

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 18, 2013

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THIS WEEK:

- **Firearms Offense**
- **DUI; Implied Consent Rights**
- **Forfeiture**

Firearms Offense

Barnes v. State, A12A1846 (1/7/2013)

Appellant was convicted of one count of armed robbery, one count of aggravated assault, and two counts of possession of a firearm during the commission of a felony. Appellant contended that (1) the evidence was insufficient to support the convictions because it consisted solely of the testimony of his alleged accomplices, and (2) the court erred in imposing two sentences on the firearm possession charges when there was only one victim in the charged incident. The Court affirmed the conviction for armed robbery and one of the convictions for possession of a firearm during the commission of a felony, but vacated the remaining firearm possession conviction and remanded the case for resentencing.

The Court noted that appellant contended that the evidence was insufficient to support the convictions because the State relied solely on the testimony of his alleged accomplices. The evidence showed that three masked men, two of whom had guns, entered a BP gas station. One of the men pointed a gun at the cashier and demanded money; the cashier described the guns as having long barrels, and opined that the guns were probably shotguns. The men grabbed money from the register and several packs of cigarettes, and ran out of the store. Seconds before the robbery occurred, a

silver vehicle occupied by several males was driven through the store's parking lot; it was driven very slowly, circled the parking lot, then parked; after the robbery, the vehicle left. Responding to a 911 call, police officers arrived at the store and, during their investigation, found on the ground outside the store a pack of Newport cigarettes. A crime lab analysis revealed Larry Garard's fingerprints on the cigarette pack. Officers initiated a traffic stop of a silver passenger vehicle registered to Tahje Williams; Garard was the driver. Appellant, Garard, Williams and three other individuals were in the vehicle. Officers found a shotgun in the trunk. Garard and Williams were arrested, after which they gave the police statements implicating appellant in connection with the robbery. The State called both men as witnesses at appellant's trial. They testified that they traveled in to the gas station; appellant, Garard and Williams entered the store and that appellant and Garard had the guns. Garard testified that the shotgun the officers later found in Williams's vehicle was the gun he had used in the robbery.

The Court found that a defendant may not be convicted on the uncorroborated testimony of an accomplice; however, only slight evidence of a defendant's identity and participation from an extraneous source is required to corroborate the accomplice's testimony and support the verdict. If the testimony of one accomplice is supported by the testimony of another accomplice, the evidence is sufficient to sustain a conviction. Here, Garard and Williams corroborated one another's testimony in several respects. Further, the testimony of both accomplices was corroborated by other evidence, such as appellant's testimony that Garard, Williams and Blackford were at his house the night of the robbery. Thus, a jury

could have found sufficient corroboration of the accomplice testimony to support appellant's convictions for armed robbery and firearm possession.

Appellant was charged with, convicted of, and sentenced on two counts of possession of a firearm during the commission of a felony. Each of the firearm possession counts in the indictment referred to one of the two firearms possessed during the commission of the robbery of the cashier. However, the State conceded that appellant could not be convicted and sentenced for two firearm possession counts when there was only one victim. The Court found that the facts showed that appellant can be convicted and sentenced only once for possession of a firearm during the commission of a felony. Therefore, the Court vacated the conviction on one of the two firearm possession counts.

DUI; Implied Consent Rights

Nagata v. State, A12A1957 (1/7/13)

Appellant was convicted of two counts of DUI and of failure to maintain lane. Appellant claimed that the trial court erred by denying his motion to exclude results of tests of his breath because the arresting officer failed, in giving the implied consent notice pursuant to O.C.G.A. § 40-5-67.1, to designate the specific state-administered test or tests for which consent was being requested. The Court found no merit to appellant's claim and affirmed.

The evidence showed that upon observing appellant's vehicle fail to maintain its lane of travel, a police officer initiated a traffic stop. During the stop, the officer noticed that appellant was not wearing a seatbelt, a strong odor of alcohol was emanating from his person, and that his eyes were red and watery. Appellant also admitted having had "a couple" of drinks, the last of which he had about an hour before the traffic stop. Based on the officer's observations, appellant's admission, and appellant's performance on field sobriety tests, appellant was placed under arrest for driving under the influence of alcohol. The officer then read to appellant an implied consent notice from a card. After the notice was given, appellant consented to a state-administered chemical test of his breath.

Appellant argued that the rights as read to him were improper. Specifically, he pointed

to the last sentence of the applicable implied consent notice, as set out in O.C.G.A. § 40-5-67.1(b)(2). That sentence states: "Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?" Appellant contended that by asking him if he would consent to a test of his "blood, breath, urine or other bodily substances," the officer failed to designate a specific test or tests, as required by O.C.G.A. § 40-5-67.1(b)(2). The Court disagreed. The Court noted that an officer may advise a person of his implied consent rights and request multiple tests at one time; and the requesting officer is authorized to decide which test or tests shall be administered. "The determinative issue with the implied consent notice is whether the notice given was substantively accurate so as to permit the driver to make an informed decision about whether to consent to testing." The Court stated that by including all of the statutorily-enumerated tests, the officer "did not change the meaning of the notice, which begins by advising the defendant that 'Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine or other bodily substances.'" The Court found that the notice given was sufficiently accurate to permit appellant to make an informed decision about whether to consent to testing. Thus, the Court held, the trial court did not err in denying appellant's motion to exclude the breath test results.

Forfeiture

Orange v. State of Ga., A12A2213 (1/7/13)

In this civil in rem forfeiture case, appellant challenged a judgment declaring two automobiles and a sum of money forfeited to the State of Georgia. The Court found no reversible error and affirmed.

Pursuant to O.C.G.A. § 16-13-49, the State filed a verified complaint for forfeiture, alleging that law enforcement seized certain property as having been used, or intended for use, to facilitate an illegal drug trade operation or as having been found in close proximity to the unlawful drug cocaine. The complaint pertinently named as defendants in rem two vehicles and \$308 in U. S. currency and named appellant as an owner of these items. Appellant filed an answer, asserting ownership of these items and sought their return. At the

trial, appellant was represented by counsel, although appellant was not present. Thereafter, the court found that all property claimed by appellant was declared to be contraband and was forfeited to the State.

Appellant, who appealed pro se, first contended that the trial court erred by proceeding with the hearing, asserting that "[his criminal case] is still pending and there has not been a conviction in this matter." Appellant stated: "I argue that by § 62C.01 criminal forfeiture—criminal forfeiture, (1) occurs only after a conviction, (2) after the defendant is convicted, he or she may also lose his or her interest in the property." The Court found appellant's assertion lacked evidentiary support and discerned no merit in his legal argument. The Court noted that the record before them, though scant, confirmed that the action was pursued by the State, then considered and ruled upon by the court, as an in rem civil forfeiture proceeding under O.C.G.A. § 16-13-49. Such proceedings do not require that a conviction against the property owner be proved as an element of civil forfeiture.

Appellant further contended that the trial court erred by conducting the hearing outside his presence. He asserted in his brief that "[b]y no fault of [his], he was not allowed to be present at that hearing"; that he had "express[ed] to his attorney . . . that he indeed wanted to be present at the hearing to defend and reclaim his property"; and that his lawyer knew that he was incarcerated in a particular detention facility, yet his lawyer "failed to have [him] transported to the court for the hearing." According to appellant, the trial court denied him "due process of law, which gives him . . . [the right] to be present to take the stand in [his] own defense." However, the Court noted that appellant failed to cite any evidence supporting his underlying factual assertions - here, that his testimony was pertinent to whatever strategy that he and his lawyer were pursuing and that he had informed his lawyer that he wished to attend the hearing so as to take the stand (and thus be subjected to cross-examination); and the Court would not speculate thereon. Given the foregoing, the Court could not conclude that appellant, who was represented by counsel at the civil hearing and whose evidence and argument were thus presented to and considered by the court in rendering its decision, was nevertheless deprived of due process for reason of his physical absence from the hearing.