

## THIS WEEK:

- **DNA Evidence; Right of Confrontation**
- **Rule of Lenity; Void Sentences**
- **DUI; Plain Error**
- **Statute of Limitations; Residual Hearsay**

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### DNA Evidence; Right of Confrontation

*Moss v. State, A22A0787 (10/20/22)*

Based on an incident that took place in 1998, appellant was convicted of rape, aggravated sexual battery, and false imprisonment. Briefly stated, the evidence showed that after the sexual assault, the 16-year-old victim was taken by police to the hospital where a rape kit was created. The rape kit was not submitted to the GBI for testing because the GBI's policy at the time was to not test rape kits without a known suspect. Almost 20 years later, in October 2017, the rape kit collected from the victim was analyzed by Sorenson Forensics ("Sorenson"), an independent forensic lab located in Salt Lake City, Utah that had contracted with the GBI. Two items from the kit were analyzed: vaginal swabs and gauze. Male DNA was identified in both items, and a male DNA profile was detected and returned to the GBI. The DNA profile was reviewed by a GBI scientist and forwarded to a database administrator to be entered into the GBI database and searched against other profiles in a national database. A match came back in February 2018, identifying appellant as a match for the DNA from the rape kit. Additional buccal swabs were taken from appellant, which also matched the DNA from the rape kit. The case was reactivated, appellant was arrested and subsequently indicted for rape, aggravated sexual battery, and false imprisonment.

Appellant argued that the trial court erred in overruling his objection to former Sorenson employee Cutler's testimony about the results of the DNA testing performed at the Sorenson lab. Specifically, he raised a claim under *Bullcoming v. New Mexico*, 564 U. S. 647 (131 SCt 2705, 180 LE2d 610) (2011), that Cutler's testimony was "surrogate testimony" in violation of his Sixth Amendment right to confront the witness who performed the test. The Court disagreed.

The Court noted that at trial, Cutler identified himself to the jury as a former forensic DNA analyst and supervisor employed at Sorenson from 2012 to 2019. Cutler testified about his qualifications and the general testing procedures at Sorenson. He also testified specifically to the procedure used on State's Exhibit 1, the evidence collected from the victim's rape kit and sent to Sorenson by the GBI. Several individuals who did not testify at trial were identified as the people who conducted the actual steps to extract, purify, quantify, and amplify the DNA before an analyst interpreted the data. The testing procedures detected male DNA present in both items that were tested. A reporting analyst, Seat, interpreted the data and identified a major male DNA profile present. Cutler was Seat's direct supervisor, and operated as the second analyst of the data, who "peer reviewed" Seat's data interpretation. Following Cutler's peer review, the evidence and the report with the DNA profile were sent back to the GBI.

First, the Court found that although appellant made a *Bullcoming* objection after his voir dire of the witness, the trial court made no ruling on the substance of the objection, stating that it was premature because Cutler had testified only to his

qualifications at that point. When Cutler actually testified about Seat's report, Moss made no objection. Therefore, the objection was not properly preserved for review and was subject only to a plain error analysis.

Under *Bullcoming*, when confronted with the results of a laboratory test used as evidence against the accused, the accused's Sixth Amendment right to confrontation includes the right to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist. The Court noted that the Georgia Supreme Court has since clarified that someone with a significant personal connection to the test could testify in lieu of the scientist who actually conducted it.

The Court found that under the circumstances, Cutler was the analyst directly supervising the primary analyst interpreting the DNA data in appellant's case, and he peer-reviewed the data personally before it left his lab. Accordingly, it was not plain error for the trial court to allow him to testify that a major male DNA profile was identified after testing and the results were sent to the GBI for further review.

Next, appellant challenged the testimony from two GBI witnesses that the DNA extracted from the rape kit matched DNA taken from appellant. The Court noted that the first GBI witness whose testimony appellant challenged was Mundo, a forensic scientist. Mundo testified that the GBI received the DNA profile in this case from Sorenson and entered it into its database to be compared to all other DNA profiles in the database. When the GBI got a match, Mundo re-analyzed the data to ensure that it actually matched the DNA profile recovered from the rape kit. As another assurance of accuracy, Mundo requested law enforcement to take another DNA sample from the matching individual, appellant, to compare once again to the DNA from the rape kit. The second witness, Turpin, was the forensic biologist who compared the DNA sample taken from appellant to the DNA profile extracted from the rape kit by Sorenson. She testified that the DNA taken from appellant matched the DNA profile from the rape kit.

Appellant contended that because the report and underlying data from Sorenson were never entered into evidence, these witnesses' testimony, based on these reports, constituted inadmissible hearsay, and violated his Sixth Amendment right to confront witnesses. The Court again disagreed.

First, as to hearsay, where an expert witness bases his or her opinion on facts "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, such facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." OCGA § 24-7-703. Thus, the Court found, even though the lab report and data themselves were not in evidence, there was no hearsay violation in allowing the GBI scientists to testify to their opinion that the DNA from the rape kit was a match to appellant.

Second, as to the Confrontation Clause, appellant cited only *Williams v. Illinois*, 567 U. S. 50, 57-58 (132 SCt 2221, 183 LE2d 89) (2012), in which a plurality of the Supreme Court held that the admission of expert testimony relying on the results of a DNA test that was not admitted into evidence did not violate the Confrontation Clause. Appellant argued that *Williams* was distinguishable from his case because the evidence in *Williams* was admitted at a bench trial, and the Court was confident that the trial judge understood the limited reason for mentioning the DNA test results and would not consider it for any improper purpose. But, the Court found, although a similar factual scenario, an important distinction exists between the bench trial in *Williams* and appellant's jury trial. In appellant's trial, a witness from Sorenson testified about the DNA profile that was extracted from the victim's rape kit. Culter, a supervisor who peer-reviewed the report in appellant's case, testified about Sorenson's methods and how it came to the results that were eventually matched to appellant. Although appellant did not cross-examine Cutler, he had the opportunity to do so. Therefore, because a witness with personal knowledge of the report and data testified and was subject to cross-examination, the Confrontation Clause problem identified in *Williams* was not present in the appellant's case.

## Rule of Lenity; Void Sentences

*Waller v. State, A22A1145 (10/21/22)*

Appellant was convicted for sale of cocaine and because of his prior convictions, he was sentenced as a recidivist to life without parole. Appellant contended that OCGA § 16-13-30 is ambiguous because the statute offers two options for sentencing, ten to forty years, or life imprisonment, and therefore the trial court erred in not applying the rule of lenity. The Court disagreed.

The Court stated that the rule of lenity ensures that if an ambiguity exists in one or more statutes, such that the law exacts varying degrees of punishment for the same offense, the ambiguity will be resolved in favor of a defendant, who will then receive the lesser punishment. However, the rule does not apply when the statutory provisions are unambiguous. The Court noted that OCGA § 16-13-30 (d) states regarding possession of a controlled substance that “[u]pon conviction of a second or subsequent offense, he or she shall be imprisoned for not less than ten years nor more than [forty] years or life imprisonment.” However, the fact that a statute permits the trial court to decide between two alternative sentences, life or a sentence of ten to forty years in confinement, does not mean the statute is ambiguous and require the trial court to utilize the rule of lenity.

Appellant also argued that the trial court erred because it sentenced him based on the assumption that a life sentence was required because of the interplay between OCGA § 16-13-30 (d) and OCGA § 17-10-7 (c). The Court agreed.

Under OCGA § 17-10-7 (c), any person who upon conviction for a fourth felony offense or for subsequent offenses must serve the maximum time provided in the sentence of the judge based upon such conviction and shall not be eligible for parole until the maximum sentence has been served. For a second or subsequent violation of OCGA § 16-13-30 (b), the sentencing judge must impose a sentence of not less than ten years nor more than forty years or life imprisonment. OCGA § 16-13-30 (d). Consequently, the sentencing judge retains the discretion either to impose any sentence within the statutory mandatory minimum and maximum sentence range or else to impose a life sentence.

But, after a review of the record, the Court found that both the trial court and the State believed that the only possible sentence the trial court could impose was life without parole. However, the Court found, this belief was mistaken. The trial court judge retains discretion to sentence a defendant to either ten to forty years in confinement *or* a life sentence for a subsequent violation of OCGA § 16-13-30 (b), even if the State pursues a recidivist sentence under OCGA § 17-10-7 (c). Consequently, the judge's failure to exercise discretion when sentencing appellant to not less than ten years nor more than forty years or life imprisonment under OCGA § 16-13-30 (d) was error which the Court found could not be harmless under the circumstances. Thus, the Court concluded, appellant's sentence must be vacated, and his case remanded for the exercise of the trial court's discretion upon resentencing.

## DUI; Plain Error

*Taylor v. State, A22A0645 (10/24/22)*

Appellant was convicted of reckless driving, improper stop on a roadway, failure to maintain lane, and DUI (less safe). At trial, appellant's counsel did not object to the officer's testimony that appellant refused to submit to the breath test. During the jury charge conference, the trial court proposed a pattern jury charge that permitted the jury to infer the presence of alcohol from a breath test refusal. Appellant objected to this charge for “appeal purposes,” but it was overruled. The State made appellant's refusal a central part of its closing argument and told the jury that it could infer the presence of alcohol from appellant's refusal of the breath test.

Appellant argued that the trial court erred in allowing the State to present evidence of his refusal to submit to a breath test and in its corresponding jury charge permitting the jury to infer the presence of alcohol from the refusal of the breath test. The Court noted that since he did not object to the introduction of the refusal evidence, it's review of the trial court's admission of the evidence was limited to whether there was plain error.

The first part of the plain error test requires that there be an error or defect — some sort of deviation from a legal rule — that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Here, the trial court's admission of appellant's refusal into evidence and the corresponding jury instruction clearly violated *Elliott v. State*, 305 Ga. 179 (2019) and the State conceded this. Thus, the Court found, the trial court committed an error, and the first prong of the plain error test was satisfied.

The second part of the plain error test requires a showing that the legal error must be clear or obvious, rather than subject to reasonable dispute. Here, the Court noted, although *Elliott* was decided after appellant's trial, whether an error is considered clear or obvious under the second prong of the plain error test is judged under the law existing at the time of appeal, regardless of whether the asserted error in the trial court was plainly incorrect at the time of the trial, plainly correct at the time of trial, or an unsettled issue at the time of trial. Accordingly, as the State conceded, the Court found that *Elliott* applied to appellant's appeal, and the second prong of the plain error test was satisfied.

The Court stated that the third and fourth prongs require showing that the error affected the appellant's substantial rights, i.e., that it affected the outcome of the trial court proceedings, and that it seriously affected the fairness, integrity, or public reputation of the proceedings. Importantly, the plain-error analysis, which must be distinguished from harmless-error analysis, requires the appellant to make an affirmative showing that the error probably did affect the outcome below.

Here, the Court found, appellant did not admit drinking alcohol that evening, and he offered an alternative explanation for his conduct (traumatic brain injury). Moreover, the officer did not smell or see any alcohol or administer an available Alcosensor test to detect the presence of alcohol. While appellant clearly exhibited behavior showing that he was a less safe driver, the State's evidence that appellant was under the influence of alcohol was weak, at best. In fact, the Court noted, when appellant moved for a directed verdict at the close of the State's case, the trial court acknowledged that it was a “very close” call and that was with the benefit of the inference of alcohol from appellant's refusal. Under these particular facts and circumstances, the Court concluded that appellant met his burden of showing that the use of refusal evidence affected the jury's decision to find appellant guilty of driving under the influence of alcohol while less safe.

Under the fourth prong of the plain error test, the Court stated that an appellate court has the discretion to remedy the error upon a determination that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. And here, the Court found, appellant's constitutional right against compelled self-incrimination was infringed, and the fairness, integrity, and public reputation of the judicial process would be seriously affected if it declined to exercise its discretion to remedy the violation of appellant's right under the Georgia Constitution. Accordingly, having found that appellant satisfied all four prongs of the plain error analysis, the Court reversed his DUI (less safe) conviction.

## Statute of Limitations; Residual Hearsay

*Brooks v. State*, A22A1110 (10/25/22)

In 2018, appellant was convicted of two counts of rape, two counts of aggravated assault, two counts of false imprisonment, and one count of burglary, based on the sexual assaults of two victims that occurred within a few days of each other in 1986. He argued that the trial court erred in denying his plea in bar based on the expiration of the applicable statute of limitation and that his indictment was based on “stale facts.” Specifically, he contended that he was not

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# CaseLaw UPDATE

WEEK ENDING JANUARY 27, 2023

Issue 4-23

“unknown” as the perpetrator of the crimes because his DNA was entered into the CODIS database in 2008, and thus, the statute of limitation on all his charges had expired by the time he was indicted in 2016.

The Court noted that when the offenses occurred in September 1986, the statutory period of limitation for rape was seven years. Absent any tolling of the limitation period, no indictment could be brought on the rape charges after September 1993. As for the charges of aggravated assault, false imprisonment, and burglary, the statutory period of limitation for these offenses was four years. Absent any tolling of the limitation period, no indictment on these offenses could be brought after September 1990. Here, the subject indictment was returned on January 7, 2016. The indictment included the following tolling provisions: “For each of the aforementioned counts of this Indictment to which the statute of limitations applies, Counts 1, 2, 3, 4, 5, 6, 7 and 8, pursuant to OCGA § 17-3-2, the Grand Jurors aforesaid also find that the accused person committing the aforementioned crimes was unknown until February 17, 2014, to wit: said accused was not positively identified as having committed the aforementioned crimes until DNA results were obtained in February of 2014.”

The Court stated that under OCGA § 17-3-2 (2), the “person unknown” exception applies when the identity of the person who committed the crime is unknown, and it tolls the limitation period from the time the crime was committed until that person's identity becomes known to the State. The identity of the perpetrator becomes “known” to the State when the State becomes aware of facts that give rise to probable cause to arrest that person for the crime. Probable cause exists when the facts known to the State could lead a reasonably prudent person to conclude that there is a probability — more than mere suspicion, but less than absolute certainty — that the defendant committed the offense. Thus, to establish that the person unknown exception applies, the State must show that the facts within its knowledge — including knowledge imputed from the victim — were not enough to lead a reasonably prudent person to identify the defendant as the perpetrator until a time that, relative to the indictment, was within the limitation period. If the known facts would allow prudent persons to draw differing conclusions on this point, probable cause exists.

Appellant argued that the State should have discovered his identity earlier because his DNA was first entered into CODIS on January 22, 2008, after the Department of Corrections took a sample from him while he was incarcerated on his 1988 rape convictions. However, the Court stated, appellant failed to point to any evidence that the State had actual knowledge that he committed the instant crimes until the GBI report showing a DNA match to appellant came back in September 2013. And the Court stated, it refuses to interpret the person unknown tolling provision contained in OCGA § 17-3-2 (2) as applying a constructive knowledge or “should have known” standard. Therefore, the Court concluded, the State was not chargeable with knowledge that gave rise to probable cause to arrest appellant for the instant crimes until September 2013, when it received a positive CODIS hit on appellant from DNA recovered from the victims' rape kits. The seven-year statute of limitation for rape and four-year statute of limitation for the other crimes began to run as of September 2013, and the operative January 2016 indictment issued within the limitation period. As a result, the trial court properly denied appellant's plea in bar based on the statute of limitation.

Appellant also contended that the trial court erred in allowing the State to present hearsay evidence under OCGA § 24-8-807, as one of the victims was deceased at the time of trial. The Court noted that the State filed a pretrial motion indicating that it intended to introduce evidence of statements made by M. H., who died in 2013, pursuant to the residual exception. Appellant's trial counsel objected to the admission of the statements, arguing in pertinent part that they lacked the requisite indicia of reliability. The trial court subsequently granted the State's motion, determining that the statements were relevant, and the surrounding circumstances demonstrated their trustworthiness and reliability. At appellant's 2018 trial, one of M. H.'s friends, her ex-husband, her parents, and her partner testified to, either what they witnessed firsthand in the aftermath of the attack, or to what M. H. told them about the incident.

The Court stated that the residual exception to hearsay is to be used very rarely and only in exceptional circumstances, and only when there exists certain exceptional guarantees of trustworthiness and high degrees of probativeness and necessity.

Page 5

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# CaseLaw UPDATE

**WEEK ENDING JANUARY 27, 2023**

**Issue 4-23**

Whether there are exceptional guarantees of trustworthiness is a determination that focuses on the declarant and the circumstances under which the declarant made the statement to the witness. The Court also noted an appellate court should be particularly hesitant to overturn a trial court's admissibility ruling under the residual hearsay exception absent a definite and firm conviction that the court made a clear error of judgment in the conclusion it reached based upon a weighing of the relevant factors.

And here, the Court found that M. H.'s post-rape statements, made to close friends and family shortly after the incident, were offered as evidence that she had been raped, forcibly and against her will; they were more probative on the points for which they were offered than other evidence which could have been procured through reasonable efforts; and the trial court found that the general purpose of the rules of evidence and the interests of justice would best be served by admission of the statements into evidence. Under these circumstances, the Court concluded, the trial court did not abuse its discretion in admitting the statements.