Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 18, 2013

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Todd Ashley
Deputy Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Resource Prosecutor

Lalaine Briones
Domestic Violence, Sexual Assault, and Crimes Against Children Resource Prosecutor

Todd Hayes
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Clara Bucci
State Prosecutor

Fay Eshleman
State Prosecutor

THIS WEEK:

Plea Bargaining; Withdrawal of Plea

Brown v. State, A13A1440 (10/9/13)

Appellant appealed from the denial of his motion to withdraw his guilty plea, contending that the trial court erred by rejecting the negotiated plea agreement without first informing him that the court intended to do so. The Court agreed. The record showed that appellant was indicted on two counts of armed robbery, two counts of possession of a firearm during the commission of a crime, and one count of possession of a firearm by a convicted felon. Pursuant to a negotiated plea agreement, appellant believed he was pleading guilty to count one armed robbery, pleading guilty on count three for the lesser included offense of robbery by intimidation and pleading guilty to count five which was possession of a firearm by a convicted felon. According to the plea form, which was signed by the State and the defendant, any sentence appellant was to receive was to run concurrently. However, when the case came before the court, the judge rejected the plea agreement and sentenced appellant to consecutive sentences. Appellant immediately requested to withdraw his plea, which the court denied. Appellant then filed a written motion to withdraw his plea, which was also denied.

The Court stated that if the trial court intends to reject a plea agreement, the trial court shall, on the record, inform the defendant personally that (1) the trial court is not bound by any plea agreement, (2) the trial court intends to reject the plea agreement presently before it, (3) the disposition of the present case may be less favorable to the defendant than that contemplated by the plea agreement, and (4) that the defendant may then withdraw his or her guilty plea as a matter of right. These steps to be taken in rejecting a plea agreement are not optional; failure to so inform a defendant mandates a reversal of the conviction. Here, the Court found, a plea agreement was negotiated and reached, and that signed agreement included a recommendation of concurrent sentencing. If the trial court intended to reject the terms of the plea agreement, it was required to so inform appellant and to permit him to withdraw his guilty plea. Under the circumstances, the judgment was reversed.

Statements; Voluntariness

Sparrow v. State, A13A1583 (10/8/13)

Appellant was convicted of burglary by breaking into his neighbor's house and taking a computer monitor. He contended that the trial court erred in admitting his confession because it was involuntary. The Court stated that a statement given by an accused to law

enforcement is admissible against him only if the statement was voluntary, and in Georgia, that means that the statement must not have been induced by "hope of benefit." A "hope of benefit" arises from promises related to reduced criminal punishment—a shorter sentence, lesser charges, or no charges at all. A promise not relating to charges or sentences, including a promise regarding release after questioning, constitutes only a collateral benefit, and even if it induces a confession, it does not require the automatic exclusion of that evidence. When a court considers whether a statement was voluntary, it must look to the totality of the circumstances, and at trial, the State bears the burden of proving by a preponderance of the evidence that a statement was, in fact, voluntary.

The record showed that appellant voluntarily accompanied the detective to the police station. Appellant was not handcuffed, placed in an unlocked room, and not placed under arrest. During the course of the interview, appellant admitted that he smoked a "rock" and the detective told him that he would keep this secret, that he was not "parole" and would not tell appellant's sister about it. At one point, the detective stated to appellant, "Like I said, you're not under arrest. As soon as we get done here, bro, I will put you right back in that car[,] and I will take you right back over to [your house]. Ok? I mean that's just as clear and honest as I can be." Appellant eventually confessed to taking the monitor. Thereafter, the detective notified parole and the parole officer asked the detective to place appellant under arrest. The detective told appellant that he was not under arrest for the burglary; the detective would talk to the neighbor before deciding whether to charge him with burglary.

Appellant argued that the detective's promises of secrecy and that he would take appellant home after the interview if appellant was honest with him was indicative of the lack of voluntariness of his statements. But, the Court found, it was clear that the detective did not promise anything with respect to prosecution for the burglary. The detective had told appellant that he still needed to speak with the victim of the crime to determine what would happen next. Thus, the detective's promise was merely that he would take him home after questioning and not that appellant would be free from future charges. A promise to take the suspect home after questioning—not relating to ultimate charges or sentences for the suspected crime—is merely a collateral benefit that does not require automatic exclusion of the confession. Further, former O.C.G.A. § 24-3-51 explicitly stated that a promise of secrecy shall not require exclusion of the statement, so the detective's promise not to tell appellant's sister or his parole officer about the drug use did not render appellant's statement involuntary. Based on the totality of the circumstances, the Court held, the record supported the trial court's determination that appellant's statements were not subject to exclusion under O.C.G.A. § 23-5-50.

Indictments; Special Demurrers

State v. Cohron, A13A1624 (10/4/13)

Cohron was charged with three counts of obscene internet contact with a child pursuant to O.C.G.A. § 16-12-100.2(e)(1). The indictment charged that Cohron unlawfully and intentionally had "contact with someone he believed to be a child under the age of sixteen (16) years, to wit: a person identified as a fourteen (14) year old female named D'anea with a screen name of absolutelyordinary14, via a computer Internet service." The trial court granted Cohron's special demurrer because the State failed to allege the name of the undercover officer, citing *State v. Grube*, 315 Ga.App. 885 (2012).

The State appealed and the Court reversed. The Court noted *Grube* was reversed by the Supreme Court. *State* v. Grube, 293 Ga. 257 (2013). Relying on the Supreme Court's decision in *Grube*, the Court held that a requirement that the officer's true identity be included in the indictment would do nothing to further the goal of apprising the defendant of what he must be prepared to meet at trial. Rather, meaningful notice of the specific conduct forming the basis of the criminal charges in such cases is provided if the victim is identified by the alias or name by which he or she is known to the defendant. Thus, the indictment in this case informed Cohron of the essential elements of the charges against him, identified the victim by the name known to him, and informed him that D'anea is someone he "believed to be a 14-year-old girl." That the victim may also have been a fictitious persona created by an undercover officer is a fact to be proved at trial, and its absence from the indictment is not a material defect. Moreover, the Court held, the indictment also protects Cohron from double jeopardy in a possible future proceeding. Here, the indictment informed Cohron of the dates on which the alleged conduct took place and informed him with some precision of the content of the alleged communications. Therefore, it cannot reasonably be argued that he is not protected from the dangers of double jeopardy.

Statements; Hope of Benefit

State v. Munoz, A13A1631 (10/2/13)

Munoz was charged with statutory rape, child molestation, and contributing to the delinquency of a minor. The evidence showed that Munoz had sex with P. G., a 15 year old girl. Munoz moved to suppress his statement to police. After a hearing, the trial court identified both a threat and a hope of benefit that it concluded wrongfully induced Munoz's statement and rendered it involuntary. Specifically, the trial court inferred from the colloquy between Munoz and the lead detective that Munoz was implicitly threatened that his failure to admit to sexual intercourse with P. G. would result in him being charged with forcible rape. And the trial court likewise construed the exchange as a promise that if he admitted to having sexual intercourse with P. G., he would not be charged with forcible rape, that he would not be thrown in jail[,] and that he would not have to register as a sex offender. The trial court therefore granted the motion and the State appealed.

The Court stated that only voluntary incriminating statements are admissible against the accused at trial. A statement is voluntary only if it was not actually induced by the "remotest fear of injury" or by the "slightest hope of benefit." Generally, "fear of injury" in this context refers to physical or mental torture or coercion by threats. And the "slightest hope of benefit" focuses on promises related to reduced criminal punishment—a shorter sentence, lesser charges, or no charges at all. Significantly, however, the mere fact that an officer promises something to a person suspected of a crime in exchange for that person's speaking about the crime does not automatically render inadmissible any statement as a result of that promise. Rather,

the key inquiry is whether the alleged promise actually induced the statement that the defendant seeks to suppress. In other words, in order for a promise to render a confession involuntary, there must also be a causal connection between the police conduct and the confession.

With respect to the implicit threat that Munoz was potentially facing a charge of forcible rape, the Court found that the detective expressed nothing more than a truism. The crime was originally reported as such by P. G.'s mother, and it was apparent that throughout the detective's investigation up to and including her interview with Munoz, the detective was attempting to determine whether the evidence gathered supported a claim of forcible, as opposed to statutory, rape. Moreover, to the extent that the detective encouraged Munoz to present his version of events so as to dispel allegations that he forcibly raped P. G., the questioning was not improper. It is well established that admonitions to tell the truth will not invalidate a confession, nor will assurances that the investigator will make a suspect's cooperation known to the prosecution and it may help him or her.

The Court further disagreed with the conclusion that Munoz's statement was actually induced by a hope of benefit. Accepting the inferences drawn by the trial court that the detective promised Munoz "that he would not be charged with forcible rape, that he would not be thrown in jail and that he would not have to register as a sex offender" if he confessed to having sex with P. G., the recorded interview showed unequivocally that Munoz's statement, nevertheless, was not actually induced by any such belief. In fact, the Court noted, immediately before his admission, Munoz expressly acknowledged that his statement would result in him being sent to "jail for a long time [and being] registered as a rapist," and the detective conceded, "[i]f it gets to that, yes." And immediately after the confession, the detective informed Munoz that she could make no promises with regard to the outcome of the case, and Munoz responded "I know" before expressing that he knew "something [was] gonna happen." Thus, even if the statements made by the detective constituted an improper hope of benefit, they nevertheless, when viewed in the totality of the circumstances, did not actually induce Munoz's confession. Therefore, the trial court erred in suppressing Munoz's statement.

Judicial Comment; Cross-Appeals

State v. Nickerson, A13A1257 (10/9/13)

Appellant was convicted of voluntary manslaughter and possession of a firearm during the commission of a crime. The evidence showed that Nickerson got into an argument with the victim on the street. When the victim turned to walk away, Nickerson shot him in the back. Nickerson took the stand on his own behalf and testified that the victim tried to shoot him first, but the victim's gun jammed and that Nickerson, who had turned and started to walk away, shot the victim while Nickerson's back was turned to the victim. The trial court found that Nickerson was entitled to a new trial under O.C.G.A. § 17-8-57 because the judge asked Nickerson to repeat a physical demonstration showing how he had fired the gun and when he asked Nickerson how many times he shot the gun. The State appealed.

The Court stated that under O.C.G.A. § 17-8-57, it is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused. A violation of O.C.G.A. § 17-8-57 will always constitute "plain error," meaning that the failure to object at trial will not waive the issue on appeal. The issue is simply whether there was such a violation. If so, it is well established that the statute is mandatory and that a violation of O.C.G.A. § 17-8-57 requires a new trial. However, it is equally well settled that a trial court may propound a clarifying question in order to develop the truth of a case without violating O.C.G.A. § 17-8-57. The extent of such questioning is a matter of the trial court's discretion, as long as the questioning does not intimate an opinion as to what has or has not been proved or as to the guilt of the accused. Viewing the judge's questions in context, the Court concluded that they were interposed to clarify Nickerson's testimony and to develop the truth in the case and that, as a result, the superior court erred in finding that the questions constituted a violation of O.C.G.A. § 17-8-57. Accordingly, Nickerson was not entitled to a new trial on that basis.

Nevertheless, Nickerson also argued that even if these two questions did not violate O.C.G.A. § 17-8-57, other questions and comments by the presiding judge during trial constituted such violations and, as a result, he was entitled to a new trial on that alternative basis. But, the Court found, the record showed that, in its order granting a new trial, the superior court specifically ruled that, apart from the questions at issue "the other instances referred to by defense counsel in the [new trial] hearing do not merit reversal of the conviction under O.C.G.A. § 17-8-57[,]" and that all other grounds raised by Nickerson in his motion for new trial were denied or deemed abandoned. Consequently, in order to secure appellate review of the superior court's adverse rulings on the other alleged violations of O.C.G.A. § 17-8-57, Nickerson was required to file either a cross-appeal to this appeal or a separate notice of appeal. Because Nickerson failed to file a cross-appeal or an independent appeal, the Court held that it lacked jurisdiction to consider his allegations of error arising from the superior court's adverse rulings.

Jury Charges; Defense of Habitation

State v. Fleming, A13A1203 (10/2/13)

Appellant was convicted of battery and criminal damage to property in the second degree. The evidence showed that the victim lived across the street from appellant. The victim worked late and slept in the mornings. One morning, the victim awoke to loud music coming from appellant's vehicle. The victim moved his truck in front of appellant's driveway, blocking appellant's truck. Appellant became enraged and threw a brick at the truck. A fight then ensued and the victim was punched in the face by appellant.

Appellant contended that the trial court erred by failing to charge the jury on justification as a defense to the offense of criminal damage to property in the second degree because it was his sole defense. The Court noted that although appellant referred to a "justification defense" in his brief, he cited to O.C.G.A. § 16-3-23, which is the statute that sets out the defense of habitation. While appellant made a request for a charge on justification, he did not specifically request a charge on the defense of habitation

and did not object to the court's instruction that the defense of justification had no relevance to the issue of criminal damage to property. Consequently, the Court reviewed whether the trial court's failure to include a specific instruction on defense of habitation constituted plain error.

The Court stated that although appellant argued that the trial court was required to charge on his sole defense, even without a request to charge, this requirement only applies where there is slight evidence supporting the theory of the charge. O.C.G.A. § 16-3-23 provides that "[a] person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to prevent or terminate such other's unlawful entry into or attack upon a habitation[.]" The clear language of the statute states that the authorized use of force is to be directed against another person, not against property. Since there was no authority that the defense of habitation applies to the use of force against another person's property, appellant could not show that the trial court's failure to include an instruction on defense of habitation was a clear and obvious error.

But, the Court added, even if the habitation defense permitted the use of force against another person's property, as opposed to the person, the charge was nevertheless unwarranted. Critical to the application of the defense of habitation is the moment in time at which the defendant resorts to force and the act being performed by the victim at that moment. Where there is no evidence that the victim was attempting to enter or attack the habitation at the time he was injured by the defendant, the defense of habitation is not available. Generally the use of force in defense of habitation is justified only where there is an unlawful entry. Here, however, at the time appellant threw the brick at the victim's truck, the victim was moving from his trailer towards his truck that was parked in front of appellant's driveway in an attempt to move it. There was no evidence that the victim was attempting to enter or attack appellant's habitation at the time appellant threw a brick at the victim's truck. Indeed, the Court noted, appellant testified at trial that the reason he threw the brick was to get the victim to move his truck. Therefore, the Court held, the charge on defense of habitation was not warranted. Accordingly, the trial court did not err, much less plainly err, in failing to charge on the defense of habitation.

Identification; Arraignment

Singleton v. State, A13A1221 (10/7/13)

Appellant and a codefendant were convicted of armed robbery and possession of a firearm during the commission of a crime. The evidence showed that appellants robbed the victim, a construction supervisor, in the on-site office trailer of the construction company. Appellant argued that the pretrial showup and trial identification of him should have been suppressed.

The Court stated that although a one-on-one showup is inherently suggestive, identification testimony produced from the showup is not necessarily inadmissible. A court must apply a two-part test to determine whether the showup was impermissibly suggestive, and, if the showup was impermissibly suggestive, the court then must consider the totality of the circumstances to determine whether a very substantial likelihood existed of irreparable misidentification. If the answer to the first question is negative, the court need not consider the second question; conversely, the court may immediately proceed to the second question and, if the answer thereto is negative, the court may entirely pretermit the first question. Thus, assuming without deciding that the circumstances surrounding appellant's identification rendered the showup impermissibly suggestive, the evidence would be inadmissible only if under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification.

Here, the Court found, the evidence showed that, when the perpetrators entered the office trailer that morning, their faces were not covered, and the victim noted their facial features, discerning each intruder's gender, race, and age. The two intruders were clad in tee-shirts and pants and stood close enough to the victim to put a gun to his head and remove property from his pockets; he noted each man's height and build. When the robbers exited the office trailer, the victim continued to observe them as they ran away. The victim rejected initial individuals presented to him for possible identification, based on their facial features, despite clothing similarities. And the victim's identification of appellant and his codefendant took place within two hours of the armed robbery. Although appellant pointed to discrepancies between the robbers' clothing and his clothing at the time he was apprehended by police, the Court stated that the existence of some inconsistencies did not render the victim's testimony inadmissible, but rather presented a matter for the jury. Under the totality of circumstances presented, the trial court was authorized to find that the showup procedure employed by police did not give rise to a substantial likelihood of irreparable misidentification. The trial court, therefore, did not err in concluding that the victim's identifications were sufficiently reliable to be admitted at trial.

Appellant also contended that the trial court erred by impaneling and swearing a jury to try him prior to arraignment. Appellant argued that the record contained no plea of not guilty and no waiver of arraignment, and therefore the issue of his guilt was never joined and it was reversible error to place him in jeopardy and try him before a jury. The Court disagreed. It has long been held that a defendant who has been indicted is presumed to waive formal arraignment by his silent acquiescence, if, before the case is submitted to a jury on its merits, he does not bring to the attention of the court that he has not been formally called upon to enter a plea to the indictment. Appellant made no assertion that he objected to the alleged lack of an arraignment either before the case was submitted to the jury or before the guilty verdicts were returned; and the record revealed no such objection. Furthermore, appellant made no claim that he was unaware of the charges against him. Accordingly, the Court held, this contention provided appellant no relief from his judgment of conviction.

Search & Seizure; Facebook

In the Interest of L. P, A13A1063 (10/2/13)

Appellant was adjudicated a delinquent for committing the offenses of participation in criminal street gang activity, possession of a firearm by a person under the age of 18, theft by receiving stolen property, and carrying a weapon without a license. He argued that the trial court erred in denying his motion to suppress. The Court disagreed. The evidence showed that a lieutenant, who conducted the stop, had received information from an

eyewitness that there had been a shoot-out at a local club involving Eastside and Southside gangs, the shooter left in a silver Honda Accord, and the shooter could be found in the area near Pamela Drive and George Circle. About an hour after the shooting, while officers were conducting a stop of the suspected shooter near Pamela Drive in the south part of the city, the lieutenant observed a Chevy Malibu driving slowly down the road. The lieutenant turned his light into the car and recognized appellant and the other occupants of the Malibu as being "Eastside guys" based on prior contacts with them. More importantly, the lieutenant saw the suspected victim of the prior shooting in the Chevy Malibu. The lieutenant also testified that in his experience, right after a shooting, individuals would load up in a car and go searching for the person who shot at them. Under the totality of these circumstances, the Court found, the lieutenant had a particularized and objective basis for suspecting that appellant and the other occupants of the Chevy Malibu were or were about to be involved in criminal activity. Therefore, the trial court did not err in denying appellant's motion to suppress.

Appellant also contended that the trial court erred in admitting printouts from a Facebook page belonging to "Alley for Real," because the State failed to provide a proper foundation showing that the Facebook page belonged to appellant. The Court stated that admissibility of evidence is a matter which rests largely within the discretion of the trial court. Any evidence is relevant which logically tends to prove or disprove any material fact which is at issue in the case, and every act or circumstance serving to elucidate or throw light upon a material issue or issues is relevant. Georgia law favors the admission of any relevant evidence, no matter how slight its probative value, and even evidence of questionable or doubtful relevancy or competency should be admitted and its weight left to the jurors.

Documents from electronic sources, such as the printouts from a website like Facebook, are subject to the same rules of authentication as other documents and may be authenticated through circumstantial evidence. As a general rule, a writing will not be admitted into evidence unless the offering party tenders proof of the authenticity or genuineness of the writing. There is no presumption of authenticity, and the burden of proof rests upon the proffering party to establish a prima facie case of genuineness. Printouts of web pages must first be authenticated as accurately reflecting the content of the page and the image of the page on the computer at which the printout was made before they can be introduced into evidence. Then, to be relevant and material to the case at hand, the printouts often will need to be further authenticated as having been posted by a particular source.

Here, the Court found, prior to the entry of the Facebook profile page into evidence, a detective testified that he was familiar with appellant's street name, "Alley for Real." The detective accessed Facebook on his computer, conducted a search for "Alley For Real," and printed the documents from his printer while observing the Facebook profile page for "Alley For Real." The detective testified that the printouts fairly and accurately depicted what he observed on his computer screen. The detective, who had previously interviewed appellant, identified appellant in pictures posted on the Facebook page, and testified that the biographical information listed on Facebook, such as day and month of birth, matched appellant's. Based on this evidence, the Court concluded, the trial court was authorized to find that the State sufficiently authenticated the printouts as accurately reflecting the content of the Facebook page, and that the material was posted by appellant. Moreover, whether the subject Facebook page actually belonged to appellant was an issue affecting the weight of the evidence, not its admissibility, and was ultimately an issue for the jury to decide.

Discovery; Alibi

Rembert v. State, A13A1513 (10/7/13)

Appellant was convicted of armed robbery. He argued that the trial court erred in denying his motion for a continuance and instead, excluding his alibi evidence. The record showed that prior to trial, the State served a discovery request on defense counsel in which it asked that appellant provide the State with notice of any alibi evidence he intended to present no later than five days prior to trial. Defense counsel did not respond to this request. On the morning of trial, before the jury was struck, appellant's lawyer requested a continuance, stating that appellant had just informed him that appellant had an alibi. The attorney explained that appellant's mother and brother would serve as alibi witnesses, as both claimed that appellant was with them at the mother's home at the time of the robbery. Appellant's lawyer further stated that appellant's mother had apparently sent the lawyer an affidavit setting forth facts in support of her son's alibi, but that he had never received it. According to the lawyer, he had been unable to have significant contact with appellant prior to trial because the current case had led to the revocation of appellant's probation on a different charge, and appellant had been removed from the county jail and sent to prison.

In a subsequent discussion with the trial judge, appellant admitted that he did not tell his attorney about his alibi until the morning of trial. Appellant also stated that this was because he only met with his attorney on two occasions: at the probation revocation hearing and the morning of trial. Appellant also claimed that he had tried to talk to his defense counsel at the probation revocation hearing about a number of issues, including his alibi, but the lawyer had told him that such information would "matter" only at trial. The judge denied the motion for a continuance, noting that the current charge had served as the basis for the revocation of appellant's probation; that the lawyer had represented appellant at the probation revocation hearing; that the hearing was a full evidentiary hearing; and that no mention of an alibi was made at that hearing. The trial court subsequently granted the State's motion to exclude appellant's alibi evidence, based on appellant's failure to provide timely notice of his intent to present such evidence.

The Court stated that a defendant is required, upon demand by the State, to provide written notice of his intent to rely upon alibi evidence, and such notice must be provided no later than ten days prior to trial. Where a defendant fails to provide such notice, a trial court may order the defendant to permit the discovery or inspection of the evidence or interview of the witness, grant a continuance, or, upon a showing of prejudice and bad faith, prohibit the defendant from introducing the evidence not disclosed or presenting the witness not disclosed. The choice of what sanction, if any, to impose for the defendant's discovery violation, including

a failure to provide the State with notice of his alibi, is within the discretion of the trial court. Here, appellant contended that the trial court abused its discretion in excluding his alibi evidence because there was no showing that he acted in bad faith or that the State was prejudiced by his failure to disclose this evidence in a timely fashion.

However, the Court noted, when excluding evidence based on a party's discovery violation, a trial court is not required to make specific findings of fact regarding bad faith and prejudice. Rather, implicit in the trial court's decision to exclude the evidence is the determination that prejudice and bad faith were shown.

With respect to the element of prejudice, a court may infer that the State is prejudiced when the prosecution does not have the full ten days to investigate alibi evidence. This is because where the State is denied the ten days authorized by law in which to investigate and refute the alleged alibi, the development of evidence to refute the alibi is clearly hampered, if not rendered impossible. Thus, the fact that the State did not learn of appellant's alleged alibi until the morning of jury selection, supported the trial court's implicit finding that the prosecution was prejudiced by appellant's failure to comply with the State's discovery request.

Additionally, the Court found, appellant presumably knew of his alibi at the time of his arrest. Yet by his own admission, he failed to mention that alibi to the arresting officer or the investigating officer. Nor did he assert his alibi at the evidentiary hearing held on the issue of his probation revocation, and he admitted that he did not inform his attorney of his alibi until the morning of trial. Moreover, during the approximately six months that elapsed between appellant's arrest and trial, neither of his alibi witnesses came forward to inform either the prosecution or appellant's lawyer that appellant was with them at the time of the robbery. These facts supported a finding that appellant acted in bad faith when he failed to provide the State with timely notice of his alibi. Accordingly, there was some evidence supporting the trial court's implicit findings that in failing to come forward earlier with information concerning his alibi, appellant acted in bad faith and that his conduct prejudiced the State. Therefore, the trial court did not abuse its discretion when it denied appellant's motion for a continuance and instead excluded appellant's alibi evidence.

DUI; Source Code

Young v. State, A13A0995; A13A0996; A13A1170; A13A1171; A13A1172; A13A1173; A13A1773; A13A1774; A13A1775; A13A1776 (10/4/13)

The Court granted an interlocutory appeal of the trial court's consolidated decision to deny the appellants' similar motions to determine the relevance and materiality of the source code of the Intoxilyzer 5000 in connection with the appellants' attempt to secure production of that proprietary source code from CMI, Inc., the machine's manufacturer, in Kentucky. Appellants contended that the trial court failed to apply the relevant law found in *Davenport v. State*, 289 Ga. 399 (2011) regarding the circumstances under which an out-of-state witness is deemed material. The Court disagreed.

Because process issued by Georgia courts does not have extraterritorial power, Georgia, like the 49 other states, enacted the Uniform Act to Secure the Attendance of Witnesses from Without the State (the "Uniform Act"). The Uniform Act provides the statutory means to compel an out-of-state witness to testify at, or to bring relevant documents to, criminal proceedings in Georgia. An out-of-state corporation is considered a witness under the Uniform Act. Under the Uniform Act, a party desiring to secure the attendance of an out-of-state witness in a prosecution or grand jury investigation pending in a Georgia court may request that the court issue a certificate of materiality regarding that witness. The Georgia trial judge presented with a request for a certificate is charged with deciding whether the sought after witness is a "material witness." A "material witness" is a witness who can testify about matters having some logical connection with the consequential facts, especially if few others, if any, know about these matters.

The Court noted that in *Cronkite v. State*, 293 Ga.476 (2013), the Supreme Court explained that under *Davenport*, a defendant seeking to show that an out-of-state witness was a material witness regarding the source code of the Intoxilyzer 5000 is required to show that the witness' testimony regarding the source code bears a logical connection to facts supporting the existence of an error in the defendant's breath test results. In other words, there must be evidence supporting a logical connection between possible problems in the source code and any consequential facts in a defendant's case that would make the out-of-state witness' testimony regarding the source code material.

The Court noted that in each of the ten almost identical orders issued in these appeals, the trial court applied *Davenport* and found that the evidence presented at the hearing did not establish the materiality of the source code, that is, that the evidence did not establish that the source code was logically connected with the consequential facts. In so doing, the trial court found that the testimony of Thomas Workman—one of the two defense experts—was "less than credible."

The Court found that only appellant Habib introduced specific evidence attempting to establish the existence of an error in his breath test results. The remaining nine appellants only offered expert testimony generally that "the source code of the machine is logically related to the consequential fact of the reliability and accuracy of the result generated by the Intoxilyzer 5000." These nine failed to present any evidence of facts supporting the existence of an error in their specific breath test results. Accordingly, under the rules established by the Supreme Court in *Davenport* and *Cronkite*, the nine appellants failed to show that the source code for the Intoxilyzer 5000 bore a logical connection with the consequential facts. The trial court therefore did not abuse its discretion by concluding that the source code, or a witness testifying to the source code, was not material under the Uniform Act with regard to these nine appellants.

As for appellant Habib, the Court found that he presented evidence that at the time he was tested on the Intoxilyzer 5000 he was crying and hyperventilating. And defense expert Workman testified that Habib's crying and hyperventilation "could" have led to an inaccurate breath test result and that it would be necessary to see the source code in order to investigate that possibility further. He also testified that "[i]t's pretty well established that a person who is hyperventilating will produce a higher breath result. That's reflected in the literature." He asserted that the source

code "would help quantify whether the machine makes any adjustments for that and, if so, what adjustments are made, are they made up or are they made down and end results and were they made in the proper direction." But, the Court noted, the trial court found that Workman's testimony was not credible. Without Workman's testimony, the Court stated that "we are left with only the mere possibility that Habib's crying and hyperventilation could have produced an erroneous breath test result, which is insufficient to establish the materiality of the source code under *Davenport*." Accordingly, because the appellants, including Habib, failed to present any evidence of facts supporting the existence of an error in their breath test results as required by *Davenport*, the trial court did not abuse its discretion when it determined that appellants failed to show that CMI was a material witness under the Uniform Act.