

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 30, 2012

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THIS WEEK:

- Probation Revocation
- Source Code; Out-of-State Witnesses

Probation Revocation

White v. State, A12A0920 (11/16/12)

The court granted appellant's application for discretionary review after the trial court revoked his probation, concluding that he had committed new drug possession crimes. The evidence showed that an investigator received information from several confidential informants that an individual named Anderson was selling drugs out of his lawnmower repair shop. The investigator had also heard, from sources not made clear by the record, that appellant was frequently at the shop. But, the investigator was not told that appellant was a part of any drug operation. The investigator ran a criminal record check and learned that both men were on probation and had waived their Fourth Amendment rights as a condition of probation. The investigator arrived at the lawnmower repair shop to conduct a search. The doors to the shop's three bays were already open. There were three men at the shop and each man emerged from the shop when the police arrived. As the officers arrived, appellant was turning his pickup truck into the driveway, and Anderson was in the passenger seat. The investigator approached Anderson at the truck and informed him of the purpose of the police presence. According to the investigator, Anderson said that he and appellant were partners in the shop. However, the investigator testified that appellant may not have heard Anderson make that

statement and the investigator admitted that he did not clarify appellant's role at the shop. A search inside the shop yielded the following: an oxycodone pill, a clear smoking device that contained methamphetamine residue, approximately 14 grams of methamphetamine, a set of digital scales, marijuana, and empty plastic bags, all found inside a pouch that had been hidden in a crack in the ceiling.

Appellant argued that the evidence was insufficient to establish that he was in possession of the drugs. The State maintained the evidence was sufficient as it showed that appellant was Anderson's "business partner" and placed appellant upon the premises of the business where the drugs were located. Nonetheless, the Court found the circumstantial evidence was insufficient to show appellant's constructive possession of the contraband found. The Court noted that there was no evidence that he lived on, or controlled any of the premises. There was no evidence that any controlled substance was found in his truck, that any controlled substance was found on his person, or that he was under the influence of any such drug. The investigator testified that he never saw appellant go inside the shop. Moreover, at the time in question, three men were already at the opened shop, and one of those men was a shop employee. Thus, the Court held that the evidence fell short of proving, even under the preponderance of the evidence standard, that appellant was in constructive possession of the drugs found inside the shop.

Source Code; Out-of-State Witnesses

Spann v. State, A12A1507 (11/21/12)

Appellant was convicted of DUI and contended that the trial court erred by not allow-

ing the issuance of an out-of-state subpoena. The Court of Appeals remanded for the trial court to reconsider the subpoena issue in light of *Davenport v. State*, 289 Ga. 399 (2011). On remand, the trial court again concluded that appellant was not entitled to subpoena an out-of-state witness and appellant again appealed.

The record reflected that prior to trial, appellant sought to secure the appearance of an out-of-state witness—an executive of CMI, Inc., the Kentucky company that manufactures the Intoxilyzer 5000—to testify about the Intoxilyzer 5000 source code. In the previously-appealed order the trial court denied appellant’s motion for an order finding the source code material to be relevant and necessary, which would have facilitated obtaining a subpoena duces tecum from a Kentucky court ordering the out-of-state witness to appear before the Georgia court with the source code and other documents. The Court therefore remanded for the trial court to determine whether the out-of-state witness was “material,” rather than “necessary and material,” and if so, whether it should have issued the certificate and granted appellant a new trial.

In this subsequent appeal, appellant argued that the trial court erred by failing to apply the standard described in *Davenport* for determining whether the out-of-state witness could testify “about matters having some logical connection with the consequential facts.” She also argued that the trial court erred in finding that the source code was not material to her defense. The Court found that the trial court’s order established that it did not apply the relatively minimal standard enunciated in *Davenport* to determine whether appellant was entitled to a certificate of materiality under OCGA § 24-10-94. Instead, the trial court answered a different question: whether the Intoxilyzer 5000 was sufficiently reliable that expert testimony about its fallibility was unnecessary. Thus, the trial court found that the legislature created procedural and testing safeguards to minimize the possibility of erroneous test results, that other safeguards were built into the trial process, such as a defendant’s right to an independent test under the Implied Consent law, the admissibility of testimony that “would go to the weight of the evidence,” and the fact that scientists and engineers on which expert opinions are based must be sufficiently qualified to attain publication.

The Court found that although the trial court stated the proper standard—that it was evaluating whether the out-of-state witness was “material” under *Davenport*—the substance of its order established that it did not determine only whether the witness could “testify about matters having some logical connection with the consequential facts, esp[ecially] if few others, if any, know about these matters.” Accordingly, the Court vacated the trial court’s order finding that appellant was not entitled to a certificate of materiality to present to an out-of-state judge to determine whether the witness found within that court’s jurisdiction is “necessary and material,” and remanded the case for further proceedings.