

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 27, 2018

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THIS WEEK:

- **DUI; Intoxilyzer Log Books**
- **Indictments; General Demurrers**
- **Prior Consistent Statements; Prior False Claims of Sexual Abuse**
- **Mallory; Pre-arrest silence**
- **Voir Dire; Impartiality of Jurors**

DUI; Intoxilyzer Log Books

Jones v. State, A17A1532 (3/7/18)

Appellant was charged with two counts of DUI. The State filed a motion in limine to introduce a log sheet that included the handwritten results of two Intoxilyzer 5000 tests of appellant's breath conducted at the sheriff's office on the date of his arrest. The State submitted an affidavit stating that the original printout of the test results had been misplaced and argued that the log sheet was admissible under the business and public-records exceptions to the hearsay rule. The trial court granted the motion and the Court granted an interlocutory appeal.

Appellant argued that the trial court erred in granting the State's motion because the log sheet is inadmissible under the best evidence rule. The Court stated that in Georgia, proof of "the contents of a writing, recording, or photograph [generally requires] the original writing, recording, or photograph[.]" OCGA § 24-10-1002. However, OCGA § 24-10-1004 sets out several exceptions to this general rule, including an exception applicable here, where the original cannot be located. OCGA § 24-10-1004 (1) provides that "[t]he original shall not be required and other evidence of the

contents of a writing, recording, or photograph shall be admissible if ... [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]" Here, the Court found, the original intoxilyzer printouts could not be located even after the investigator conducted a multi-source search, and appellant failed to point to any evidence in the record suggesting any bad faith on the part of the State in connection with the missing documents. Under these circumstances, the Court held, the trial court did not abuse its discretion in finding that admission of the log sheet would not violate the best evidence rule.

Next appellant argued that the business-records exception to the hearsay rule does not apply to the log sheet because the log sheet was prepared and maintained for the purpose of litigation. The Court disagreed. Here, the investigator averred that every officer at the jail who performs intoxilyzer breath tests is required to record the following information into the log immediately after the test is completed: his or her name, the name of the offender, the date of the test, the offender's driver's license number, the arresting officer's name, the results of the two samples making up the test, and whether blood was drawn. The Court found that this evidence supports a finding that the log sheet was (a) made at or near the time of the intoxilyzer tests; (b) made by, or from information transmitted by, a person with personal knowledge and a business duty to report; (c) kept in the course of the regularly conducted sheriff's office's activity of testing offenders charged with DUI; and (d) it was the regular practice of the sheriff's office to keep the log book of that testing activity. Therefore, the evidence met the criteria set forth under

Georgia's business records exception. Moreover, although the State is seeking to use the log sheet at trial, the record supported a finding that it was not made in anticipation or preparation for litigation. Rather, the State generally relies on the original intoxilyzer printouts themselves to supply proof of intoxication at trial, and the log sheet was usually kept at the sheriff's office. Accordingly, the Court found no abuse of discretion in the trial court's decision to admit the log sheet showing appellant's intoxilyzer results under the business record exception.

Nevertheless, appellant argued, the State failed to sufficiently authenticate the log sheet under OCGA § 24-9-902 (11), which requires a written certification from "its custodian or other qualified person," because the State failed to show that the investigator was either a custodian or otherwise a qualified person. The Court again disagreed. Here, the investigator was a former deputy who averred that he was familiar with the procedures of the sheriff's office regarding the handling of the intoxilyzer printout cards. He investigated the missing printouts in this case, and after he was unsuccessful in locating them, he asked for the intoxilyzer log sheet and explained the procedure for completing and maintaining the log book at the jail facility in detail. Under these circumstances, the Court found no abuse of discretion in the trial court's determination that the investigator was a "qualified person" under OCGA § 24-9-902 (11) to properly authenticate the log book entry.

Finally, appellant argued that the log sheet should be excluded under the rule of completeness because it only contains portions of what the intoxilyzer printout would have shown and that the missing information hampers his ability to defend against the DUI charges. The Court noted that under OCGA § 24-1-106, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which, in fairness, should be considered contemporaneously with the writing or recorded statement." Moreover, Georgia law provides that "[u]pon the request of the person who shall submit to a chemical test or tests at the request of a law enforcement officer, full information concerning the

test or tests shall be made available to him or his attorney." OCGA § 40-6-392 (a) (4). But, here, it was undisputed that the State had provided everything it has with regard to the intoxilyzer results and that there is nothing left in the State's possession to complete that evidence. To the extent that the State has failed to provide information in the detail provided on an intoxilyzer printout, the Court found that such omissions go to the weight and not the admissibility of the intoxilyzer results. Cross-examination of the officer who administered the test will allow appellant's counsel the opportunity to test the nature of the State's evidence, and the trial court has indicated that it will revisit the motion in limine should the State not offer the testimony of that officer. Accordingly, the Court found no grounds for reversal.

Indictments; General Demurrers

Budhani v. State, A18A0645 (3/7/18)

Appellant was convicted of three counts of unlawful sale of a schedule I controlled substance, known as XLR11, in violation of OCGA § 16-13-30 (b) (2014) for sales occurring on three separate dates, and one count of unlawful possession with intent to distribute the schedule I controlled substance XLR11 in violation of OCGA § 16-13-30 (b) (2014). Appellant argued that the trial court erred in denying his general demurrer. The Court disagreed.

A general demurrer challenges the validity of an indictment by asserting that the substance of the indictment is legally insufficient to charge any crime. An indictment is void to the extent that it fails to allege all the essential elements of the crime or crimes charged. Appellant contended that the indictment is void because it failed to allege the inapplicability of certain exemptions. The Court found that the statutory definition of a schedule I controlled substance in 2014 excluded XLR11 that was "specifically utilized as part of the manufacturing process by a commercial industry of a substance or material not intended for human ingestion or consumption, as a prescription administered under medical supervision, or research at a recognized institution." OCGA § 16-13-25 (12) (N) (2014). Thus, in order for

the XLR11 to even qualify as a "schedule I controlled substance," the exemptions could not have applied. In other words, the very definition of a "schedule I controlled substance" embodies an allegation that the exceptions were inapplicable. Consequently, although the indictment did not explicitly allege the inapplicability of the exemptions, it inherently did so by alleging that the substance possessed and sold by appellant was, in fact, by definition, a "schedule I controlled substance."

Thus, the indictment put appellant on notice of the factual allegations he must defend in court. Specifically, the indictment put appellant on notice of the specific dates involved, his actions that constituted an alleged violation of OCGA § 16-13-30 (b) (2014), and that the State alleged that the XLR11 he sold and possessed was a "schedule I controlled substance" as that term is defined by statute. Consequently, appellant's indictment was not void.

Prior Consistent Statements; Prior False Claims of Sexual Abuse

Ray v. State, A18A0333 (3/7/18)

Appellant was convicted of rape and two counts of sexual battery. The evidence showed that the victim, a mentally-challenged adult, lived with her aunt and several cousins. Appellant, who was also related to the victim, visited the home on occasion, and the family spent time at his house, as well. In December 2009, the victim disclosed to a family member that appellant had assaulted her. The victim's aunt reported the disclosure to the police.

Appellant argued that the trial court erred in admitting a video recording of the victim's December 29, 2009 forensic interview, which was played for the jury after the victim had testified. Appellant objected to the video's admission, characterizing the evidence as hearsay that improperly bolstered the victim's credibility. The trial court disagreed with this characterization, finding the video admissible as a prior consistent statement.

The Court stated that OCGA § 24-6-613 (c) governs the admissibility of prior consistent statements. Here, appellant's primary defense at trial was that various individuals had convinced the mentally-disabled victim to fabricate the allegations against him. He specifically

claimed that the victim was influenced before the December 29, 2009 interview. But through his cross-examination of the victim and other witnesses, appellant also intimated that relatives and state officials had influenced her trial testimony *after* the interview occurred. Thus, the Court held, the trial court appropriately admitted the prior consistent statement to rebut appellant's implied charge of recent undue influence.

Appellant also argued that the trial court erred in excluding evidence that the victim's aunt had, on several previous occasions, falsely accused other individuals of sexual misconduct. Appellant proffered evidence regarding these prior accusations at a pretrial hearing, but the trial court found the evidence irrelevant, noting that the aunt was deceased and would not be a witness at trial.

The Court stated that evidence of a victim's prior false claims of sexual abuse are admissible in a sexual assault case to attack the credibility of the victim and as substantive evidence tending to prove that the instant offense did not occur. Here, the Court acknowledged, appellant's allegations involved purportedly false accusations by the victim's aunt, rather than the victim. But, appellant asserted that the family of the mentally-challenged victim had convinced her to fabricate the allegations against him, and the aunt made the initial report to police. Given these particular circumstances, evidence that the aunt had previously made false claims of sexual abuse would be relevant to the veracity of the allegations here. Nevertheless, the Court stated, before admitting such evidence, the trial court must make a threshold determination that a reasonable probability of falsity exists. Although the trial court held a pretrial hearing and received evidence regarding the prior allegations, it did not appear from the record that the court assessed the truth or falsity of the claims. Instead, it erroneously found the evidence irrelevant based on the aunt's death and consequential absence from trial. Accordingly, the Court remanded the case for the trial court to make the necessary threshold determination regarding falsity. If a reasonable likelihood of falsity exists, evidence of the allegations is admissible, and appellant would be entitled to a new trial.

Mallory; Pre-arrest silence

State v. Orr, A17A2096 (3/8/18)

Orr was convicted of family violence battery and cruelty to children in the third degree. He filed a motion for a new trial asserting that the trial court erred when it failed to declare a mistrial after the State impermissibly commented on Orr's pre-arrest silence during closing arguments. After a hearing, the trial court granted Orr's motion, finding that the prosecutor did comment on Orr's pre-arrest silence and that the error was not harmless. The State appealed.

The Court noted that in granting Orr a new trial, the trial court relied on *Mallory v. State*, 261 Ga. 625 (409 SE2d 839) (1991), overruled on other grounds, *Clark v. State*, 271 Ga. 6, 9-10 (515 SE2d 155) (1999), and its progeny. *Mallory* created a bright-line rule in Georgia that the State may not comment on either a defendant's silence prior to arrest or failure to come forward voluntarily. The State argued that the trial court was no longer bound by *Mallory*. The State further contended that under OCGA § 24-8-801 and relevant federal precedent, evidence of a defendant's pre-arrest silence may be admissible. Thus, the State argued, in deciding the motion for a new trial, the trial court should have analyzed whether the evidence at issue was admissible under OCGA § 24-4-403 as being more probative than prejudicial.

The Court disagreed, stating “[w]hat the State's argument fails to acknowledge, however, is that although *Mallory* has been called into question, it has never been overruled. And in the absence of a decision from our Supreme Court expressly overruling *Mallory*, this Court, like the trial court, remains bound by its holding.” Accordingly, the Court affirmed the grant of Orr's motion for new trial.

Voir Dire; Impartiality of Jurors

Harris v. State, A18A0513 (3/8/18)

Appellant was convicted of criminal attempt to commit armed robbery, entering an auto with intent to commit theft, and three counts of armed robbery. He contended that the trial court erred in striking a juror from

the jury panel for cause. The record showed that during general voir dire of all prospective jurors, Juror 13 indicated that he might not be able to fairly decide the case if selected for the jury. Later, he stated that he had previously been arrested, although all charges were ultimately dismissed. Explaining the incident, the juror asserted that an undercover officer had lied about the facts in court and, after the dismissal, threatened to “get [the juror] next time.” The prosecutor asked whether the experience “still affect[ed] [the juror] today.” He responded: “It — not really affect me today, but I'm always leery on knowing that law enforcement planted [evidence] on me.” The juror then admitted that he would “have a hard time with the law enforcement witness who comes up and say[s], we found some evidence.” The State moved to strike the juror for cause on the ground that he could not be fair if law enforcement officers testified. The trial court granted the motion, noting that the juror had “already formed an opinion about a witness, regardless of ... what that witness has to say and making an independent decision.”

The Court noted that the trial court has broad discretion to determine a potential juror's impartiality and to strike for cause jurors who may not be fair and impartial. Here, Juror 13 expressed doubt about his ability to be fair and indicated that he would have a difficult time believing a law enforcement witness. Given these circumstances, the Court found, the trial court did not abuse its discretion in excusing the juror from the panel.