Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 26, 2014

THIS WEEK:

Search & Seizure; Cellphones

Brown v. State, A14A2284 (12/16/14)

Appellant was charged with two counts of DUI and twelve counts of possessing a lewd depiction of a minor child in violation of O.C.G.A. § 16-12-100(b)(8). The trial court denied his motion to suppress the digital images found on his cellphone and the Court of Appeals granted him an interlocutory appeal. The evidence showed that after being arrested for DUI, appellant was placed in the back seat of a patrol car while an officer was sitting in the front passenger seat. Appellant's cellphone was placed in the front seat with the officer. The officer decided to look through the phone to see if there was any evidence to substantiate the stop or show that appellant had been drinking before the stop. As the officer scrolled through the photographs stored on the cellphone, he came across images of apparent child pornography. Based solely on the information obtained by this officer, a search warrant was obtained that yielded the images forming the basis for the O.C.G.A. § 16-12-100(b)(8) charges.

The Court found that under *Riley v. California*, ____U. S.____(IV) (134 S.Ct. 2473, 189 L.E.2d 430) (2014), the officer's warrantless search of the cellphone was unconstitutional because the search incident to arrest exception does not apply to cellphones. And, although a warrantless search of a cellphone may be permissible if there are exigent circumstances, none was alleged or shown here. As to the subsequent search pursuant to the warrant, the Court found that because the warrant was obtained based solely on the information gathered illegally by the officer, it too was unconstitutional as fruits of the poisonous tree.

The State argued that because the officer was complying with *Hawkins v. State*, 290 Ga. 785 (2012), the controlling precedent at the time of the search, the officer's actions were legal under the good faith exception to the Fourth Amendment. The Court disagreed. First, the Court found, the Supreme Court held long ago in *Gary v. State*, 262 Ga. 573, 574 (1992) that the good faith exception to the exclusionary rule is not applicable in Georgia. Second, even under *Hawkins*, the officer did not have a reasonable basis for believing that evidence relevant to the DUI for which he was arrested might be found in the cellphone. The officer did not text with appellant prior to appellant being pulled over for DUI, did not see appellant enter any data into the phone, and did not receive any text messages from appellant at the time of arrest. Additionally, the officer did not have any particularized reason to believe appellant used his phone to take pictures that would corroborate the DUI arrest. Based on the lack of any information suggesting that appellant's cell phone contained evidence of the offense of DUI, the officer's reasoning for searching the cell phone was nothing more than a "fishing expedition" and was illegal. Therefore, even without applying the holding in *Riley*, the trial court nevertheless erred in refusing to suppress the evidence under *Hawkins*.