Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JANUARY 6, 2023
Issue 1-23

THIS WEEK:

- **Competency; OCGA § 17-7-130**
- **Prolonged Traffic Stops; K-9 searches**
- **Venue; Terroristic Threats**

Competency; OCGA § 17-7-130

Cosby v. State, A22A0701 (10/12/22)

Appellant entered a non-negotiated guilty plea to charges of rape, kidnapping, aggravated battery and three counts of aggravated assault. The record, very briefly stated, showed that after his 2016 indictment, he filed a plea of mental incompetency to stand trial, and in August 2017, the trial court found him to be incompetent. Pursuant to OCGA § 17-7-130 (c), the court ordered the Department of Behavioral Health and Developmental Disabilities (DBHDD) to evaluate appellant and determine whether he was competent to stand trial or whether he could attain competency in the future. The case was placed on judicial hold in the interim. In January 2018, Dr. O'Connell, a DBHDD psychologist, determined that appellant was competent. The judicial hold was removed in April 2018.

His trial began in March 2020. After the State rested, appellant inquired about entering a guilty plea. The Court stated that it would accept a non-negotiated plea. The prosecutor then listed the penalties that appellant was facing on each charge. Appellant at first decided to continue with the trial, but after the trial court denied his motion for a directed verdict, he changed his mind and entered his non-negotiated plea following an extensive and thorough plea colloquy. However, soon after sentencing, appellant through new counsel, filed a motion to withdraw his plea. The trial court denied the motion following a hearing.

Appellant argued that the trial court failed to comply with the requirements of OCGA § 17-7-130 (d) (1) when it did not hold a competency hearing within 45 days of receiving the DBHDD's evaluation. The Court agreed, finding that there was no dispute that the trial court failed to hold the statutorily required competency hearing after Dr. O'Connell found appellant competent in January 2018 and before appellant entered his guilty plea. But the Court rejected appellant's argument that "the record is devoid of any competency hearing in compliance with OCGA § 17-7-130." The Court noted that the failure to comply with OCGA § 17-7-130 (d) (1) does not require a reversal. Rather, our precedent holds that when an appellant raises as error the trial court's failure to hold a mandatory hearing on competency, the trial court must conduct a post-conviction competency hearing. And here, the Court found, appellant had the same interest and obligation to adduce evidence of his incompetence in support of his motion to withdraw his guilty plea as he would have at a competency trial. And on that evidence, the trial court expressly evaluated his competency at the time he entered his plea. Moreover, appellant did not identify any evidence not already in the record that would require a new competency hearing. Accordingly, the Court concluded, appellant received a post-conviction review of his competency, and remand would serve no useful purpose. Therefore, the trial court's failure to hold a timely competency trial was remedied, and appellant failed to demonstrate reversible error on this ground.

Nevertheless, appellant contended, the trial court erred when it failed to sua sponte inquire into his competency. The Court stated that a trial court has the sua sponte duty to inquire into a defendant's competency only when information becomes known to it, prior to or at the time of the trial, sufficient to raise a bona fide doubt regarding the defendant's

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competence. The salient question is whether the trial court received information which, objectively considered, should reasonably have raised a doubt about the defendant's competency and alerted the trial court to the possibility that the defendant could neither understand the proceedings, appreciate their significance, nor rationally aid his attorney in his defense. In consideration of this issue, the Court stated that it must focus on three factors: (1) any evidence of the defendant's irrational behavior; (2) the defendant's demeanor at trial; (3) and any prior medical opinion regarding the defendant's competence to stand trial. The analysis focuses on what the trial court did in light of what it knew at the time of the trial or plea hearing.

And here, the Court found, the record showed that following the plea colloquy, appellant's counsel agreed that appellant was competent, that he understood what was going on, and that the plea was voluntary. Before pronouncing sentence, the trial court explained that it had determined appellant to be competent. Further, in denying the motion to withdraw, the trial court recalled that "throughout voir dire and the presentation of the State's case-in-chief, [appellant] was attentive and calm." It noted that appellant had inquired about a plea after the State had presented "overwhelming evidence of his guilt," which demonstrated to the trial court appellant's "clear understanding of how the evidence had unfolded and the risk of conviction." In light of appellant's conduct and Dr. O'Connell's report finding appellant competent — and in the absence of any evidence to the contrary — the trial court found no reason to believe that appellant was incompetent when he entered his guilty plea. Under these circumstances, the Court concluded, appellant failed to show that he exhibited any irrational behavior or unusual demeanor, or that there existed any medical opinion that would have triggered a sua sponte inquiry into his competency.

Finally, as to the third inquiry, appellant contended that the trial court's awareness that he had been found incompetent multiple times, as well as his admission that he had not taken his medication the day he entered his guilty plea, necessitated an inquiry into his competency. However, the Court found, although appellant had been found incompetent on several previous occasions, Dr. O'Connell's report finding him competent raised a presumption of competency. And while appellant argued that the trial court should have been concerned that he did not take his medication because Dr. O'Connell's report concludes that "compliance with his medication regimen is essential" for him to remain competent, the trial court was entitled to rely on appellant's own assertion that he did not take his medication because it sometimes affected his ability to understand the proceedings. Accordingly, the Court concluded, appellant failed to show the type of behavior or demeanor at trial that would reasonably raise a bona fide question about his competence, and because the only medical opinion in evidence indicated that he was competent to stand trial, his competency argument failed.

Prolonged Traffic Stops; K-9 searches

State v. Fish, A22A0920 (10/13/22)

Fish was indicted for trafficking in methamphetamine, possession of methamphetamine, possession of a firearm during the commission of a felony (two counts), theft by receiving stolen property, and possession of a firearm by a convicted felon. Briefly stated, the evidence showed that a police officer was conducting surveillance at a local gas station because the police department had received "multiple complaints of drug activity, drug sales going on at that gas station." While the officer was observing the gas station through binoculars, he noticed two males and a female walk between the gas station building and a vehicle multiple times and meet with different people over a period of 20 to 30 minutes. The group returned to their vehicle, a black Chevrolet Sonic, and left. The officer did not observe any illegal activity at the gas station, but he deemed their behavior "suspicious." The officer followed the vehicle and ran the tag. After the computer search reported that "the tag that was on the car was no longer assigned to the car and it should have a different tag on it," the officer pulled the vehicle over. The officer questioned the driver, Fish, about the tag. Fish showed him the rental agreement for the vehicle. That agreement showed that it was rented to a female not in the vehicle and that the vehicle was listed as a white Chevrolet Sonic. Fish then called the woman who allegedly rented the vehicle who stated on the phone to the officer that Fish had permission to drive the vehicle.

During this conversation with Fish, he asked for consent to search. Fish declined. The officer saw a K-9 unit and flagged it down. It took the K-9 officer one minute to get to the location where Fish's vehicle was pulled over. At some point, a female officer arrived on the scene. She noticed Fish and the other two vehicle occupants were outside of the vehicle, sitting on a guardrail, and the K-9 officer had not begun the K-9 search. The K-9 search did not begin until approximately four minutes after the female officer arrived. Prior to the K-9 search, the officer who stopped the vehicle did not begin to write a citation for any of the vehicle occupants or seek to have the vehicle impounded.

Fish filed a motion to suppress. The trial court granted the motion and the State appealed.

The Court stated that the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission" - to address the traffic violation that warranted the stop and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. Authority for the seizure thus ends when tasks tied to the traffic infraction are - or reasonably should have been - completed. During a traffic stop, an officer may take steps to ensure roadway safety, such as checking the driver's license and determining if the driver has any outstanding arrest warrants. However, a dog sniff lacks the close connection to roadway safety, and instead is a measure aimed at detecting evidence of ordinary criminal wrongdoing. The critical question is not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the sniff prolongs - i.e., adds time to - the stop. As a result, prolonging a traffic stop in order to conduct an open-air dog sniff renders the seizure unlawful, even if that process adds very little time to stop.

And here, the Court found, the officer testified that while he was standing outside of the vehicle with the occupants, he was not writing traffic citations, taking steps to have the vehicle impounded, or conducting any further investigation into the traffic stop, but was, instead, "investigating what the suspicious activity was at the gas station." In fact, despite the minimum of four minutes that elapsed between the K-9 officer's arrival and the open-air sniff, the officer failed to pursue the traffic stop at all. Thus, the Court found, while there may have been remaining tasks to perform for the traffic stop, the officer failed to perform them. Instead, the undisputed evidence showed that the officer did not pursue the mission of the traffic stop for at least four minutes prior to the K-9 search. Therefore, the Court concluded, the officers prolonged the traffic stop in order to conduct a K-9 open-air sniff, which rendered the seizure at issue unlawful.

Finally, the Court noted, a police officer may detain a suspect after the conclusion of a traffic stop so long as the officer has reasonable articulable suspicion of criminal activity. However, that did not occur here. While the officer testified that he was investigating the "suspicious activity … at the gas station," the State conceded that he did not have articulable suspicion of illegal drug activity sufficient to conduct the search. As such, the trial court's finding that the officer abandoned the original purpose of the traffic stop to conduct the K-9 search was not clearly erroneous. Accordingly, the Court affirmed the trial court's grant of the motion to suppress.

Venue; Terroristic Threats

State v. Stubbs, A22A1449 (10/17/22)

The State filed an accusation in Newton County charging Stubbs with three counts of terroristic threats based upon the allegation that, using Instagram, she threatened to kill her sister and two nieces. The trial court sustained Stubbs's plea in bar and granted her motion to dismiss the accusation for lack of venue. The State appealed.

First, the State contended that the trial court erred in considering the issue of venue in the context of a pretrial motion seeking dismissal of the accusation. The Court disagreed, finding that in Georgia, a defendant may challenge venue through

the filing of a pretrial motion seeking dismissal of the indictment or accusation. But, in ruling on such a motion, the trial court cannot resolve disputed questions of fact pertaining to venue, which are reserved for the jury.

Next, the State argued that the trial court erred in concluding that venue could not be established in Newton County. The Court agreed.

The Court stated that because the terroristic threats statute, OCGA § 16-11-37, does not contain a venue provision, it must first review the language used to define the crime in the statute, focusing on the key verbs defining the offense. OCGA § 16-11-37 provides in relevant part that "[a] person commits the offense of a terroristic threat when he or she threatens to … [c]ommit any crime of violence … [w]ith the purpose of terrorizing another." OCGA § 16-11-37 (b) (1) (A), (2) (A). Under this statutory provision, the State must establish two elements to sustain a conviction for making terroristic threats: (a) that the defendant threatened to commit a crime of violence against the victim, and (b) that the defendant did so with the purpose of terrorizing the victim. Regarding the first element, the plain and ordinary meaning of the word "threat" refers to a communication, declaration, or expression of an intention to inflict harm or damage. Hence, a conviction for making terroristic threats contemplates proof that the defendant communicated a threat to the victim with the intent to terrorize. The threat can be communicated directly to the victim or in such a way as to support the inference that the defendant intended or expected it to be conveyed to the victim.

Second, while the General Assembly has not specifically identified where a communication occurs for purposes of the terroristic threats statute, in other contexts, the Court noted that it has held that venue in communication-based crimes is proper in either the county in which the communication was sent or the one in which it was received. Discerning no reason to depart from that general rule, the Court concluded that venue for the crime of making terroristic threats can lie in the county where the threatening communication was sent or the one where it was received. Thus, venue in this case could lie in Newton County, where it is undisputed that the threatening Instagram voice messages were received by Stubbs's family members.

Furthermore, the Court noted, Georgia has a venue provision addressing the circumstance where, as here, the "[c]rime [was] commenced outside the state." OCGA § 17-2-2 (d). That statutory provision reads: "If the commission of a crime under the laws of this state commenced outside the state is consummated within this state, the crime shall be considered as having been committed in the county where it is consummated." OCGA § 17-2-2 (d). "Consummate" means to finish or complete. See Consummate, Merriam-Webster's Online Dictionary (last visited Sept. 9, 2022), https://www.merriam-webster.com /dictionary/consummate. And the crime of terroristic threats is complete when the threat is communicated to the victim and is coupled with the intent to terrorize. Hence, the Court found, the alleged crimes in this case were not completed, and thus were not consummated, until the threats were communicated to Stubbs's family members in Newton County, rendering venue in that county proper under OCGA § 17-2-2 (d).

Finally, the Court addressed the trial court's determination that dismissing the accusation for lack of venue was warranted because venue could not be predicated on the victims' receipt of the threatening voice messages and because the terroristic threats statute focuses exclusively on the conduct of the defendant. The Court stated that it is true that the crime of making terroristic threats focuses on the defendant's conduct and intent rather than on the victim's state of mind or full comprehension of the threat, and the threat does not have to be directly communicated to the victim. But even so, the threat cannot simply exist in the defendant's mind; there must be some conveyance or transmission of the threat. Consequently, the Court was unpersuaded that venue for the crime of making terroristic threats should deviate from the general rule that venue for communication-based crimes can lie in the place where the communication was received.

Therefore, the Court concluded, the State could prove that venue was proper in Newton County for Stubbs's alleged crimes of making terroristic threats based on the undisputed facts. Thus, because the trial court erred in granting Stubbs's plea in bar and dismissing the accusation for lack of venue, it reversed the judgment.