

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 10, 2018

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THIS WEEK:

- **DUI; Motions in Limine**
- **Demands for Speedy Trial; Statutory Requirements**
- **Sovereign Citizens**
- **Prosecutorial Misconduct; Conflicts of Interest**
- **Confessions; Hope of Benefit**
- **Search & Seizure; Controlled Buys**
- **First Offenders; Immigration and Nationality Act**

DUI; Motions in Limine

State v. Botts, A18A0652 (6/12/18)

Botts was charged with DUI and endangering a child. She filed a motion in limine to exclude evidence of the results of her blood test. She argued, among other things, that under OCGA § 40-6-392 (c) (2), the person who drew her blood was not qualified to do so. The trial court scheduled a hearing on her motion in limine. In spite of Botts' allegations in her motion in limine of an insufficient foundation to admit the blood-test results, the State presented no evidence regarding the blood draw; its only witness at the hearing was the arresting officer, who testified about stopping Botts and conducting field sobriety tests. The trial court granted the motion in limine and the State appealed.

The State argued that a trial court's ruling on a motion in limine is only a preliminary ruling subject to being revisited at trial, so the court may not definitively rule on the admissibility of evidence challenged in a motion in limine. The Court found that in effect, the State argued that it could ignore Botts' motion,

decline to present evidence at the hearing on the motion, and instead address Botts' motion at trial. The Court disagreed.

In considering a pre-trial motion in limine, the trial court may defer any ruling until trial, issue a conditional ruling, or make a definitive ruling admitting or excluding evidence. Of course, the trial court has the discretion to modify its rulings on a motion in limine at any time. Nevertheless, citing *State v. Johnston*, 249 Ga. 413 (1982), the State contended that the trial court was obligated to notify it in advance that the court had elected to make a pretrial ruling on the admissibility of the blood test. The State apparently relied on the language in *Johnston* that “[t]he trial court, having decided to rule on the admissibility of evidence prior to the trial, and upon the failure of the state *thereafter* to lay the foundation for the admissibility of the evidence, did not err in ruling as it did.” *Johnston*, 249 Ga. at 415 (3) (emphasis supplied).

But, the Court stated, it does not read the *Johnston* Court's use of the word “thereafter” as creating some kind of obligation on the court's part to notify the State of its intent to rule on the admissibility issue. In any event, the State had notice of the issue before the court. The State was served with the motion in limine “seeking to exclude in evidence blood test results” in which Botts requested the court to issue an order “holding inadmissible any blood tests drawn from the defendant,” a permissible use of a motion in limine. And the State did not dispute that it was given notice of the hearing date. Further, as the trial court found in the order granting the motion in limine, at the beginning of the hearing, Botts announced the issues she expected to address, including the motion in limine to exclude the evidence

because “the state can’t lay a proper foundation,” and the State nonetheless announced that it was ready to proceed. Under these facts, the Court concluded, the State failed to show that it lacked notice. Accordingly, the trial court did not abuse its discretion in granting Botts’ motion in limine.

Demands for Speedy Trial; Statutory Requirements

Uribe v. State, A18A0582 (6/13/18)

Appellant appealed from the trial court’s order denying his motion for discharge and acquittal on statutory speedy trial grounds under OCGA § 17-7-170, contending that the order is erroneous and that the court erred in denying his motion without first holding an evidentiary hearing, in violation of his constitutional right to due process. The record showed that after the State filed an accusation, appellant’s counsel filed several pleadings, including a document entitled “Defendant’s Waiver of Formal Arraignment, Entry of ‘Not Guilty’ Plea and Demand For Jury Trial” (the “demand”). The text of that pleading is as follows: “NOW COMES Defendant and hereby waives formal arraignment, enters a plea of ‘not guilty’ to all pending charges, and demands a trial by jury pursuant to Art. I, Sec. I, Par. XI (a) and Art. I, Sec. I, Par. I of the Georgia Constitution, as well as the Sixth and Fourteenth Amendments of the United States Constitution, and under OCGA § 17-7-170. Having served the Prosecutor with a copy of this demand within the present term or the next term of this court, the Defendant prays that he/she be acquitted and discharged of any and all offenses charged/arising herein in the event a trial is not had within that time period.” Appellant thereafter filed a “Motion for Discharge and Acquittal Pursuant to OCGA § 17-7-170” (the “motion”), arguing that because he had not been tried in the same term in which he filed his demand or in the next succeeding term, he was entitled to discharge and acquittal. The trial court denied the motion without a hearing.

Appellant contended that he was entitled to discharge and acquittal. The Court disagreed. The pleading requirements set forth in OCGA § 17-7-70 (a) are clear and unambiguous. Appellant did not comply strictly with the pleading requirements in that statute because his pleading was not entitled “Demand for Speedy Trial” and was filed as part of another

pleading (a waiver of formal entry of not guilty plea, and demand for jury trial). Therefore, he did not properly file a statutory speedy trial demand pursuant to OCGA § 17-7-170 (a) and he was not entitled to discharge and acquittal pursuant to OCGA § 17-7-170 (b).

Appellant also contended that the trial court violated his due process rights by denying his motion without first conducting a hearing. Specifically, he argued that a hearing would have provided him the “opportunity to argue that [the demand] was still ‘legally sufficien[t]’ under current Georgia case law [or] that he had a ‘good faith argument’ for the modification or extension of the law so that [the demand] would or should be held as sufficient,” and the opportunity to demonstrate that the other requirements of OCGA § 17-7-170 were met and that he had not taken any affirmative action to waive his speedy trial demand. However, the Court found, appellant’s arguments regarding the two pleading requirements addressed in the trial court’s order were unavailing, and the demand was insufficient on its face. Consequently, his compliance with the remaining pleading requirements, and the issue of whether he waived his speedy trial demand, were irrelevant.

Moreover, the Court found, appellant moved for discharge and acquittal on the record and had the opportunity to make, in his pleadings, any argument to the trial court that he deemed necessary; the State filed a brief in opposition; appellant filed no response, and did not allege that he was not permitted to respond to the State’s brief; and he failed to show by the appellate record that he requested a hearing. In these circumstances, the Court concluded, appellant did not demonstrate that he was denied notice and a meaningful opportunity to be heard.

Sovereign Citizens

Brown v. State, A18A0064, A18A0065, A18A0066 (6/13/18)

Appellant was convicted of rape, incest, three counts of aggravated sodomy, and child molestation. In several enumerations alleging, among other things, bias, fraud, monopoly, and violations of due process and equal protection, appellant made arguments that amounted to a “sovereign citizen” claim that he is not subject to governmental jurisdiction. In support, appellant pointed, without meaningful analy-

sis, to various provision of the United States Constitution, the Constitution of the State of Georgia, the Declaration of Independence, as well as decisions of the appellate courts of our sister states, (occasionally) of this state, and of the federal courts — including *Dred Scott v. Sandford*, 60 U.S. 393, 15 L. Ed. 691 (1857).

The State contended that the claims of “sovereign citizens” that they are beyond the jurisdiction of the courts have no conceivable validity and should be rejected summarily, however presented. The Court agreed.

Citing to federal appellate court decisions, the Court stated that all defendants claiming to be “sovereign citizens” assert that the government is illegitimate and insist that they are not subject to its jurisdiction. The defense has no conceivable validity in American law. Courts have repeatedly rejected such theories of individual sovereignty, immunity from prosecution, and their ilk. Regardless of an individual’s claimed status of descent as a “sovereign citizen,” that person is not beyond the jurisdiction of the courts. These theories should be rejected summarily, however they are presented. Thus, the Court stated, “[t]hese arguments are entirely without merit, and we take this opportunity to adopt federal case law directing our trial courts to summarily reject them, however presented.”

Prosecutorial Misconduct; Conflicts of Interest

Ventura v. State, A18A0479 (6/14/18)

Appellant was convicted in Cobb County of two counts of child molestation and one count of enticing a child for indecent purposes. He contended that the prosecutor had a conflict of interest and should have been disqualified because her husband had previously represented him in an unrelated felony case in Cobb County. He argued that during his representation, the prosecutor’s husband learned confidential information about him which he “may have unwittingly shared” with the prosecutor. Further, according to appellant, the same rules of professional conduct which prohibit partner and associates at a disqualified attorney’s law firm from accepting employment, should be employed in this circumstance. The trial court found that nothing in the Georgia Rules of Professional Conduct prohibit a prosecutor from prosecuting the former client of his or her spouse. The

Court agreed.

The Court stated that there are two generally recognized grounds for disqualification of a prosecuting attorney. The first such ground is based on a conflict of interest, and the second ground has been described as “forensic misconduct.” For example, a conflict of interest has been held to arise where the prosecutor previously represented the defendant with respect to the offense charged, or consulted with the defendant in a professional capacity with regard thereto; such conflict also has been held to arise where the prosecutor acquired a personal interest or stake in the defendant’s conviction. In applying these standards, the reversal of a conviction due to such a conflict of interest requires more than a theoretical or speculative conflict. An actual conflict of interest must be involved.

The Court found that appellant’s assertion that the prosecutor’s marriage to an attorney that represented him in an unrelated plea three years earlier might result in the prosecutor gaining confidential information in the prosecution of an unrelated case, amounts to the type of status disqualification that the Georgia Supreme Court rejected in *Blumenfeld v. Borenstein*, 247 Ga. 406 (276 SE2d 607) (1981). There, the Court refused to assume a per se rule of disqualification on the sole ground of a marital relationship between the attorneys. The *Blumenfeld* Court held where, as is the case here, the appearance of impropriety is based not on conduct but on status alone, there is an insufficient ground for disqualification. While the marital relationship may be the most intimate relationship of a person’s life, it does not follow that professional people allow this intimacy to interfere with professional obligations. And here, the Court stated, it could not say that the trial court abused its discretion in denying appellant’s motion for new trial on this basis.

Confessions; Hope of Benefit

Meddings v. State, A18A0422 (6/14/18)

Appellant was convicted of multiple counts of child molestation. He contended that the trial court erred in denying his motion to suppress his confessions. Specifically, he argued that his confessions were involuntary and inadmissible because they were induced by an improper promise of benefit. The Court

disagreed.

The record showed that appellant was interviewed twice by Corporal Hilton. In the first interview, which was video-recorded, he denied any wrongdoing and agreed to go take a polygraph test. When he met with the polygraph examiner later that morning, however, appellant confessed to his crimes during the pre-test interview. After admitting his guilt to the polygraph examiner, appellant wrote out a statement summarizing his confession. The polygraph examiner then made a telephone call to Corporal Hilton and faxed appellant’s written confession to her. After leaving the polygraph examiner’s office, appellant met with Corporal Hilton again that same day for a second video-recorded interview, wherein he confirmed his written confession. Although Corporal Hilton was now aware of his confession, she did not place him under arrest at that time. Rather, she allowed appellant to leave to get his affairs in order before his arrest. Five days later, appellant turned himself in to Corporal Hilton to be placed under arrest. After being advised of his *Miranda* rights, appellant participated in a third video-recorded interview, wherein he gave Corporal Hilton a more detailed confession regarding his crimes.

Corporal Hilton testified that, on the morning of appellant’s scheduled polygraph examination, she did not pressure, threaten, or promise anything to him, nor did she give him any kind of inducement to persuade him to talk to the polygraph examiner. The Court found that the video-recording of this particular interview indicated that Corporal Hilton informed appellant that “today is the only day that I can help you.” However, to put her statement into context, Corporal Hilton further explained to appellant that she is part of a multi-disciplinary team which includes investigators, the district attorney, psychologists, child advocates, and others, and that the multi-disciplinary team meets monthly to discuss pending cases involving abused children. She also explained to appellant that the district attorney may ask her for a recommendation at one of these meetings, and she informed appellant that if he was open and honest with her, she could inform the district attorney of his cooperation and that she might not recommend the maximum punishment. Although Corporal Hilton indicated to appellant that his cooperation could result in probation as a possible outcome, she further

clarified that “I can’t really say as far as this case [is concerned],” but that they do ask team members for recommendations.

The Court concluded that under the totality of the circumstances, Corporal Hilton’s statements did not amount to the type of “hope of benefit” that would render his subsequent confessions involuntary. Merely telling a defendant that his or her cooperation will be made known to the prosecution does not constitute the hope of benefit sufficient to render a statement inadmissible. Further, merely presenting a defendant with the possibility of a better result in his case if he chooses to cooperate does not constitute an impermissible hope of benefit where the defendant is aware that any agreement with regard to possible punishment is ultimately up to others.

Nevertheless, appellant contended, the polygraph examiner induced him to make his initial confessions by telling him that he would get probation if he confessed to his crimes. The Court again disagreed. The Court found that the polygraph examiner was an independent contractor who had been hired by the Sheriff’s Office to administer appellant’s polygraph examination, and testified at the hearing on the motion to suppress that he did not make any promises to appellant or suggest to him that he would receive any particular benefit by confessing. The examiner testified that he merely informed appellant that he would make appellant’s cooperation known to Corporal Hilton. Accordingly, the Court concluded, the trial court did not err in denying appellant’s motion to suppress.

Search & Seizure; Controlled Buys

Woods v. State, A18A0667 (6/15/18)

Appellant was convicted of possession of cocaine with intent to distribute, possession of less than an ounce of marijuana, and possession of drug related objects. He argued that the trial court erred by denying his motion to suppress evidence seized pursuant to a search warrant because the magistrate who issued the warrant was not presented with information establishing a confidential informant’s basis of knowledge and reliability. The Court disagreed.

The affidavit stated as follows: “In the past seventy two hours a confidential and reliable informant ... contacted your affiant. In the

past 72 hours CI# 59 did conduct a controlled purchase of crack cocaine utilizing ... Sheriff's Office funds inside the residence [to be searched]. CI# 59 advised that the subject identified as [appellant] often kept an amount of crack cocaine in the residence that was kept for sale.

Independent investigation by your affiant revealed the following. Physical observation of the premises, conducted from a public place revealed the premises to match the above locations. CI# 59 is reliable because CI# 59 has purchased an amount of narcotics for your affiant."

The officer testified that he provided the following additional information under oath to the magistrate: the confidential informant was searched before walking to appellant's residence to make the buy with money supplied by the police; an officer or officers watched the confidential informant "go into the residence and come back out"; an officer or officers "didn't directly follow right behind them, but we kept a loose tail, making sure not to lose sight and watched them go in"; an officer or officers saw the confidential informant come out "[a]nd after he came out, they provided us with a phone call and advised that they had just come out and they were on their way back to the location where we previously had met"; the confidential informant had a substance believed to be an illegal drug in his possession after he left appellant's residence; the officer had used the confidential informant on "two previous occasions, two previous cases, multiple times"; and the confidential informant was "working off a drug charge" by helping the police.

The Court stated that a controlled buy strongly corroborates the reliability of the informant and shows a fair probability that the contraband would be found. Indeed, even if the informant had no known credibility, the controlled buy conducted under the observation of the officer alone, would have been sufficient to establish probable cause. Thus, based upon this evidence, the magistrate had sufficient information to find that probable cause existed for the issuance of the search warrant.

But, appellant contended, "it *appears* the CI was not watched from the time he came out of the residence until rejoining police with the drugs." (Emphasis supplied.) The Court noted that the testimony relied upon by appellant to support this assertion related

to communication from the informant after the controlled buy. But, the Court found, this testimony did not demand a conclusion that the informant was out of sight after leaving appellant's residence, and other testimony by the officer shows that law enforcement watched the informant "go into the residence and come back out." To establish probable cause for the issuance of a search warrant, the officers were not required to see drugs at the residence. Probable cause does not demand the certainty we associate with formal trials. And even doubtful cases should be resolved in favor of upholding a magistrate's determination that a warrant is proper. Accordingly, the Court affirmed the trial court's denial of appellant's motion to suppress.

First Offenders; Immigration and Nationality Act

Lam v. State, A17A1546 (6/18/18)

After agreeing to accept a negotiated guilty plea in 2006 to the charges of aggravated assault, theft by receiving stolen property, and possession of tools for the commission of a crime, appellant was sentenced as a first offender to serve 90-120 days in the boot camp program, followed by five years of probation. Appellant successfully fulfilled the terms of his sentence and probation, and the trial court thereafter issued an order discharging him without an adjudication of guilt and exonerating him of any criminal purpose in accordance with the provisions of the First Offender Act. Nevertheless, despite appellant's discharge and exoneration under Georgia law, the federal government issued a Notice declaring that he was subject to removal from the United States on the ground that he had been "convicted" of aggravated assault and theft by receiving stolen property in violation of the federal Immigration and Nationality Act (INA). Appellant filed a motion in the superior court seeking to vacate his plea agreement and sentence, contending that he relied to his detriment on the agreement and did not achieve the benefit of the bargain in light of the federal government's removal order. The trial court denied the motion.

Appellant argued that the trial court erred in holding that he did not rely to his detriment on the first offender terms of his sentence. Specifically, the trial court held that although

it granted appellant's request to sentence him as a first offender, first offender treatment was never a part of the negotiated plea itself or promised by the State in return for appellant's plea of guilty. The Court found that a review of the plea hearing transcript showed that first offender treatment was *not* included in the State's initial recitation of the terms of the negotiated plea; indeed, the issue was not raised until the trial court inquired about it after reviewing with appellant the waiver of his constitutional rights. Therefore, the record supported the trial court's finding that appellant did not rely to his detriment on being sentenced under the First Offender Act when he agreed to plead guilty.

Appellant also argued that the trial court erred in concluding that he received the benefit of his bargain under the plea agreement. Specifically, because his plea resulted in a conviction under the INA as that term is defined by the federal statute, the trial court was unable to exonerate him of guilt and discharge him as agreed. The Court disagreed. The First Offender Act is a function of Georgia law. In accordance with the provisions of that Act, the trial court issued an order declaring appellant discharged under Georgia law without an adjudication of guilt or a criminal conviction, and exonerated him of any criminal purpose. The trial court further directed that appellant's discharged plea shall not affect his civil rights or liberties or disqualify him from any application for employment or appointment to office. Thus, the trial court fully complied with the requirements of the First Offender Act. That Congress elected to adopt such a broad definition of "conviction" in the INA is an issue of public policy that falls squarely within its domain. It does nothing to render void appellant's guilty plea under Georgia's First Offender Act. Accordingly, the Court affirmed the denial of appellant's motion to vacate his plea agreement and sentence.