Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 5, 2014

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THIS WEEK:

- **Search & Seizure; Roadblocks**
- **Ineffective Assistance of Counsel**
- **Evidence of Gang Affiliation; O.C.G.A. § 24-4-404(b)**
- **DUI; Field Sobriety Tests**

Search & Seizure; Roadblocks

Charales v. State, A14A1040 (11/12/14)

Appellant was convicted of DUI. He contended that the trial court erred in denying his motion to suppress because the checkpoint at which he was stopped was unlawful. The Court agreed and reversed his conviction.

There are five requirements that the State must show for a checkpoint to be upheld as constitutional: (1) the decision to implement the checkpoint was made by supervisory personnel rather than the officers in the field; (2) all vehicles were stopped as opposed to random vehicle stops; (3) the delay to motorists was minimal; (4) the checkpoint operation was well identified as a police checkpoint; and (5) the "screening" officer's training and experience was sufficient to qualify him to make an initial determination as to which motorists should be given field tests for intoxication. Additionally, the State must show that the law enforcement agency's checkpoint program had an appropriate primary purpose other than ordinary crime control—*a purpose examined at that programmatic level*, rather than by trying to determine the motives of the supervisor who implemented and the officers who conducted the particular checkpoint at issue.

Here, the Court found, there was no testimony nor any written evidence admitted regarding the law enforcement's checkpoint policy or program as a whole. Thus, because the State failed to show that the checkpoint program had an appropriate primary purpose other than ordinary crime control when viewed at the programmatic level, the Court concluded that the checkpoint at which appellant was stopped violated the Fourth Amendment. Accordingly, the trial court erred by denying appellant's motion to suppress.

Ineffective Assistance of Counsel

State v. Shelton, A14A1113 (11/13/14)

Shelton was convicted of possession of cocaine, two counts of obstruction of an officer, and a sound violation (O.C.G.A. § 40-6-14(a)). The evidence showed that Shelton was pulled over for the sound violation. The officer checked Shelton's license and registration, checked the window tint on Shelton's vehicle and immediately thereafter asked for consent to search the vehicle. Shelton agreed and the officer asked him to step out of the vehicle and place his hands on top of the car. While conducting a pat-down of Shelton, the officer felt a bulge in Shelton's right pocket. When the officer asked what it was, Shelton tried to reach into his pocket. The officer grabbed Shelton's wrist and put Shelton's hand back on the top of the car. Shelton tried to reach into his pocket again and when stopped by the officer, he tried again to get into his pocket. The officer and a backup officer then fought with Shelton, and he was eventually handcuffed. A search of the vehicle resulted in the discovery of digital scales with cocaine

residue and a Ziploc baggie containing a razor with cocaine residue.

Following his conviction, Shelton argued in his motion for new trial that his defense counsel was ineffective for a number of reasons. The court agreed with them all and granted him a new trial. The State appealed and the Court reversed. First, the Court agreed with the State that defense counsel was not ineffective for failing to file a motion to suppress. The officer did not unreasonably prolong the stop by running a check on Shelton's license and registration. Also, Shelton's rights were not violated by the officer contemporaneously checking the window tint or asking Shelton whether he had contraband in the vehicle and whether he would consent to a search because Shelton was lawfully detained at the time. Counsel was also not ineffective for failing to move to suppress with regards to the pat-down of Shelton's person. Even if the pat-down search was unjustified, it did not taint the subsequent search of Shelton's vehicle because authority to search the vehicle was based on Shelton's valid consent.

Second, the Court agreed with the State that defense counsel was not ineffective for failing to properly investigate the case, talk to witnesses and call witnesses on Shelton's behalf at trial. Shelton argued that someone else had recently put the scales in his car while it was in a repair shop. But, the Court found, Shelton admittedly failed to give his attorney the name and location of the place where his vehicle was repaired even though trial counsel met and spoke with him numerous times prior to trial. Shelton also told the court during trial that he did not wish to present any witnesses, there were no witness whom he wanted to call and trial counsel had done everything he wanted her to do concerning his case.

Finally, the Court agreed with the State that counsel was not deficient for failing to object to the admission of the digital scales with cocaine residue on it. The State presented the complete chain of custody of the digital scales from the time the officers retrieved the digital scales from Shelton's vehicle and sealed them in an evidence bag at the scene of the stop to the time when the forensic chemist at the crime lab retrieved the sealed bag and tested the white powder residue that she found on the digital scales. Moreover, the forensic chemist identified the set of digital scales at trial as the item of evidence that was submitted to the crime lab for testing, and Shelton presented no evidence that the digital scales were tampered with. Therefore, any objection to the admission would have been futile.

Evidence of Gang Affiliation; O.C.G.A. § 24-4-404(b)

Lingo v. State, A14A0832 (11/12/14)

Appellant was convicted of one robbery but acquitted of others. Prior to trial, and over appellant's objection, the trial court permitted the State under O.C.G.A. § 24-4-404(b) to introduce testimony from an officer regarding appellant's gang membership for the purpose of showing identity, concluding that the probative value of the evidence outweighed its prejudicial effect.

The Court found that the trial court erred. Here, there was no evidence whatsoever that the robberies were gang-related. Although gang affiliation may be admissible to show motive, that was not the purpose of the admission of the evidence in this case, and there was no evidence that appellant's gang membership was in any way related to his motive for committing the crimes. And although the admission of evidence regarding a defendant's prior gang affiliation has in the past been properly admitted as res gestae, the evidence of appellant's gang affiliation here was unrelated to the crimes, and thus, it was not res gestae. Moreover, appellant's prior gang affiliation had minimal probative value with regard to identity. The fact that appellant was wearing gang colors—red and black—at the time the crimes were committed was not enough in itself to establish a probative connection between the crimes alleged and his gang affiliation, particularly given that others who were involved in the robberies were not wearing gang colors. Similarly, the fact that appellant's co-defendant was also a member of the same gang was of limited probative value, considering that they were apprehended together and in the absence of any evidence that the crimes were gang-related. Thus, the evidence of appellant's gang membership two years before the crimes at issue in the case was of minimal, if any, probative value. Moreover, the Court added, in the absence of a charge of violation of the Georgia Street Gang Terrorism and Prevention Act, evidence of a defendant's gang affiliation is highly prejudicial. And here, the unfairly prejudicial effect of the evidence of appellant's gang affiliation substantially outweighed its minimal probative value. Accordingly, the trial court abused its discretion in admitting the evidence of appellant's gang membership.

Nevertheless, the Court found, the victim identified appellant in court; a police officer saw appellant in the same apartment complex where the crimes occurred on the day of commission; appellant was apprehended two days after the robbery in the same apartment complex wearing a red hat and red jacket matching that described by the victim; and the police discovered in appellant's home clothing matching the description of that worn by both assailants on the day of the robbery. Given this evidence, the Court concluded that the trial court's erroneous admission of the evidence of appellant's gang affiliation was harmless and did not require reversal.

DUI; Field Sobriety Tests

State v. Smith, A14A1127 (11/14/14)

Smith was charged with DUI (less safe). The trial court suppressed the suppressed the results of the HGN, VGN, walk and turn, and one leg stand tests because the officer failed to comply with National Highway Transportation Security Administration ("NHTSA") standards while administering the tests. The court further concluded that because of the attendant weather conditions, specifically including the wet road surface, the walk and turn and one leg stand tests were "conducted in an unsafe manner," and "the discrepancies between [the officer's] police report and the driver impairment form g[a] ve th[e trial] court doubt as to the propriety of [the] administration of [those tests]." The State appealed.

The State argued that the trial court erred by suppressing the results of Smith's walk and turn and one leg stand tests. The Court agreed. The Court found that although HGN and VGN tests constitute scientific procedures, field sobriety tests such as the walk and turn and the one leg stand, both of which demonstrate a suspect's dexterity and ability to follow directions, do not constitute scientific procedures. And, testimony from an officer about a suspect's inability to complete such dexterity tests does not amount to testimony regarding scientific procedures, but

instead amounts to testimony as to behavioral observations on the officer's part. Therefore, these two tests and any testimony concerning their administration are not subject to the standard for determining whether a scientific procedure is admissible. Consequently, a defendant's arguments regarding proper administration of walk and turn and one leg dexterity tests, including compliance with NHTSA standards, go to the weight of the evidence, not to admissibility. Accordingly, the trial court erred by suppressing the results of Smith's walk and turn and one leg stand tests based solely on its conclusion that they were not properly administered.