Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
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Issue 41-18

THIS WEEK:

- **DUI; Implied Consent Notices**
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- **Right to Counsel; Retained Counsel**
- **Records Restriction; Clerks' Records**

DUI; Implied Consent Notices

Gelzer v. State, A18A1067 (8/29/18)

Appellant was charged with DUI while operating a commercial vehicle and driving with a suspended license. The evidence showed that appellant indicated that he had a commercial driver's license ("CDL"). However, when the officer ran appellant's driver's license through dispatch, it was revealed that appellant did not have a CDL and that his Florida driver's license was suspended. The officer read the implied-consent notices to be given to drivers age 21 and over, rather than the implied consent notice for commercial motor vehicle suspects. The trial court denied appellant's motion to suppress, finding that the difference between the implied consent warning for suspects age 21 or over and the implied consent warning for commercial vehicle drivers was "within the range of substantial compliance and did not render the warning insufficiently accurate." The Court disagreed.

The Court noted that the notice for drivers 21 years or over provides, in relevant part, that a suspect's Georgia driver's license or privilege to drive on the highways of Georgia may be suspended for a minimum of one year if the suspect either refuses chemical testing or the testing reports a blood alcohol content of 0.08 grams or more. OCGA § 40-5-67.1 (b) (2). The notice for commercial vehicle drivers provides, in relevant part, that a suspect's right to operate a commercial vehicle will be suspended for a minimum of one year if the suspect either refuses chemical testing or the testing reports a blood alcohol content of 0.04 grams or more. It was essentially stipulated by the parties in their briefs that the arresting officer should have provided appellant with the implied consent notice for commercial vehicle driver.

Thus, the Court found, the arresting officer read the wrong implied consent notice and *overstated* the blood alcohol concentration that may result in the revocation of appellant's license. Citing *Kitchens v. State*, 258 Ga. App. 411, 413 (1) (2002), the Court found that the arresting officer's overstatement of the blood alcohol concentration affects the substance of the implied consent notice because a suspect might be led to submit to testing if the legal limit were overstated. Accordingly, the Court concluded that the trial court erred in holding that the difference between the 0.08 legal limit applicable to suspects age 21 and over and the 0.04 legal limit applicable to commercial vehicle drivers is not a substantial change.

Next, the Court addressed the trial court's order which, in the alternative, held that under *Birchfield v. North Dakota*, __ U. S. __ 136 SCt 2160, 2177-2184 (IV) (B) - (C) (195 LEd2d 560) (2016), the breath test results were admissible as evidence resulting from a search incident to appellant's arrest, regardless of whether he validly consented to the breath

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test. However, the Court noted, at the time the trial court issued its order (and at the time appellant filed his notice of appeal in this case), the Supreme Court of Georgia had not yet issued its decision in *Olevik v. State*, 302 Ga. 228, 234 (2) (b) (2017). Therefore, the Court vacated and remanded the case in light of the *Olevik* decision.

Merger; Mutually Exclusive Convictions

Bell v. State, A18A1046 (8/30/18)

Appellant pled guilty to two counts of armed robbery and two counts of aggravated assault. The proffered evidence showed that two women were leaving an apartment complex in their vehicle in Gwinnett County when a white Honda Civic blocked their path. Two armed men with masked faces got out of the Civic and forced the women out of their car. The women left the car keys and their cell phones in the vehicle. The men then took their vehicle, while a third man drove away in the Civic. Police later found the vehicle parked near another stolen vehicle that they had tracked to a mall parking lot in Cobb County. Appellant was then found in possession of the keys to one of the stolen cars.

The State conceded that appellant's convictions for aggravated assault should have merged with his armed robbery convictions. Appellant was charged with armed robbery for taking the victims' cell phones through the use of a handgun and aggravated assault for pointing a handgun at the victims with an intent to rob them. Because the "assault" element of aggravated assault is contained within the "use of an offensive weapon" element of armed robbery and both crimes share the "intent to rob" element, there is no element of aggravated assault with intent to rob that is not contained in armed robbery. Thus, the Court vacated his sentences and remanded for resentencing.

Appellant also argued that the trial court erred in denying his plea in bar and motion for dismissal of his indictment. Specifically, he argued that because he pleaded guilty in Cobb County to theft by receiving and retaining a stolen vehicle, he could not also be convicted of the armed robbery of that vehicle, as these convictions would be inconsistent. But here, the Court found, appellant was indicted for armed robbery based on his intent to take the cell phones of the victims, not their vehicle. Thus, these charges involved different elements — that is, the theft of different property. It was not logically or legally impossible to convict appellant of stealing the cell phones and receiving the stolen car. Therefore, his armed robbery convictions were not mutually exclusive with his theft by receiving conviction. Accordingly, the Court affirmed appellant's convictions.

Right to Counsel; Retained Counsel

Lynch v. State, A18A1013 (9/6/18)

Appellant pled guilty to three counts of homicide by vehicle in the first degree, one count of hit and run, and one count of DUI (less safe). He then unsuccessfully moved to withdraw his plea asserting that he was denied his right to counsel. The evidence, briefly stated, showed that at a pre-trial hearing, appellant told the court that he wished to fire his retained counsel. Counsel stated that he wished to remain on the case and detailed in open court much of the work that he put in on appellant's behalf and that he thought appellant should accept the negotiated plea offer. The trial court indicated that since appellant's trial counsel was prepared for trial the following week, he was not going to remove appellant's counsel. The court then let appellant and his counsel talk with the understanding that appellant could either accept the plea

(which the court stated was "more than reasonable") right then or go to trial the following week with his retained counsel. Appellant, after conferring with his counsel, agreed to accept the negotiated plea.

Appellant contended that the trial court violated his Sixth Amendment right to counsel when it denied his request to terminate his counsel and thus erred when it denied his motion to withdraw his guilty plea. The Court agreed. The Court stated that under the Sixth Amendment, a defendant who does not require appointed counsel enjoys both the right to effective assistance of counsel and the right to choose who will represent him. The right to choose counsel is incomplete if it does not include the right to discharge counsel that one no longer chooses. A defendant exercises the right to counsel of choice when he moves to dismiss retained counsel, regardless of the type of counsel he wishes to engage afterward.

However, the Court stated, a defendant's right to counsel may not be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same. A trial court must balance the defendant's constitutional right to the counsel of his choosing against the need to maintain the highest standards of professional responsibility, the public's confidence in the integrity of the judicial process and the orderly administration of justice.

The Court found that the trial court did not engage in the necessary balancing test. The standard the trial court used to determine if appellant should be allowed to terminate his retained trial counsel was whether the trial court felt that trial counsel was providing effective representation. But, the Court stated, this is the correct inquiry when confronted with a situation where a defendant wishes to terminate court-appointed counsel, but not when a defendant wishes to terminate *hired* counsel. Consequently, because the trial counsel applied the wrong standard in denying appellant's motion to fire counsel, failed to engage in the required balancing test, and gave appellant no alternative to proceeding with retained counsel whom he wished to fire, the Court concluded that the trial court violated appellant's Sixth Amendment right to counsel of his choosing and appellant should have been allowed to withdraw his guilty plea to correct a manifest injustice.

In so holding, the Court acknowledged that the trial court's understanding of the case was probably due to trial counsel's detailed recitation in open court of the "damning" case against appellant, which included arguably privileged information and attorney work product. And, without commenting on the propriety of the trial court's statement regarding the plea recommendation, the Court noted that trial judges should not participate in plea discussions.

Records Restriction; Clerks' Records

Doe v. State, A17A0115 (9/6/18)

In 2003, appellant, who was 20 years old, pled guilty to possession of marijuana and was sentenced as a first offender under OCGA § 16-13-2 (a) (2004). In January 2008, after he satisfied the terms of his probation, the trial court discharged him without conviction and his sentence was terminated. In May 2008, he successfully sought the expungement of his records under former OCGA § 35-3-37 (d). Thereafter, after the General Assembly amended OCGA § 35-3-37 (2013), he sought to have the records of his arrest by the clerk of the court restricted and sealed pursuant to OCGA § 35-3-37 (m). At a hearing, appellant presented evidence in support of his petition whereas the

State presented no evidence against the petition. Nevertheless, the court denied the petition on policy grounds of favoring "transparency" but issued an order finding in terms of the statutory balancing test.

Appellant contended that the trial court abused its discretion by refusing to apply the statutory balancing test due to its stated disagreement with the law and the policy behind it. The Court agreed. OCGA § 35-3-37 (m) provides that, upon petition by a person whose criminal history has been restricted, the trial court shall order all criminal history record information in the custody of the clerk of court to be sealed and unavailable to the public if the court finds by a preponderance of the evidence that "the harm otherwise resulting to the privacy of the [petitioner] clearly outweighs the public interest in the criminal history record information being publicly available." The Court found that the competing interests to be considered in the context of sealing records under current OCGA § 35-3-37 (m) are the same as the interests that were to be considered in the context of expunging criminal records under former OCGA § 35-3-37 (d), but the new provisions are even more protective of arrestees' privacy interests. Thus, the effect of the 2013 amendments to OCGA § 35-3-37 is to *expand* the right of individuals to restrict access to their criminal history record information and, concomitantly, to *limit* the right of the general public to gain access to such information.

The Court stated that generally, there is a presumption in favor of the regularity of all proceedings in a court of competent jurisdiction, and a trial court's written order prevails over any oral conclusions made by a judge during a hearing. Here, however, while the trial court's written order expressed its finding in the terms of the applicable statutory balancing test, the views expressed by the trial judge from the bench, clearly showed that the trial court was disinclined to weigh the public's interest in access to appellant's court record, in particular against the harm to his privacy, because the trial judge favored the transparency of criminal records in general, while acknowledging that the court's views were "not the law." And the Court noted, the State offered no evidence in opposition to appellant's petition and did not even present argument regarding the public's interest in access to appellant's criminal history record in particular, but simply argued in favor of transparency in general and against the "slippery slope" of complying with OCGA § 35-3-37 (m) (2013). Thus, although the appealed order parroted the statutory standard, the Court concluded that under the circumstances the record rebutted any presumption of regularity and consequently, because the trial court failed to exercise its discretion as required under the statute, the appealed order could not stand.

Appellant also contended that the trial court erred in denying his petition to seal his public court record because the undisputed evidence showed that the harm to him clearly outweighs the public's interest in access to that information. The Court noted that ordinarily it is a court for the correction of legal errors and not to make such determinations in the first place. In this case, however, State made no effort to adduce evidence and argument in support of a finding that the public interest in appellant's criminal history record information outweighs the harm that public availability of his records is causing him, despite having multiple opportunities to do so. Because the scales are therefore necessarily tipped in favor of appellant's affirmative showing, the Court also concluded that further consideration on the merits by the trial court is not required. It therefore directed that upon remittitur of this case to the trial court, the appellant's petition is to be granted and an order entered that the record concerning appellant's 2003 arrest and all related proceedings be sealed as provided in OCGA § 35-3-37 (m).