

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 30, 2016

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THIS WEEK:

- **DUI; Voluntary Consent**
- **Verdicts; Double Jeopardy**
- **Jury Coercion; Judicial Misconduct**
- **Pipeline Rule; Sufficiency of the Evidence**

DUI; Voluntary Consent

State v. Clay, A16A1233 (11/15/16)

Clay was charged with DUI. The trial court granted his motion to suppress his blood test and the State appealed. The evidence showed that Clay was arrested after a traffic accident. He refused to be treated by EMS, which arrived on the scene, but agreed to take a blood test after being read his implied consent rights.

The Court noted that the trial court found that Clay “was not threatened in any [way] and did not show any physical resistance,” and the Court found ample evidence in the record to support this conclusion. However, the trial court further found that “a suspect *could* feel concerned about refusing [the test] because of the possibility of losing a limited permit” to support its conclusion that Clay only acquiesced to the blood draw. (Emphasis supplied.) But, the Court found, nothing in the record supported that Clay ever expressed any concern or even considered the possibility of losing his driving privileges during this encounter. Although it is appropriate for the trial court to consider whether a reasonable person would feel free to decline the officers’ request, nothing in our jurisprudence allows the trial court to speculate about how a hypothetical (and possibly unreasonable) suspect might feel under the circumstances.

Moreover, the Court noted, its recent decisions have declined to find that the reading of the implied consent notice is coercive in and of itself because there is no unlawful coercion where, as here, the officer merely informs the arrestee of the permissible range of sanctions that the State may ultimately be authorized to impose. This is consistent with the United States Supreme Court’s recent pronouncement in this area in *Birchfield v. North Dakota*, 579 U. S. ___, ___ (VI) (136 S.Ct. 2160, 195 L.E.2d 560) (2016), which struck down state statutes making it a crime to refuse to submit to a blood test. *Birchfield* made it clear that the Court is approving of the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Accordingly, the Court held, the trial court erred as a matter of law in placing any weight on what a hypothetical suspect might feel about how a refusal could affect his driving privileges.

Furthermore, with respect to the trial court’s finding that “there was no apparent additional conversation or interaction with regard to the test to indicate that actual consent was sought or given,” not only was this finding questionable in light of the officer’s testimony that EMS personnel obtained Clay’s consent, both orally and in writing, there is no support in our case law that requires the State to provide evidence of any such additional conversation or interaction to demonstrate actual consent. To the contrary, the Court stated, it does not read *Williams*’ rejection of a per se rule of consent under the implied consent statute as authorizing the Court to replace it with its opposite — that is, a per se rule that the State must always show more than consent under the implied consent statute. Accordingly, since

there was no evidence that Clay's consent was anything but free and voluntary, the trial court erred in granting the motion to suppress.

Verdicts; Double Jeopardy

Washington v. State, A16A1430 (11/15/16)

Appellant appealed from the denial of his plea in bar based on double jeopardy. Appellant and a codefendant were charged in separate indictments with malice murder in Count 1 and felony murder in Count 2 and tried together. The trial court charged the jury on the lesser included offense of voluntary manslaughter. The record revealed the following: (1) during several hours of deliberation, the jury expressed its confusion over Count 2 through a series of notes to the original trial judge, culminating in an *Allen* charge; (2) the jury then reported that it reached a verdict on every count against both defendants except Count 2 of appellant's indictment; (3) in open court, the jury reported that it was hopelessly deadlocked on Count 2; (4) the original trial judge did not see the verdict form prior to publishing the verdict; (5) the original trial judge instructed the deputy clerk of court to publish the verdict with the exception of Count 2; (6) the verdict, absent Count 2, was published; (7) the original trial judge discharged the jury; (8) without having seen the verdict form, the original trial judge declared a mistrial as to Count 2; and (9) at some point, after the verdict had been published and the jury discharged, the original trial judge struck through the jury's handwritten statements "not guilty" and "voluntary manslaughter?" relating to Count 2 of appellant's verdict form.

The Court stated that whether to declare a mistrial is in the discretion of the trial court and will not be disturbed on appeal unless it is apparent that a mistrial is essential to the preservation of the right to a fair trial. However, a motion for mistrial, by its very nature, seeks to end the trial proceedings *before* a verdict is rendered in order to ensure that the defendant may receive a fair trial. A trial court cannot grant a mistrial *after* a verdict.

Here, the Court found, the original trial judge's failure to review the verdict form was error. Since verdicts acquire their legality from return and publication, there was no verdict in this case until it was received and published in open court. As a result, the jury's notes that it had deadlocked were not controlling once it

returned its verdict. Had the original trial judge viewed the verdict form more carefully, the fact that the jury returned a verdict of not guilty as to felony murder, when it previously reported that it was deadlocked on Count 2 (felony murder), would have become evident. It was also likely that the judge would have noticed the handwritten words, "voluntary manslaughter?" Such a verdict would have triggered a number of options for the original trial court, including: (1) questioning the foreperson more directly concerning the verdict to eliminate any confusion; (2) polling the jurors to learn the truth of their verdict before deciding whether to declare a mistrial; or (3) requiring the jury to continue their deliberations and present a clearer verdict. But, the Court found, none of these measures were taken.

Moreover, upon the trial court's ultimate review of the jury verdict after the jury had been discharged, none of the remedial options to clarify the verdict could have been exercised. When an ambiguous verdict is returned by a jury, the trial court may refuse to accept the verdict and require the jury to continue its deliberations. However, "after [a verdict] has been received, recorded, and the jury dispersed, it may not be amended in matter of substance, either by what the jurors say they intended to find or otherwise." O.C.G.A. § 17-9-40. In such a circumstance, a defendant is entitled to the benefit of the doubt in the construction of an ambiguous verdict.

Thus, the Court concluded, the original trial court did not abuse its discretion by declaring a mistrial as to the lesser included offense of voluntary manslaughter. The jury's notes, coupled with the verdict form it actually returned, indicate that it was unable to reach a unanimous verdict on that offense. However, as to felony murder, the Court held that the trial court abused its discretion by declaring a mistrial as to felony murder because it failed to review the jury's verdict. Although the jury's notes reflected confusion and an inability to reach a verdict, the verdict form clearly stated that appellant was "not guilty" of felony murder. In other words, there was no manifest necessity for a mistrial as to felony murder in view of the jury's verdict. Furthermore, once the verdict was returned, the original trial judge was without authority to modify or attempt to construe the jury's verdict in a certain light. At worst, the verdict was ambiguous, requiring that appellant be given the benefit of the doubt. In

either instance, the trial court erred by striking the words "not guilty" on appellant's verdict for felony murder and the trial court on remand abused its discretion by denying appellant's plea in bar as to felony murder. Accordingly, the Court reversed and remanded the case to the trial court for a new trial as to voluntary manslaughter and with direction to enter a judgment of acquittal as to felony murder.

Jury Coercion; Judicial Misconduct

Mosley v. State, A16A1096 (11/16/16)

Appellant was convicted of rape and of two counts of aggravated sodomy. The record revealed that on the first day of deliberations, the jurors deliberated for at least four and a half hours, maybe more. The next morning, the jurors deliberated for approximately two hours before informing the trial court that regarding three of the four counts, they were at an impasse of nine to three; they had reached a verdict on one count. The court queried: "And you don't think if I gave you a further charge on the law called an *Allen* charge it would make a difference? Basically an *Allen* charge encourages you strongly to reach a unanimous verdict." The prosecutor interrupted, and both the prosecutor and defense counsel expressed the opinion that it was too early to give an *Allen* charge. The court then further instructed the jury that "[w]hen the jury is hung, we generally give what's called an *Allen* charge." The court stated, however, that it would not give such a charge and would instead send the jurors to lunch, and ask that when they returned they "talk about everybody's views and see if the questions of the three can be answered." The record did not reflect when the jury returned from lunch, but it showed that the jury returned a unanimous verdict on all counts approximately two and one half hours after the court's last communication.

Appellant contended that the trial court erred by having "unduly coercive" communications with the jury. Specifically, he contended that the italicized language was "tantamount to charging that even in the event of any conscientious and irreconcilable difference of opinion between the jurors, one or more jurors would be required to surrender his view in order to reach a verdict." The Court disagreed.

The Court found that the trial court's challenged statement that unanimous verdicts

are encouraged was a correct statement of the law. Moreover, nothing in the court's further correct statement — that at times it is authorized to give a charge which strongly encourages jurors to reach a unanimous verdict — undid the court's prior instructions or either stated or implied that any juror in the instant case should abandon his/her honest convictions about the case. Likewise, there was no reversible error from the trial court's comment to the jury that they continue to deliberate to see whether the questions of the minority could be answered.

Whether a verdict was reached as the result of coercion depends upon the totality of the circumstances. The length of deliberation and reaffirmation in polling play an important role in determining coerciveness when there is a possibility the charge could be coercive. And here, the Court found, the trial court's remarks did not pressure the jury. The trial court made no statements that could be construed as attempting to force any juror to give up his or her honest opinion, and the fact that the court did not reiterate that a juror should not surrender his or her convictions merely in order to reach a verdict did not render its treatment of the situation coercive.

Finally, the Court stated, even assuming that the remarks could be construed as an intimation regarding the propriety of a particular verdict, the circumstances of this case did not warrant reversal. The court prefaced its comment by first stating that it would ask the jury to "talk about everybody's views"; the jury returned its verdict more than two hours after the court's comments; and when the jury was polled, each juror affirmed that the verdict was his/hers in the jury room, that it was freely and voluntarily made by him/her, and that it was still his/her verdict.

Pipeline Rule; Sufficiency of the Evidence

Stoica v. State, A16A1147 (11/16/16)

Appellant was convicted of DUI (less safe), DUI (per se) and failure to maintain lane. The record showed that prior to trial, appellant alleged his consent to the blood test was not voluntary and therefore the blood draw was an illegal search and seizure under *Missouri v. McNeely*, 569 U.S. ____ (133 S.Ct. 1552; 185 L.E.2d 696) (2013). The court denied his motion. After trial, appellant filed a motion for new trial arguing that under *Williams v.*

State, 296 Ga. 817 (771 S.E.2d 373) (2015), which adopted the voluntary consent analysis in *McNeely*, the trial court erred in admitting evidence of the blood test. The court agreed and granted his motion as to the per se count, but denied the motion as to the less safe count and the failure to maintain lane. Appellant argued that the evidence regarding the per se and less safe violation was intertwined to such a degree that the erroneous admission of the blood test required a retrial of the other charges too. The Court disagreed.

Before addressing the merits of appellant's arguments, the Court noted that although the State argued that the analysis in *Williams* was inapplicable because the opinion was issued after appellant was convicted, under the pipeline rule, a new rule of criminal procedure will be applied to pending cases, so long as the issue was preserved for appellate review. Appellant's motion to suppress cited *McNeely*, upon which *Williams* relied, and thus, the Court found, was sufficient to put the State on notice that the seizure of his blood was at issue and that it was necessary to present evidence to justify the warrantless search.

The Court stated that error of constitutional dimension is harmless only if it can be determined beyond a reasonable doubt that it did not contribute to the jury's guilty verdict. Here, before the jurors heard any evidence regarding the blood test results, they heard testimony about appellant's erratic, dangerous, and concerning driving, the odor of alcohol emanating from his person, his slurred speech and bloodshot eyes, his unsteadiness, his inability to comply with the field sobriety tests, his admission to drinking, the open container of a liquid that smelled like alcohol in his car, and his positive alcosensor result. The jury also viewed the dash-cam video of the trooper's interaction with appellant. Accordingly, the Court held, because the evidence that appellant was a less-safe driver was overwhelming, even in the absence of his blood tests results, the erroneous admission of that evidence was harmless beyond a reasonable doubt. Consequently, the trial court did not err in denying appellant's motion for new trial as to the DUI less safe conviction.

Similarly, the Court held that the trial court also did not err in denying appellant's motion for new trial on the failure to maintain lane conviction. Appellant was charged with "fail[ing] to drive his vehicle as nearly as practicable entirely within a single traffic lane" pursuant to

O.C.G.A. § 40-6-48 (1). The arresting trooper testified that he observed appellant "completely travel off the right side of the roadway across the fog line and into the concrete median area, failing to maintain his lane." Appellant's failure to maintain lane conviction was based on the trooper's observation rather than on the admission of the BAC evidence or any other evidence related to the DUI charges. One can be guilty of failure to maintain lane without being impaired by alcohol.