Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING September 23, 2022
Issue 38-22

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Probation Revocations; Present Sense Impressions
Grimes v. State, A22A0076 (6/28/22)

In 2019, appellant pled guilty to aggravated assault, second-degree arson, and second-degree criminal damage to property, and the trial court imposed a total sentence of one year in prison, to be followed by 11 years on probation. As relevant here, the conditions of his probation prohibited appellant from: (i) violating any criminal laws; and (ii) engaging in violent contact with victims Mitchell and her brother.

In February 2020, the State petitioned to revoke appellant's probation on grounds that he committed the offenses of aggravated assault and terroristic threats when he appeared at the house of the two named victims and threatened to kill and/or hurt them. During the ensuing probation revocation hearing, the victims did not appear and did not testify. Rather, the State tendered a recording of the 911 call made by Mitchell who stated that her "boyfriend," who she did not identify, was at her home and was threatening to kill everyone in the house. The victim mentioned that there were several children in the home, and that the perpetrator was high or drunk and acting "crazy." The police officer who responded to the call testified that she was dispatched to Mitchell's home following a 911 call and arrived approximately eight minutes later. Over appellant's objections on due process grounds, the officer further testified that when she arrived at the victim's home, the victim told her that appellant "beat on the garage," entered her home, brandished a steak knife, and threatened to kill her and her brother. Appellant was not at the house when the officer arrived.

The trial court revoked appellant's probation and sentenced him to an additional two years of incarceration. Appellant sought discretionary review and the Court granted his petition.

The Court noted that in a probation revocation hearing, the right to confront adverse witnesses arises not under the Confrontation Clause, but rather as a matter of due process, which is less stringent than the confrontation guarantee in a criminal trial. The minimum requirements of due process include the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good

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cause for not allowing the confrontation). To that end, some specific objection or invocation of the due process right of confrontation is necessary to trigger consideration of the secondary issue of whether there was good cause for not allowing the confrontation, which usually requires examination of both the reasons for the State's failure to produce the declarant and the reliability of the hearsay evidence. The burden of proving that hearsay evidence bears sufficient indicia of reliability to withstand due process scrutiny lies with the State.

The State contended that the hearsay was reliable because the responding officer's testimony fell within the present sense impression exception to the general rule excluding hearsay. The Court disagreed. A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter." OCGA § 24-8-803 (1). The underlying theory of the present sense impression exception is that the substantial contemporaneity of the event and the statement negate the likelihood of deliberate or conscious misrepresentation. The idea of immediacy lies at the heart of the exception, and thus, the time requirement underlying the exception is strict because it is the factor that assures trustworthiness.

But here, the Court found, although the victim's statement to the 911 operator was made while the victim "was perceiving the event or condition or immediately thereafter," her later statement given to the responding officer was not sufficiently contemporaneous with the event to come within the present sense impression exception to the hearsay rule. And because 1) appellant specifically invoked his due process right of confrontation, and 2) the trial court failed to examine the reasons for the State's failure to produce the victims and to ensure the reliability of the hearsay evidence, the responding officer's testimony was erroneously admitted. Thus, the competent evidence — which consisted solely of the admitted portion of the 911 call — failed to identify appellant as the perpetrator, and therefore, was insufficient to establish by a preponderance of the evidence that appellant violated a condition of his probation. Consequently, the Court stated that it was “constrained to reverse.”

Probation Revocations; Best Evidence Rule
Glasper v. State, A22A0505 (6/29/22)

In 2021, appellant pled guilty to four counts of entering an automobile with intent to commit theft for which the trial court sentenced him to a term of 5 years with the first 18 months to be served in confinement. As a general condition of his probation, he was forbidden from violating the criminal laws of any governmental unit. Thereafter, the State sought to revoke his probation for stealing a truck from the parking lot of a Kroger supermarket. The officer testified that he was given access to view the store's video of the parking lot and that the video footage showed appellant approaching the victim's truck, walking around it, entering the driver's door, and driving away from the scene. The officer further stated that he recognized appellant in the video based upon their prior encounter that day at the store, and that appellant was wearing the same clothing.

Appellant objected to the officer's testimony based upon the best evidence rule, and the trial court asked for a response from the State. The officer stated that he viewed the security video at the store and obtained a copy of the video on a disk, which he delivered to the police department as evidence. However, the officer acknowledged that he did not bring the disk to court and that he had not reviewed it since the recording had been made. Appellant renewed his objection based upon the best evidence rule, but the trial court overruled his objection. Following the hearing, the court granted the State's petition and revoked 3 years of appellant's probation. The Court granted appellant's application for discretionary appeal.

Appellant contended that the trial court erred in overruling his best evidence objection to the officer's testimony and, consequently, in revoking his probation. The Court agreed.

The Court noted that as a general matter, "[t]o prove the contents of a . . . recording, . . . the original . . . recording . . . shall be required." OCGA § 24-10-1002. But here, the Court found, that did not occur. The officer testified that he obtained a copy of the security video recording and entered it into evidence, but neither he nor the State brought the recording to the probation revocation hearing. In addition, neither offered an excuse for failing to do so. There was no indication that the video was lost, destroyed, or otherwise unavailable or inaccessible, and the State did not claim that any of the exceptions in OCGA § 24-10-1004 applied. Certainly, the video was closely related to the issue of appellant's probation revocation, as it formed the primary evidence used against him during the revocation hearing. Nevertheless, over appellant's objection, the trial court allowed the State to present the officer's testimony as to the contents of the security video without introducing the video itself into evidence.

Furthermore, the Court found, the record showed that neither the officer nor the State's representatives undertook any effort whatsoever to retrieve the video recording, which the officer testified had been taken into evidence, or to account for its absence. Consequently, the officer's testimony concerning the content of the security video violated the best evidence rule and the trial court abused its discretion in admitting the testimony.

And, the Court concluded, the trial court erred in revoking appellant's probation. Here, absent the officer's testimony concerning his review of the security video recording, the only evidence admitted against appellant was that the officer saw appellant at Kroger earlier in the day and that he was found walking in the vicinity of the crash site wearing the same clothes he had been wearing earlier. The evidence therefore fell well short of even the State's lessened burden of proof in a probation revocation.

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Venue; Search & Seizure
Oliver v. State, A22A0254 (6/29/22)

Appellant was convicted of aggravated stalking, attempt to commit a felony (aggravated stalking), and making a false statement. Briefly stated, the relevant evidence showed appellant had a long history of harassment against the victim spanning from California to Georgia and beginning in or around 2004. In February 2019, the victim, the daughter of appellant and the victim, and the victim's boyfriend, were driving in South Carolina when the victim receive a text from her daughter's best friend that she needed to talk to her. When they arrived at their destination in South Carolina, the victim called her daughter's best friend. The best friend told the victim that appellant had apparently followed her and her mother to a restaurant in Chatham County. Appellant stared at them while the ate their lunch and as they were leaving, approached them, and inquired about the victim and her daughter's whereabouts.

Appellant contended that the State failed to prove venue in Chatham County for his aggravated stalking conviction because the mother was in South Carolina when she talked on the telephone with her daughter's friend about what he had said at the restaurant. The Court agreed.

The Court found that although the aggravated stalking statute, OCGA § 16-5-91, does not contain a specific venue provision, OCGA § 16-5-90, which defines stalking, contains the following provision: "For the purpose of this article, . . . the term 'contact' shall mean any communication including without being limited to communication in person, by telephone, . . . or by any other electronic device . . . and the place or places that contact by telephone, mail, broadcast, computer, computer network, or any other electronic device is deemed to occur shall be the place or places where such communication is received."

The Court stated that the key verb in OCGA § 16-5-91 (a) relevant to this case is "contacts," which is further defined in OCGA § 16-5-90 (a) (1) as "any communication." And this communication must be with "another person . . . without the consent of the other person for the purpose of harassing and intimidating the other person." OCGA § 16-5-90 (a) (1). Since the "person" alleged in the indictment was the mother, the crime was not complete until she received appellant's message by telephone in South Carolina from the third party. As the evidence showed that the mother learned about and received appellant's communication by telephone while she was in South Carolina, the State presented insufficient evidence of venue in Chatham County. Therefore, the Court held, it must reverse appellant's conviction.

Next, appellant contended that his trial counsel rendered ineffective assistance for failing to file a motion to suppress. Specifically, he contended that the motion would have been granted because the search warrant for his electronic devices was invalid because it did not authorize the evidence to be forensically examined by the United States Secret Service. The Court disagreed. The Court found that the

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warrant expressly authorized a search of the contents of his electronic devices, and the fact that the warrant was addressed to "All Peace Officers of the State of Georgia" did not preclude forensic examination by a person who is not a Georgia peace officer. Thus, appellant's trial counsel did not render ineffective assistance for failing to file a meritless motion to suppress.

Pleas in Bar; Procedural Double Jeopardy
Schrader v. State, A22A0067 (6/30/22)

In 2019, appellant was indicted on three counts of computer trespass. Her trial in February 2020 ended in a mistrial after the jury was unable to reach a verdict. On November 6, 2020, she was re-indictment for six offenses: (Count 1) Computer Trespass; (Count 2) Computer Password Disclosure; (Count 3) Computer Theft; (Counts 4 and 5) two counts of Tampering with Evidence; and (Count 6) Violation of Oath of Office by a Public Officer. On December 4, 2020, appellant was arraigned on that indictment and entered a plea of not guilty. The following month, the State moved to nolle pross the 2019 indictment; the trial court granted that motion, entering an order on January 29, 2021. On February 5, 2021, appellant filed a plea in bar contending that Counts 2 through 6 (that is, all but the "Computer Trespass" count) were barred under double jeopardy principles pursuant to OCGA §§ 16-1-7 (b) and 16-1-8. Following a hearing, the trial court denied her plea, finding that it was untimely.

Appellant contended that the trial court erred in denying her plea in bar. The Court noted that the prohibition against double jeopardy has two aspects. One aspect prohibits certain successive prosecutions; it is referred to as the procedural bar against double jeopardy. The other aspect prohibits successive punishments for the same offense; it is referred to as the substantive bar against double jeopardy. Appellant's plea in bar was based on the procedural aspect of double jeopardy.

Appellant argued that OCGA § 17-7-110 did not render her plea in bar untimely. Specifically, she contended that the double jeopardy issue did not become ripe until January 29, 2021 (when the nolle pross order was entered, thereby ending the first prosecution). Thus, she contended, her plea in bar — filed within ten days of when the nolle pross order was entered — was timely, asserting further that "a Plea in Bar must be filed before trial." However, the Court found, under the Supreme Court's decision in *Davis v. State*, 307 Ga. 784, 786-787 (2020), a plea in bar is a challenge to the validity of an indictment and therefore, her plea was untimely.

Nevertheless, citing *State v. Evans*, 192 Ga. App. 216, 217-221 (I) (1989), disapproved in part on other grounds, *Gary v. State*, 262 Ga. 573 (1992), and *McClure v. State*, 179 Ga. App. 245 (1986), appellant argued that a plea in bar must only be filed before trial to be timely. The Court disagreed. The Court found that appellant's reliance on those cases was misplaced since they were both decided prior to the codification of OCGA § 17-7-110 in 2003.

Finally, appellant contended that *Nicely v. State*, 305 Ga. App. 387 (2010), supports her proposition that a plea in bar premised on procedural double jeopardy is not waived for failing to comply with the time requirement of OCGA § 17-7-110. The Court again disagreed. The Court noted that the statute was not raised as an issue in *Nicely* and thus, was not a precedent. Therefore, because the plain language of the new statute gave appellant ten days following her arraignment in which to file her plea in bar contesting Counts 2 through 6, her claim that *Nicely* abrogated that statutory time requirement was unavailing.

Due Process; Failure to Preserve Evidence
State v. Nixon, A22A0406 (6/30/22)

Nixon was indicted on two counts of aggravated assault. Very briefly stated, the evidence showed that the two victims, Hunter and Edwards, are the adult sons of Nixon's girlfriend, Walker. Nixon and Walker had been living with Hunter and Edwards' uncle, and the stabbing allegedly occurred at the uncle's home. The uncle's residence had a Ring doorbell system with a camera which recorded some of the men's interactions outside the house. Wright, along with another investigator, Black, watched the Ring video, with the uncle's permission, on the uncle's cellphone. The video was not continuous, as it was motion-activated.

The video was emailed on September 1, 2019. That same day, Black began uploading evidence to the sheriff's department's operating system, which is used for all reports and evidence. Black indicated in his report that he intended to download the Ring video and enter it into evidence. He downloaded photographs and other evidence from discs, thinking "that the Ring video was on there[,]" but, in fact, did not download the Ring video. Black testified this was a "[l]ack of experience and just being new to investigations and just making [a] human error mistake."

Appellant moved to dismiss the charges following the loss of the video from the Ring doorbell system, which he contended would have provided exculpatory evidence supporting his assertion that he was acting in self-defense. After a hearing, the trial court granted his motion. The trial court found the evidence had "apparent exculpatory value that cannot be obtained by other reasonably available means[.]" The State appealed.

The State first argued that the trial court erred in granting the motion to dismiss because it improperly found the Ring video to be constitutionally material, in that it had exculpatory value apparent to investigators before it was lost. The Court stated that in evaluating whether a defendant's constitutional right to due process was violated when the State fails to preserve evidence that could be exculpatory, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence. To meet the standard of constitutional materiality, the evidence must possess an exculpatory value that was apparent before it was destroyed and be of such a nature

that the defendant would be unable to obtain comparable evidence by other reasonably available means.

The Court found that while they recalled that the video showed the men verbally arguing, it showed no physical contact between them and recorded no threats made by any of the men. Black testified that the video did not impact his investigation, but merely corroborated what Edwards had told him about the argument, the driving of the car, and the men going into the house. Black's interpretation of the video "*at the time* did not make or break the case." (Emphasis supplied.)

Nevertheless, Nixon argued, because the police took out warrants charging Hunter and Edwards with battery "after viewing the Ring video, [this] show[ed] the video was apparently exculpatory at the time the warrants were taken." However, the Court noted, Nixon pointed to no testimony from either investigator indicating that what they observed on the video influenced the decision to charge Hunter and Edwards. Rather, Black testified that Hunter and Edwards were charged "due to the injuries on [Nixon's] face[,]" — injuries which Wright testified that she observed first-hand, when she went to the residence and found him sitting outside the house on a power box. The investigative report says that warrants were taken out for Hunter and Edwards "due to the injuries …. Nixon received prior to the stabbing taking place[,]" but does not attribute this conclusion to the Ring video. Thus, the Court concluded, Nixon failed to show that the Ring video contained any apparently exculpatory value prior to its loss or destruction.

Furthermore, the Court found, the video had some possible inculpatory value, given Wright's recollection that the video depicted Hunter holding his side and Edwards saying, "He stabbed my brother, Bro. He stabbed my brother[,]" and Wright's stated belief that the video showed "probable cause" that Nixon had stabbed Hunter and Edwards. Given that the testimony indicated only that the video showed the men arguing, and showed no threats or physical contact, there was no apparent reason for the police to think that the video would tend to exonerate rather that further inculpate Nixon. Therefore, under the circumstances, any contention that the video would have, as opposed to theoretically could have, supported Nixon's defense, was pure speculation. Consequently, the Court held, the video was not constitutionally material.

Finally, the State argued, the trial court erred in granting the motion to dismiss because it failed to determine whether law enforcement acted in bad faith in failing to preserve the Ring video. The Court agreed. Even if the video was constitutionally material, the failure to preserve this potentially useful evidence does not violate due process unless a criminal defendant can show bad faith on the part of the police. Bad faith is reserved for those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. In other words, the police must show, by their conduct, some intent to wrongfully withhold constitutionally material evidence from the defendant. And here, the Court noted, while the trial court indeed did not decide whether the police

acted in bad faith, it explicitly found that even though the evidence clearly showed that the State and the police were extremely negligent in the handling of the video evidence, the video was not intentionally destroyed. And, the Court found, consistent with the trial court's factual finding, the record showed no evidence of bad faith. Accordingly, the Court reversed the dismissal of the indictment against Nixon.