

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 25, 2015

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THIS WEEK:

- **Implied Consent; Independent Testing**
- **Double Jeopardy; Collateral Estoppel**
- **Speedy Trial; Right to Independent Blood Testing**

Implied Consent; Independent Testing

Brown v. State, A15A1425 (11/13/15)

Appellant was charged with DUI in Lawrenceville, Gwinnett County. The Court granted his petition for interlocutory appeal after the trial court denied his motion to suppress. The evidence showed that after being arrested for DUI, appellant took the State's breath test and then requested a "urine test." At first, appellant asked to be taken to a hospital in Forsyth County, but the officer refused after consultation with a magistrate judge and because of the distance involved. Appellant then asked to be taken to Emory Johns Creek Hospital (Emory), but again the officer refused. Appellant next requested to be taken to Gwinnett Medical Center in Duluth (GMC-D) and the officer took him there. The testimony established that Emory was only 3 miles farther than GMC-D from the police station and that appellant was able to obtain his independent test at GMC-D.

The Court stated that O.C.G.A. § 40-6-392(a)(3) requires that a suspect is to be given a meaningful opportunity to choose the testing facility. Nonetheless, if the suspect's choice is unreasonable, a law enforcement officer is justified in refusing to accommodate the request. The trial court may consider several factors in resolving this issue, including the following: (1) availability of or access to

funds or resources to pay for the requested test; (2) a protracted delay in the giving of the test if the officer complies with the accused's requests; (3) availability of police time and other resources; (4) location of the requested facilities, e.g., the hospital to which the accused wants to be taken is nearby but in a different jurisdiction; and (5) opportunity and ability of the accused to make arrangements personally for the testing. An additional factor to be considered is whether the suspect actually made arrangements with a qualified person of his own choosing prior to asking the officer to transport him to that location. But an officer is not required to ask the suspect where and by whom she wishes the elective test performed.

The Court stated that the mere fact that the requested facility is in another jurisdiction does not justify an officer's refusal to accommodate a suspect. But here, the Court found, the officer offered additional facts to justify his refusal to take appellant to the two hospitals located outside of Gwinnett County. The officer was willing to take appellant to facilities that were "in the Gwinnett County area"; the officer was a supervisor and did not want to travel too far or take too much time away from those reporting to him; the requested facilities were further away than those in the Gwinnett County area; and the officer obtained the opinion of a magistrate judge that a request to go to a facility outside of Gwinnett was unreasonable. In addition, appellant did not make arrangements with anyone at the facilities in Fulton and Forsyth to ensure that those facilities were able and willing to perform a test, and, ultimately, the officer took appellant to a hospital that appellant selected. This evidence supported

the ruling of the trial court that appellant was able to exercise his right to have a chemical test of his blood by a qualified person of his own choosing and that no basis existed for the exclusion or suppression of the evidence.

Double Jeopardy; Collateral Estoppel

Robinson v. State, A15A1072 (11/18/15)

Appellant was convicted of armed robbery. The procedural history shows that in 1998, appellant, the alleged driver in the robbery of an armored car, was indicted and tried for murder, felony murder, armed robbery, two counts of aggravated assault, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a felony. He was tried separately and acquitted on all but the armed robbery and possession of a firearm count, which the jury deadlocked on. In 1999, he was tried with a co-defendant for armed robbery and the weapons charge. He unsuccessfully moved for severance of the trials, arguing that based on the State's arguments that he was a co-conspirator and/or party to the armed robbery, the issue was precluded from retrial. His co-defendant, Womack, was tried for murder, felony murder, armed robbery, two counts of aggravated assault, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. Appellant was convicted of the armed robbery and acquitted on the weapons charge.

Appellant argued that the trial court erred by overruling his objection to the State's attempt to prove armed robbery via a party to the crime theory because the issue was barred from re-litigation under collateral estoppel, res judicata, or double jeopardy based on his acquittal under this theory in the first trial. The Court agreed.

The Court stated that to conduct an issue-preclusion analysis, courts examine the verdict and trial record to determine the facts that the jury necessarily decided in returning its verdict of acquittal and then determine whether the previously determined facts constituted an essential element of the second offense. The doctrine of collateral estoppel will not bar a retrial unless the record of the prior proceeding affirmatively demonstrates that an issue involved in the second trial was definitely determined in the former trial; the possibility

that it may have been does not prevent the re-litigation of that issue.

The Court found that during the first trial, the State proceeded against him under theories that he conspired with his two co-defendants or was a party to the crimes, asserting that although no one saw appellant at the scene of the shooting, he was the getaway driver and had plotted the robbery with his co-defendants, making him criminally liable for their actions at the scene of the crime. At the second trial, the State again argued that appellant was a party to the crime of armed robbery and conspired to commit the crime by acting as the getaway driver for his co-defendants. Thus, the Court noted, the State did not attempt to prove that appellant committed armed robbery in any other way than via the same theory propounded during the first trial.

Nevertheless, the trial court found that the jury could have determined that appellant did not conspire to commit aggravated assault or murder, but he did conspire to commit armed robbery. But, the Court stated, the trial court's findings were a conflation of the issue of inconsistent verdicts with issue preclusion and collateral estoppel of the party to a crime theory. Thus, the fact that the first jury could have returned inconsistent verdicts and convicted appellant of armed robbery while acquitting him of the charges arising from the victim's death during the robbery because it decided to nullify on the murder in the face of the clear requirement it convict under the party to a crime instruction if it found that he participated in the robbery as the getaway driver, was an inconsistency viewed through the rational lens of issue preclusion. The only rational conclusion from the first trial is that the jury determined that appellant was not a party to the crimes, and therefore, the State could not propound these theories against him in the second trial for armed robbery. Accordingly, appellant's conviction for armed robbery was reversed.

Speedy Trial; Right to Independent Blood Testing

State v. Thompson, A15A1626 (11/18/15)

The State appealed from the grant of Thompson's plea in bar based on a violation of her constitutional right to a speedy trial. The record, briefly stated, showed that on

December 12, 2012, Thompson was involved in a one-car wreck. She was taken to a hospital and charged with DUI. She agreed to the State's request for a blood test and declined an independent test. The case started in probate court but was transferred to superior court at Thompson's request. In August, 2013, she was charged with DUI (drugs and alcohol). Defense counsel filed a general demurrer and a motion to suppress. In October, 2013, she sought to get independent testing of her blood sample held by the GBI. The GBI informed her of its policy, including that it would only hold the sample for one year. The case appeared on two calendars, both times the State announced ready. In February, 2015, Thompson asserted her right to a speedy trial. The trial court granted her plea in bar under *Barker v. Wingo*.

The Court found that the delay of two years, two months, was presumptively prejudicial and thus, the trial court was authorized to presume prejudice and to analyze the remaining three factors. As to the responsibility for the delay, the Court found that without noting whether Thompson herself caused any part of the delay, and thus without engaging in any weighing process, the trial court concluded that responsibility for the delay weighed against the State. But, the Court found, Thompson caused much of the delay and that the delay caused by the "negligence and workloads" of the State should only be weighed lightly. Therefore, the trial court did not properly calculate this factor.

As to the assertion of the right to a speedy trial, the Court found that there was no indication in the trial court's order that it considered the delay in Thompson's assertion of her speedy trial right in the balancing process. The fact that Thompson failed to invoke her speedy trial right until well after the case was first called for trial, at which time she moved for a continuance, may also weigh "heavily" against her.

Finally, as to prejudice, the trial court concluded that Thompson was prejudiced by the State's delay in charging her with driving under the influence of both alcohol and drugs and by the destruction of the blood sample she first requested in October 2013. The Court disagreed.

The Court noted that Thompson admitted that O.C.G.A. § 40-6-392(a)(3), which specifically concerns independent tests, did not apply, presumably because

her request came months after she waived any right she had to such a test. Further, although O.C.G.A. § 40-6-392(a)(3) allowed Thompson to obtain an independent test of her blood sample, neither that statute nor any other statute granted her that right in perpetuity. On the contrary, the Court found, the facts showed that Thompson was afforded the opportunity to obtain an independent test of her blood, and that is all that is required by § 40-6-392(a)(3). Also, neither O.C.G.A. § 17-16-23 nor O.C.G.A. § 17-5-56(a) require blood samples under these circumstances to be preserved. Finally, the Court found, Thompson failed to show that she was prejudiced as to any constitutional right by the destruction of the blood sample because she did not show that the evidence possessed an exculpatory value that was apparent before it was destroyed. Specifically, and in light of both Thompson's admission to have drunk bourbon in combination with her prescribed doses of methadone, and the State blood test results confirming a blood alcohol level of .03, Thompson's assertion that the destroyed blood sample would have exonerated her was mere speculation. Therefore, the Court held, this fourth *Barker* factor must weigh in the State's favor as a matter of law.

Accordingly, the Court remanded to the trial court for a rebalancing of the second factor, but noted that the third and fourth factors weighed heavily against Thompson.