over 100 m/p/h and the officer gave chase. The Dodge crashed and three passengers fled. Assault rifles were found in the vehicle.

While in the process of setting up a perimeter to search for the fleeing passengers, a second officer observed a Volkswagen Passat with Alabama tags that matched the description of that which had been driving in tandem with the Dodge. The vehicle was driving slowly through a subdivision near the area of the Dodge's crash site, and the officer suspected that it may have been looking to aid the fleeing passengers. The Volkswagen was ultimately stopped by several officers. The occupants, including appellant, were ordered out of the vehicle at gunpoint and placed into handcuffs while the officers sought to identify them and investigate their possible connection to the occupants of the Dodge. Marijuana, firearms, and large amounts of cash were discovered inside the Volkswagen.

Appellant moved to suppress the physical evidence seized from the Volkswagen. He contended that the car was unlawfully stopped and searched, and that he was de facto arrested without lawful authority in violation of the Fourth Amendment. The court denied the motion but granted appellant a certificate of immediate review. The Court granted him an interlocutory appeal.

The Court stated that while probable cause is required for a warrantless arrest, a person may be lawfully seized for purposes of a brief investigation when only a reasonable and articulable suspicion exists. What is intended to be an investigatory detention can be transformed into a de facto arrest by the means of detention employed. However, a law enforcement officer who detains a person for purposes of investigation should not be denied the opportunity to protect himself from attack by a hostile suspect and may lawfully detain the person in a manner reasonably necessary to protect his personal safety and to maintain the status quo. In sufficiently dangerous circumstances, law enforcement officers may affect and maintain an investigatory detention by drawing weapons, forcing individuals to the ground, and/or handcuffing suspects without transforming the detention into a de facto arrest.

And here, the Court found, the same factors that justified the stop also supported a finding that the circumstances were sufficiently dangerous to justify the officers' removing appellant from the Volkswagen at gunpoint and handcuffing him as part of their investigatory detention. The officers collectively had a reasonable suspicion that appellant and the other Volkswagen occupants were associated with the individuals in the Dodge. Those individuals had led police on a high-speed chase and left violent assault weapons in their abandoned vehicle. The relative locations of the two vehicles suggested that the Volkswagen was likely seeking (and may have contained) one or more of the fleeing Dodge occupants. And it was reasonable to suspect that the vehicle may have also contained weapons.

Accordingly, the Court concluded, the officers' act of removing appellant at gun point and placing him in handcuffs, when considering the totality of the circumstances, was reasonable under the Fourth Amendment. Consequently, the order denying the motion to suppress was affirmed.

### **Implied Consent; Right to a Second Test**

*Henry v. State*, A20A0501 (6/15/22)

Henry was convicted of DUI (per se). He contended that he received ineffective assistance because his trial counsel failed to seek to suppress the results of his State-administered blood test on the basis that he was not provided the opportunity to independently test his blood. The Court of Appeals agreed. *Henry v. State*, 355 Ga. App. 217, 222 (2) (2020) ("*Henry I*"). Specifically, at the time of Henry's trial, the law provided that "[a]n accused's right to have an additional, independent chemical test or tests administered is invoked by some statement that *reasonably could* be construed, in light of the circumstances, to be an expression of a desire for such test." (Emphasis supplied.) *Ladow v. State*, 256 Ga. App. 726, 728 (2002). As the Court recited in *Henry I*, "after Henry was read the implied consent notice and asked to consent to a blood test for the second time, he asked the trooper, 'so you are saying I can take, my blood, my blood, my doctor can do my blood test and all that?' The trooper responded to Henry's question by stating, 'I need a yes or a no right now. I did not ask anything about your doctor. I said the State. Yes or no.'" 355 Ga. App. at 221 (2). Relying on *Ladow* and other cases following it, *Henry I* found this statement ambiguous and thus held that it "reasonably could" have been a request for independent chemical testing. See *id.* at 220-221 (2).

The Supreme Court granted certiorari. The Supreme Court rejected the "reasonably could" standard set forth by the Court of Appeals in *Ladow*, and overruled *Ladow* and its progeny holding that a suspect's right to an additional, independent test is invoked by a statement to a law enforcement officer that "reasonably could" - rather than "*reasonably would*" - be construed as an expression of a request for such a test. *State v. Henry*, 312 Ga. 632, 640 (3) (d) (2021) ("*Henry II*") (emphasis supplied). The Court then remanded the case to the Court of Appeals to apply the "reasonably would" standard the facts of this case.

On remand, the Court found that Henry's statement, though able to satisfy the previous "reasonably could" standard for the reasons outlined in *Henry I*, was too ambiguous to meet the more exacting "reasonably would" standard announced in *Henry II*. The Court found that it was unclear whether Henry was requesting that his doctor perform the State's test (which the law does not permit) or requesting that his doctor perform independent testing after the State-administered test (which the law does permit) or was simply confused about the testing protocol and seeking clarification. In other words, the Court determined that a reasonable officer would not reasonably construe Henry's ambiguous statement to be a request for independent testing of his blood, so the trooper's failure to secure additional testing was justified. Accordingly, the Court concluded, Henry's trial counsel was not

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ineffective for failing to file a motion to suppress which, judged under the correct “reasonably would” standard, would have been meritless.