Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
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Search & Seizure; OCGA § 17-5-27

Underwood v. State, A22A1448 (1/27/23)

Appellant was convicted of trafficking in methamphetamine and possession of tools for the commission of a crime. The evidence showed that after conducting a buy from appellant's home using a wired CI, the officers obtained a search warrant for the residence. As the house's own surveillance cameras recorded the scene, the officers knocked on the door of the residence and announced their presence and purpose, saying, "Sheriff's Office, search warrant." After hearing a shuffling of feet as they continued to knock on the door, the officers opened the unlocked door and saw appellant sitting on a couch a few feet inside. The lapse of time between the first knock and the entry was not more than three seconds.

Appellant contended that the trial court erred when it denied her motion to suppress because police entered her house only three seconds after announcing their presence. Specifically, she contended that the police entry violated OCGA § 17-5-27. A divided court disagreed.

The Court noted that that OCGA § 17-5-27 provides: "All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute a search warrant if, after verbal notice or an attempt in good faith to give verbal notice by the officer directed to execute the same of his authority and purpose: (1) [h]e is refused admittance; (2) [t]he person or persons within the building or property or part thereof refuse to acknowledge and answer the verbal notice or the presence of the person or persons therein is unknown to the officer; or (3) [t]he building or property or part thereof is not then occupied by any person. (Emphasis supplied). The State conceded that subsection (3) of the statute, concerning unoccupied properties, did not apply here, and appellant did not contest the validity of the search warrant itself. The only question, then, was whether police were authorized to enter the house three seconds after giving "verbal notice" to the occupants.

The Court stated that a law enforcement officer entering an occupied residence for the purpose of executing a search warrant is required to give or attempt to give verbal notice of his authority and purpose. And here, it was undisputed that after announcing their presence, the officers heard "shuffling" inside rather than any verbal response, and relying on Swan v. State, 257 Ga. App. 704, 706 (3) (2002) the Court found that a three-to five-second lapse between announcement and entry complied with OCGA § 17-5-27 (1) and (2).

Nevertheless, the Court noted that with the benefit of hindsight, appellant implied that the absence of firearms at this her residence rendered the situation less dangerous such that a rapid response to the occupants' apparent "refus[al] to

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acknowledge and answer the verbal notice" was unreasonable. But, the Court stated, the only relevant inquiry was whether, at the moment they entered the house, police might have reasonably expected to encounter firearms or other resistance to the search and its purpose, including the destruction of contraband, such that their decision to delay entry for only a short time was reasonable. And, "[b]ecause we believe that these officers' decision to enter this drug house only three seconds after knocking was objectively reasonable, we affirm."

Due Process; Failure to Preserve Evidence

State v. Newberry, A22A1467 (1/30/23)

Newberry was indicted for furnishing methamphetamine, marijuana, and tobacco to an inmate in violation of OCGA § 42-5-18 (b) and for crossing the guard lines with methamphetamine in violation of OCGA § 42-5-15. The evidence showed that the warden, while observing inmate visitation on a live video feed, saw Newberry pull something out of her waistband and give it to her inmate son. The son was searched as well as Newberry's vehicle and the contraband was discovered.

After making repeated requests for the video footage, Newberry filed a motion to compel discovery. When the State responded that it had no video footage of the incident in its possession, Newberry filed a motion to dismiss the charges against her. In her motion, Newberry argued that the video footage would demonstrate that she did not commit the charged crimes, and that she had no way to obtain comparable evidence by other means.

At the hearing, the warden testified that the video footage of the visitation incident was not available to be provided to the defense because the prison had undergone computer and camera system upgrades and on that particular weekend, they were able to view live footage, but could not download the footage to a disk for evidence purposes. The warden acknowledged that the system had worked the weekends prior to and following the incident and that "policy states that every visitation has to be recorded and reviewed by the chief of security that following Monday to check for any discrepancies" and to ensure that "staff is following policy and procedures when it comes to shaking down the visitation area." He testified that any footage of the incident at issue could no longer be accessed because the system had been completely upgraded.

The trial court ruled that the missing video footage was material and its "apparent exculpatory value" was the fact that "the State stated it was able to observe [Newberry] transfer contraband to the inmate and connect other evidence later gathered in the Investigator's search." The court also ruled that the State acted in bad faith in failing to preserve the evidence because the prison officials did not comply with Georgia Department of Corrections regulations requiring them to maintain video recordings of prisoner visitation. The State appealed both rulings.

The Court stated that in evaluating whether a defendant's constitutional right to due process was violated when the State failed 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. And when considering materiality, the fact that evidence may be "potentially useful" in a defendant's attempt at exoneration is insufficient to sustain a claim that the defendant has suffered an abridgment of due process of law due to the destruction or loss of the evidence. The key is the "apparent exculpatory value" of the evidence prior to its destruction or loss and "apparent" in this context has been defined as "readily seen; visible; readily understood or perceived; evident; obvious."

The Court found that the only evidence regarding the content of the missing video footage was that it showed Newberry's commission of the charged crimes and was therefore inculpatory. The record did not show that any exculpatory value of

the footage was apparent before it became unavailable. As a result, the evidence was not constitutionally material, and the trial court therefore erred in granting Newberry's motion to dismiss the indictment. And, given this conclusion, the Court stated that it did not need to address the trial court's finding that the State acted in bad faith in failing to preserve the evidence.

Ineffective Assistance of Counsel; Blood Tests

Swanson v. State, A22A1554 (2/1/2023)

Appellant was convicted of DUI (less safe). The record showed that during the course of his testimony, the officer explained various standardized field sobriety tests that can be performed on a suspect and then included, "Is it required to do these to convict somebody of DUI? No." Appellant contended that the officer's comment that field sobriety tests are not necessary for a DUI conviction violated the ultimate issue rule, and his trial counsel was ineffective in failing to object to that testimony.

The Court stated that while a witness generally may testify to an ultimate issue of fact, he may not testify as to his opinion regarding ultimate legal conclusions. Courts must remain vigilant against the admission of legal conclusions, and an expert witness may not substitute for the court in charging the jury regarding the applicable law.

However, even if the officer's testimony was objectionable and trial counsel was deficient in failing to object, appellant failed to prove prejudice. Here, the Court found, the evidence against appellant was very strong. Furthermore, the officer's testimony regarding field sobriety testing was a correct statement of the law and thus did not mislead the jury about the law applicable in this case. Additionally, the jury was instructed that, in deciding whether a driver was under the influence of alcohol to the extent that it was less safe for him to drive, the jury could "consider anything — any evidence that you find relevant in deciding whether the defendant was a safe driver," including "among other factors" whether "any tests indicated the presence of alcohol in the defendant's system." (Emphasis supplied.) Thus, the instructions to the jury made clear that evidence of testing was not dispositive in determining the defendant's guilt, and it is presumed that jurors follow the instructions of the trial court. Therefore, the Court concluded, given the strength of the evidence, the fact that the officer's testimony did not misstate the law, and the fact that the jurors were properly instructed on what evidence they could consider, appellant did not establish a reasonable probability that the result of the trial would have been different if his counsel had objected to the testimony.

Appellant also argued that his trial counsel was ineffective in failing to seek suppression of evidence that he refused to take the State-administered blood test requested by the Officer. However, the Court noted, in contrast to a refusal to take a breath test, admission of a defendant's refusal to consent to blood testing does not implicate the constitutional right against self-incrimination and is admissible. Ineffective assistance premised on a failure to file a motion to suppress requires a strong showing that the motion would have been granted and because appellant could not make such a showing, his ineffective assistance claim failed.

Courtroom Closures; Partial vs Total Closures

Hicks v. State, A22A1188 (2/2/23)

Appellant was convicted of kidnapping, rape, incest, a violation of the Georgia Street Gang Terrorism and Prevention Act, and two counts of child molestation. Prior to trial, the State filed a written motion requesting that the courtroom be cleared of non-essential personnel for the victim's trial testimony, pursuant to OCGA § 17-8-54. At trial, appellant's counsel stated that he had no objection to the courtroom closure. The trial court required that all people, other than those from the

newspaper, "the defense team," counsel, the court-reporter, sheriff, and the victim's stepmother, leave the courtroom for her testimony.

Appellant contended that his convictions should be reversed because the trial court violated his constitutional right to a public trial by closing the courtroom during the victim's testimony. The Court stated that a criminal defendant enjoys the right to a public trial under both the Sixth Amendment to the United States Constitution and the Georgia Constitution. However, a defendant's right to a public trial is not unlimited. Under the rare circumstances where a defendant's right to a public trial is limited, the balance of interests must be struck with special care.

The Court noted that OCGA § 17-8-54 is based upon a legislative determination that there is a compelling state interest in protecting children while they are testifying concerning a sex offense. OCGA § 17-8-54 provides a limitation on a defendant's right to a public trial, stating that "[i]n the trial of any criminal case, when any person under the age of 16 is testifying concerning any sexual offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, victim assistance coordinators, victims' advocates, and such other victim assistance personnel as provided for by Code Section 15-18-14.2, jurors, newspaper reporters or broadcasters, and court reporters."

In reviewing a courtroom closure, the Court stated it must determine whether the closure was total or partial. A total courtroom closure occurs when no members of the public are allowed to attend the trial, whereas a partial closure occurs when some members of the public, such as the press, are permitted to attend. This distinction matters because when the courtroom is only partially closed to spectators, the impact of the closure is not as great, and not as deserving of such a rigorous level of constitutional scrutiny. And here, the trial court specifically stated that "newspaper" people were allowed to stay in the courtroom. As such, the courtroom closure was partial.

The Court also found that the victim was below the age of 16 at the time of her testimony, and the courtroom was closed only for her testimony. As such, the partial closure of the courtroom — which allowed members of the press, among others, to remain in the courtroom — was permitted under OCGA § 17-8-54 and did not violate appellant's constitutional right to a public trial.

Confrontation Clause; Hearsay Exceptions

Spratlin v. State, A22A1213 (2/2/23)

Appellant was convicted of criminal trespass. The relevant evidence showed that Pearson was appellant's long-term partner and the mother of his two children. Pearson called 911 because, while she was pulling into her driveway, appellant shot the windshield of her van with a BB gun, leaving the windshield damaged with holes and cracks. Pearson—who was accompanied in the vehicle by one of the couple's children—immediately drove away from the scene and called the police. In that 911 call, Pearson relayed that appellant fired a pellet gun at her vehicle, dropped the gun in the yard, and left the scene on foot. Officers arrived at the home approximately six minutes later, before Pearson returned. Then, when Pearson arrived, the statements she made about the incident to law enforcement were captured on the body cameras of two officers. Appellant was apprehended several hours later.

At trial, the child who was in the van did not testify and Pearson had passed away (from unrelated natural causes) just weeks after the incident in question. As a result, because Pearson was unavailable to testify, the State sought to admit her 911 call and the body-camera footage as non-testimonial "excited utterances." Appellant objected on the grounds that the statements were both inadmissible hearsay and violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. Specifically, as to the Confrontation Clause arguments, appellant asserted that the statements made

during the 911 call and recorded on the officers' body cameras were all testimonial in nature because there was no ongoing emergency when Pearson called 911 or when she returned to the scene.

Following a pretrial hearing, the trial court ruled that Pearson's statements on the 911 recording and body camera footage were admissible as excited utterances. Appellant then asked the trial court to "address the proffer in the [C]onfrontation [C]lause," noting that the hearsay objection and Confrontation Clause objection were two separate and distinct issues. The trial court then responded as follows: "I think my ruling overrides your argument that the [C]onfrontation [C]lause overrides [sic] the issue that the statements need to be excluded because they are excited utterances, and I'm just denying your motion… I'm finding that the [C]onfrontation [C]lause arguments do not apply in this case."

Appellant argued that Pearson's statements on the 911 recording and body-camera footage were improperly admitted into evidence by the trial court. In response, the State contended that the trial court properly concluded that this evidence fell squarely within an exception to the hearsay rule as excited utterances; but as to application of the Confrontation Clause, the State noted that "the trial court never appears to have either conducted a full Confrontation Clause analysis or rendered a distinct ruling on whether Pearson's statements were testimonial." In fact, the Court noted, the State conceded that before and after trial, the trial court "appears to have conflated its assessment of hearsay with its Confrontation Clause analysis."

The Court stated that the Confrontation Clause of the United States Constitution imposes an absolute bar to admitting out-of-court statements in evidence when they are testimonial in nature, and when the defendant does not have an opportunity to cross-examine the declarant. And if the primary purpose of a statement is to establish evidence that could be used in a future prosecution, that statement is testimonial in nature. Importantly, only after a court determines that a statement is nontestimonial in nature do the normal rules regarding the admission of hearsay apply.

In a Confrontation Clause analysis, statements are nontestimonial in nature when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Then, if the answer to that question is "yes," the court proceeds to consider the admissibility of statements under an exception to the hearsay rule. But here, the trial court only considered the statements in question under a hearsay analysis and, using its conclusion that the statements were admissible as "excited utterances," it also found the Confrontation Clause did not bar admission of the statements.

Thus, the Court concluded, because the trial court indeed conflated its hearsay analysis with an analysis of appellant's Confrontation Clause arguments, as applied to the 911 recording and body-camera footage, it could not discern whether it abused its discretion in concluding this evidence was admissible. And therefore, the Court vacated the trial court's judgment and remanded for it to consider the issue anew, separating its hearsay and Confrontation Clause analyses.

Ammons; Harmless Error

Robertson v. State, A22A1286 (2/2/23)

Appellant was convicted of DUI (less safe), failure to obey a traffic control device, and failure to maintain lane. Prior to trial, the court denied appellant's motion to suppress his refusal to submit to the officer's request to conduct field sobriety evaluations on the basis that the admission of his refusal violated his State right against self-incrimination. Thereafter, appellant proceeded to a bench trial, renewing his objection to admission of the refusal and stating that he had waived his right to a jury based on the trial court's denial of his motion to suppress on this ground.

The Court stated that under the Supreme Court's recent decision in Ammons v. State, 315 Ga. 149 (2) (a) & (b) (2022), the trial court erred in denying appellant's motion to suppress. Nevertheless, the State argued, the trial court's error was harmless because the trial court did not rely on the evidence of the refusal when determining appellant's guilt. The Court disagreed.

The Court agreed with the State that the trial court's order omitted from its reasoning for its finding of guilt the fact that appellant refused to submit to field sobriety testing, and the testimony and the video of the stop supported a finding of guilt without this evidence. Nevertheless, appellant gave other reasons for his poor driving — his emotional situation with his mother that morning. Moreover, although appellant asked the officers "for a favor" and offered to take a rideshare home, which could be taken as an admission of guilt, at no point did he explicitly admit that he was driving under the influence of alcohol to the extent that it is less safe to do so, despite the State's insistence otherwise. The State also relied on appellant's refusal when arguing its side to the trial court.

Moreover, the Court found, appellant argued that he specifically waived a jury trial based on the trial court's decision to deny his motion to suppress and allow evidence regarding his refusal. A harmless error analysis cannot be applied to a jury trial waiver. Thus, the Court concluded, while appellant's waiver of his right to a jury trial may have been knowing and intelligent under the circumstances, it was based wholly upon the trial court's erroneous decision as to the suppression issue. Accordingly, the Court declined to find that the error in failing to suppress the evidence was necessarily harmless. Consequently, the Court vacated in part the trial court's order as to the motion to suppress as to appellant's refusal to perform roadside sobriety tests and remanded for entry of an order consistent with Ammons. The Court also vacated in part the final judgment as to the conviction for DUI and remanded the case for retrial on that charge. Finally, the Court affirmed appellant's convictions for failure to maintain lane and failure to obey a traffic control device.