Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 22, 2017

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THIS WEEK:

Probation Revocation; Polygraphs

Hilley v. State, A17A0834, A17A1691 (10/25/17)

Appellant was convicted of using a computer internet service to seduce a person he believed to be a child as well as two counts each of attempted aggravated child molestation and attempted child molestation. The Court combined his direct appeal from his conviction and his discretionary appeal from his probation revocation. Appellant contended in his direct appeal that he had been denied due process because the federal court violated his right to counsel when it erroneously denied his subpoena requests for "documents and witnesses needed to investigate potential appellate claims" on the basis that the evidence was privileged. However, the Court found, because appellant did not pursue an appeal of this action in federal court, he had no remedy in any Georgia court on his right to counsel. Appellant next argued that the trial court should have ruled on the federal court's error. But, the Court noted, appellant did not specify the documents and witnesses to which he was denied access by the federal court. Nevertheless, the Court found, it appeared in appellant's brief, as well as the news stories attached to his motions for new trial, that he had sought evidence for the purpose of impeaching FBI Special Agent Hillman, who was involved in appellant's arrest and testified briefly at trial. The Court therefore decided to treat appellant's argument as asserting error as to the Georgia trial court's denial of a motion for new trial on the basis of the "newly discovered evidence" referenced in the news stories. The Court stated that a new trial will not be granted on newly discovered evidence if the only effect of the evidence will be to impeach the credit of a witness. Moreover, it is not enough to assert that further discovery might produce evidence helpful to the defense, i.e., to embark on a "fishing expedition." And here, the Court found, appellant sought the evidence concerning Special Agent Hillman's activities for the single, impermissible purpose of impeaching him after trial. Further, because appellant did not specify that the evidence he was seeking actually exists, it was clear that he was engaged in a fishing expedition. Accordingly, the Court concluded, the trial court did not abuse its discretion when it denied his motion for new trial on this basis. Appellant also

argued in his discretionary appeal that the trial court erred when it revoked his probation because he asserted his Fifth Amendment right against self-incrimination during his polygraphs. The Court disagreed. The Court stated that probation cannot be revoked merely on the basis of refusing to answer incriminating and particular questions during a polygraph examination. However, appellant did not dispute that his probation was revoked as a result of his refusal, lasting over almost a year, to engage in treatment. In fact, the Court noted, that Dr. Fraser, who treated appellant at appellant's weekly sex offender treatment sessions, testified that appellant was terminated based on his high "level of denial" as to the facts of his offenses for a substantially longer period than was usual. The record also showed that when Dr. Fraser informed appellant that treatment would necessarily require administering "more polygraphs to investigate . . . areas that were of concern," appellant refused such tests in advance, asserting that they amounted to "cruel and unusual punishment." Further, because appellant "could not be accurately supervised" without polygraph testing, the treating psychologists were bound by their own contracts with the State not to grant him "credit under [Department of Community Supervision] guidelines for treatment" pursued without polygraph testing. Thus, the Court found, this evidence was sufficient to support that court's discretionary determination that appellant's probation should be revoked because of his failure to complete treatment, which was a specific condition of that probation.

DUI; Miranda

State v. Licata, A17A1200 (10/26/17)

Appellant was accused of DUI (less safe), reckless driving, hit and run, and other traffic offenses. The evidence, briefly stated, showed that after Licata was stopped, the officer read him his *Miranda* rights. The officer then had Licata perform standardized field sobriety tests and once completed, arrested Licata. After the officer read Licata the implied consent warnings and requested a breath test, Licata asked if he could call his attorney. The officer said no and twice informed him that he was not entitled to consult with an attorney prior to deciding whether to submit to the breath test. Licata successfully moved to suppress the results of his field sobriety tests and evidence of his refusal to take a breath test. The State appealed. The State argued that the trial court erred in suppressing the results of Licata's field sobriety tests. The trial court found that Licata was in custody, and although the arresting officer had read Licata a correct *Miranda warning*, the officer did not inform Licata of his right to refuse to perform physical acts as protected by Art. I, Sec. I, Par. XVI of the Georgia Constitution of 1983. The court therefore granted Licata's motion to suppress the results of the field sobriety tests. The Court stated that while the federal constitutional right against self-incrimination has been construed to be limited to oral testimony, the Georgia Constitution gives greater protection and applies to evidence, both oral and real. Also, *Miranda* warnings address only the right to remain silent and the Georgia Supreme Court has never addressed the argument that a *Miranda* warning is therefore insufficient to apprise of the additional rights afforded by the Georgia Constitution. Nevertheless, in *Price v. State*, 269 Ga. 222 (1998), our Supreme Court held that under Georgia law, an arresting officer's failure to give *Miranda* warnings to a suspect in custody rendered evidence of field sobriety tests inadmissible. Thus, *Price* stands for the proposition that, under Georgia law as well as federal law, a *Miranda* warning to a suspect in custody is sufficient to render evidence of field sobriety tests admissible. Thus, the Court held, regardless of whether Licata was in custody, he was sufficiently warned of his right not to incriminate himself. Therefore, the trial court erred in suppressing the results of the field sobriety tests. In so holding, however, the Court stated, "We acknowledge that there is at least arguably tension between our Supreme Court's opinion in *Price* and Art. I, Sec. I, Par. XV of the Georgia Constitution of 1983…. But whether any such tension is to be resolved by narrowing the holdings of *Price* and similar cases is up to our Supreme Court." The State also argued that Licata was not entitled to counsel when deciding whether to submit to the state-requested breath test, so the trial court erred in excluding evidence of Licata's refusal to take the test on the basis that he had requested an attorney pursuant to a *Miranda* warning. The Court agreed. An individual is not entitled to the advice of counsel when asked to submit to a breath test under the Georgia Implied Consent Law. Moreover, nothing in the record demonstrated that the officer somehow misled Licata to believe that he was entitled to an attorney at the time of the breath test. And, while at the beginning of the encounter, the officer did inform Licata that he had the right to an attorney as part of the *Miranda* warnings, the officer twice clarified that Licata was not entitled to consult an attorney regarding whether to submit to the state-requested breath test and that he had to make that decision himself. Accordingly, the Court held that the trial court also erred in excluding evidence of Licata's refusal on this basis.

Right to be Present at Trial

Burch v. State, A17A1027 (10/27/17)

Appellant was convicted of VGCSA and a firearms offense. He argued that his right to be present at all stages of the trial was violated when the trial court conducted a portion of the jury

selection outside his presence. The Court stated it was "constrained to agree." The record showed that on the second day of jury selection, appellant was not present when court began. He was apparently still outside, looking for a parking spot. A juror also was not present. The juror was in terrible pain and told the bailiff at the conclusion of the first day that she did not think she could continue. During appellant's absence, counsel agreed to continue without the juror and to continue voir dire during appellant's absence. Appellant returned to the courtroom 10 to 15 minutes after voir dire had begun. The State argued that appellant waived his right to be present when he voluntarily absented himself from trial after he clearly knew the proceedings had begun. The Court stated that it is generally true that if a criminal defendant is free on bond, such as appellant was here, he may waive his right to be present by his voluntary absence from trial. However, relying on *Pollard v. State*, 175 Ga. App. 269, 270 (1985), the Court stated that for Sixth Amendment waiver purposes, trial begins when jeopardy attaches, and thereafter a defendant can waive his constitutional right of confrontation by voluntarily absenting himself from the proceeding. In the absence of jeopardy attaching, the waiver principles are inapplicable. And here, the jury had not been impaneled and sworn before appellant absented himself from the proceedings, so jeopardy had not yet attached. Thus, as in *Pollard* and its progeny, waiver principles are inapplicable in this case. Nevertheless, the State argued, counsel may waive his client's right to be present if the waiver is made either in the defendant's presence or by his express authority, or if the waiver is subsequently acquiesced in by him. Thus, the State maintained, appellant acquiesced in his counsel's waiver when he arrived during voir dire and proceeded without objecting. The Court found that under *Pollard*, the State is incorrect that appellant may waive his right to be present merely by his voluntary absence from the proceedings, and the record did not show that the attorney's waiver was in appellant's presence or by his express authority. And here, it was not clear from the record when appellant entered the proceedings, but what was clear was that in his absence, the trial court discussed with counsel about excusing a juror and eventually released her from returning to court. Appellant testified at his motion for new trial hearing that he was not aware that the juror had been excused, and his trial counsel likewise testified that he could not recall notifying appellant of that fact. Accordingly, the Court concluded that appellant was entitled to a new trial because his right to be present was violated.

Reckless Conduct by an HIV-Infected Person

Rodriguez v. State, A17A1301 (10/27/17)

Appellant was convicted of committing reckless conduct by an HIV-Infected person in violation of OCGA § 16-5-60 (c) (1). The evidence, briefly stated, showed that appellant removed a condom he was using while having sexual intercourse with the victim. Afterwards, the victim demanded to know why appellant had removed the condom. Appellant responded that he was sorry and reluctantly told her, "I am HIV positive. I just carry the virus." The two went for testing. Appellant then showed the victim a single-page document from Quest Diagnostics purporting to show that he had tested positive for the presence of HIV infection. Appellant contended that the evidence was insufficient to support the guilty verdict because the State failed to prove an essential element of the crime, i.e., that appellant is an "HIV infected person" as that term is defined by statute. The Court agreed. The Court noted that the elements are found in OCGA § 16-5-60 (c) ("HIV Reckless Conduct Statute"). Importantly, OCGA § 16-5-60 (a) provides that "[a]ny term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1." Thus, the statute requires that certain terms in the HIV Reckless Conduct Statute must be given the meanings provided in OCGA § 31-22-9.1. OCGA § 31-22-9.1 defines a number of terms and phrases that appear in the HIV Reckless Conduct Statute. First, the term "HIV infected person" is defined as someone "who has been determined to be infected with HIV. …" The latter phrase "means having a confirmed positive HIV test." And the phrase "confirmed positive HIV test" "means the results of at least two separate types of HIV tests, both of which indicate the presence of HIV in the substance tested thereby." Finally, "HIV test" is defined as "any antibody, antigen, viral particle, viral culture, or other test to indicate the presence of HIV in the human body, *which test has been approved for such purposes by the regulations of the department*." (Emphasis supplied). As used in that chapter of the Code, "the department" refers to the Department of Community Health ("DCH"). The Court found that when these Code sections are read together, they require the State to prove, among the other elements, that appellant was determined to be infected with HIV by an HIV test "approved for such purposes by the regulations of the [DCH]." Absent such proof, appellant could not be found guilty because under the uniform rule of strict construction, a penal statute can not be expanded by implication to include conduct or persons not explicitly identified in the statute. The only evidence of appellant's HIV status was (a) his admission to the victim and to police that he was "HIV positive," and (b) a one-page Quest Diagnostics testing report that appellant handed to the victim after being tested at the local

health department office. With respect to appellant's admission, it could not satisfy the State's burden to prove his HIV status as defined under OCGA § 31-22-9.1 because it did not address the statutory element of. the type of testing or the approval by DCH. Likewise, the Court found, the Quest Diagnostics document did not satisfy the regulations of the DCH, nor did any witness testify as to the nature of the Quest Diagnostics report or its compliance with DCH regulations or licensing requirements. The report itself presented raw blood data and medical jargon. The State did not call any physician or other competent witness to explain the test report; testify as to its origin, methodology, or meaning; or describe how it satisfied the statutory criteria for demonstrating that a person is an "HIV infected person" under the definitions in OCGA § 31-22-9.1. Thus, the Court found, there was no evidence addressing this element, so there was no evidence to support a finding that appellant was an "HIV infected person" with a "confirmed positive HIV test," as those terms are defined by the statute. Accordingly, the Court concluded that the State failed to meet its burden to prove appellant's status under OCGA § 16-5-60 and consequently, reversed his conviction.

Jury Instructions; Corroboration of Accomplices

Ross v. State, A17A1082 (10/27/17)

Appellant, Holmes, and Dukes were indicted together based on a shooting that occurred during an alleged attempted drug buy at the apartment of Myron Glenn. The evidence, very briefly stated, showed that Glenn setup a drug buy at which Holmes would sell marijuana to appellant and Dukes. Appellant and Dukes busted in the door and put guns in the face of Glenn and Holmes. A firefight started. Dukes and appellant both suffered numerous gunshot wounds. In its charge to the jury, the trial court stated that "[t] he testimony of a single witness if believed is sufficient to establish a fact. Generally, there is no legal requirement of corroboration of a witness, provided you find the evidence to be sufficient." It is undisputed that the trial court did not charge the jury that the testimony of an accomplice must be corroborated by other evidence. Appellant argued that the trial court committed plain error by failing to instruct the jury on the necessity of corroboration of accomplice testimony as required by OCGA § 24-14-8. Appellant contended that the only testimony connecting him and Dukes to the alleged counts of aggravated assault came from Glenn and Holmes, both individuals who could have been considered by the jury to be appellant's and Dukes's accomplices in the common criminal enterprise of the drug sale at Glenn's home. The Court agreed. First, the Court found that there was some evidence from which the jury could determine that Dukes and appellant were accomplices of Glenn and Holmes. Second, there was no affirmative waiver of the accomplice corroboration requirement by appellant, and thus, the failure to give the charge in this case was clear error not subject to reasonable dispute. As to the third prong, the Court agreed with appellant that his substantial rights were affected. Specifically, the outcome of the trial proceedings would have been different because if the proper jury instruction had been given, he would have been acquitted of aggravated assault because the only evidence showing that he or Dukes brandished or fired weapons was the testimonies of Glenn and Holmes. Finally, as to the fourth prong, the Court found that because the only testimony connecting appelalnt to the commission of aggravated assault against either Glenn or Holmes or to the possession of firearms during the commission of felonies was the testimony of Glenn and Holmes, it could not be said that reversal was not required in this instance.

DUI; Right against Self-Incrimination

State v. Council, A17A1218 (10/30/17)

Council was arrested for DUI. The evidence showed that she consented to take a breath test after the arresting officer read her the implied consent warnings. On the way to the police station, which was a few minutes away from the accident scene, Council's phone rang, and she asked the officer if she could answer it. He apologized to Council and said he could not allow her to answer her phone. During the conversation, the officer offered to send another officer to check on Council's 14-year-old daughter, who was at home alone. The officer also told Council that, even though it was against the police department's policy, "when we get to the precinct, once we're finished there at the precinct, I'll let you call [your boyfriend] to make sure [your daughter] gets checked on." After arriving at the police station, the officer removed Council's handcuffs and administered two breath tests. The trial court granted Council's motion in limine to exclude the results of her breath test. The trial court found that Council "was compelled to [perform the breath test], and to do that act two times, to produce evidence against herself in violation of her Georgia Constitutional right against self-incrimination." The State appealed. The State argued that the trial court erred in ruling that the administration of the breath test violated Council's right against self-incrimination provided by the Georgia Constitution. Specifically, the State argued that Council's right against self-incrimination was not violated because the State did not compel Council to submit to the breath test. The Court agreed. The Court noted that Council asked the officer numerous questions about the different field sobriety tests and the breath test throughout the

interaction. From the record, including the video recordings of the interaction between Council and the officer, the officer patiently and calmly answered her questions. Further, Council appeared to understand and respond to questions. The officer testified that he did not make any promises in exchange for Council's agreement to submit to a breath test. And, although the officer did not allow Council to make any phone calls until they were finished with the breath tests, there was no evidence that Council was forced to take the breath tests against her will in order to make the phone calls, as the trial court appeared to imply. In other words, Council was not going to be allowed to make the calls until she *either* took the breath tests *or* refused to do so. Thus, refusing to allow her to make the calls did not constitute coercion. Therefore, the Court concluded, under the totality of circumstances, the State did not coerce or compel Council to undergo the breath tests. Thus, her agreement to the breath tests did not violate her right against self-incrimination.