

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 1, 2010

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THIS WEEK:

- **Speedy Trial**
- **DUI, Voir Dire**
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- **Influencing a Witness**
- **General Demurrers**
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- **Statements; Implied Consent**
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Speedy Trial

Grizzard v. State, A09A2301

Appellant appealed from the denial of his plea in bar alleging a violation of his constitutional right to a speedy trial. The facts showed that appellant was arrested on 6 counts of child molestation in October, 2000. He was indicted in February, 2001.

Shortly after his indictment, he moved to dismiss four of the indictment's six counts on statute of limitation grounds. In October 2001, the trial court denied the motion to dismiss but certified the matter for immediate review. The Court of Appeals reversed, ordering that the four counts be dismissed. The trial court received the remittitur in November, 2002. Although more than two years had already passed since appellant's arrest, nothing happened in the case for the next six years on the

remaining two counts. The State conceded that it did not diligently prosecute the case, that the case had fallen "off the radar" screen, and that it "just did not get prosecuted" until it began to appear on court calendars in late 2008. It was finally called for trial in February, 2009, at which time appellant filed his plea in bar based on a violation of his Sixth Amendment rights.

Utilizing the *Barker-Doggett* balancing test, the Court held that 1) the eight year delay was uncommonly long; 2) the delay after appeal of six years in which the State negligently let the case languish should be weighted heavily against it; 3) appellant's appearance for trial in 2001 was not a constitutional or statutory invocation of his right to a speedy trial but that this factor weighted equally against the State and appellant; and 4) the eight year delay raised the presumption of prejudice to appellant. The Court also found that appellant did not acquiesce in the delay by failing to assert his rights until the eve of trial in 2009. Thus, in balancing the factors, the Court held that the trial court erred in denying appellant's plea in bar.

DUI, Voir Dire

Blankenship v. State, A09A2229

Appellant was convicted of DUI (less safe) and possession of marijuana. He argued that the trial court erred in not dismissing four prospective jurors for cause after each stated that he or she felt that a defendant should testify in order to prove his innocence. Whether to strike a juror for cause lies within the sound discretion of the trial court, and a trial court is not obligated to strike a juror for cause in every instance where the potential juror expresses doubts about his or her impartiality

or reservations about his or her ability to set aside personal experiences. Here, no evidence showed that the jurors in question had formed a fixed or definite opinion regarding the guilt or innocence of appellant. With regard to their responses that he should testify to be acquitted, the prosecutor immediately informed them that to be acquitted, the defendant bore no such obligation, and each of the jurors indicated that he or she would be able to put aside what he or she felt and would follow the law. Each further indicated to the court that he or she could listen to the evidence and find him not guilty regardless of whether or not he testified or presented any evidence. Thus, the trial court did not abuse its discretion in not dismissing the jurors for cause.

Statements

State v. Klepper, A09A1752

Klepper was indicted for armed robbery and other offenses. He moved to suppress his statements and the trial court granted the motion, finding the statements were induced by a hope of benefit. The State appealed and the Court affirmed the trial court.

Klepper was stopped in his vehicle shortly after an alleged armed robbery. The investigating officer recognized Klepper from college and spoke with him in a “personal in nature” conversation in which he raised whether the crime was a theft by taking rather than an armed robbery. Thereafter, Klepper was transported to the station where he gave a statement indicating that he was guilty of a theft by taking but not an armed robbery because he did not actually have a gun.

A promise that a defendant will not face a certain charge creates an impermissible hope of benefit that renders an incriminating statement inadmissible. Although the investigator denied making a promise to Klepper, the Court held that the evidence, viewed most favorably to support the trial court’s findings and judgment, showed that he did tell Klepper his action constituted theft by taking rather than armed robbery, inducing Klepper to make the custodial statement. In so holding the Court found no merit to the State’s contention that the evidence showed only a hope of benefit that originated in Klepper’s own mind because the investigator admitted that he initiated the conversation with Klepper about the lesser offense. The State’s argument

that the trial court’s finding that Klepper was offered a hope of benefit was mere speculation was also found to be meritless because the investigator’s admission that the lesser charge was discussed and the specific language in Klepper’s written statement expressly admitting to the lesser offense supported the trial court’s factual finding.

Right to Remain Silent

Franks v. State, A09A2030

Appellant was convicted of numerous sex offenses. During the State’s case, the prosecutor asked a detective if he had any additional involvement in the case. In response, the following occurred: “A: Yes. After he was arrested, we —I had him [Franks] into our office. We Mirandized him, and I — Q: Hang on a second now. After — .” Defense counsel moved for a mistrial. The trial court denied the motion but offered a curative instruction. Defense counsel insisted on mistrial. The Court held that because the detective’s recitation was interrupted, there was no testimony that could be fairly construed as commenting or even touching upon whether appellant had exercised his right to remain silent. Furthermore, while the detective testified that appellant had been arrested and thus was informed of his *Miranda* rights, that testimony was not prejudicial because there was no testimony that the arrest was for anything other than the charges for which appellant was on trial. Moreover, the trial court offered to give a curative instruction to the jury, but that offer was rejected. The Court held that because a mistrial was not essential to preserve appellant’s right to a fair trial, the trial court did not abuse its discretion in refusing to declare one.

Prosecutorial Misconduct; Suborning Perjury

Arnold v. State, A09A1622

Appellant was convicted of aggravated assault. He argued that the State suborned perjury by placing the victim on the stand to testify that appellant shot him even though the prosecutor knew that the victim had previously testified that he was shot by someone else. The Court stated that conviction of a crime following a trial in which perjured testimony on a material point is knowingly used by the prosecution is an infringement on the

accused’s Fifth and Fourteenth Amendment rights to due process of law. However, there is no constitutional requirement that the witnesses upon whom the State relies to prove its case must give consistent evidence. Here, the Court found, appellant did not show that the victim’s trial testimony was untrue or that the State knew it to be untrue. According to the victim’s trial testimony, he falsely identified another as the shooter at the juvenile court hearing because he was scared and because he did not want appellant to go to jail. Also, defense counsel used the victim’s inconsistent statements and alleged exposure to prosecution to challenge the victim’s credibility on cross-examination. Under the circumstances, the Court held, the jury had the benefit of the victim’s present testimony and his previous inconsistent testimony. Neither was kept from the jury, and the jury properly was given the opportunity to decide for itself which version was the truth, and which the fabrication. Accordingly, appellant’s conviction was not based on the prosecution’s knowing use of perjured testimony, but upon that version of the events most unfavorable to him which version the jury accepted after hearing all of the evidence and resolving the credibility of all of the witnesses.

Influencing a Witness

In the Interest of G.L.B., A09A2374

Appellant was adjudicated a delinquent for improperly influencing a witness in violation of OCGA § 16-10-93 (b) (1) (C). Specifically, the State charged that appellant allegedly threatened a person to hinder that person from communicating a criminal offense to a law enforcement officer. The evidence showed that a few weeks following an earlier altercation with a fellow middle-school student on a school bus, appellant confronted that same student in the hallway at school, grabbing his shoulder, ripping his jacket, and reminding the student, “Remember, I’m still going to kill [you and] your family.” Appellant argued that the evidence was insufficient to support his conviction. The Court agreed because nothing in the transcript reflected any threat designed or intended to prevent the communication of any information whatsoever, whether to a law enforcement officer or otherwise, let alone to the specific law enforcement officer identified in the petition. The only threat identified by

the victim —”Remember, I’m still going to kill you and your family” —was accompanied by no indication that this threat related or was tied to any possible communication to a law enforcement officer of a crime, nor did the victim indicate that he so understood the threat. Accordingly, the essential elements of the crime were not shown by any evidence and therefore, the adjudication of delinquency as to the charge of influencing a witness under OCGA § 16-10-93 (b) (1) (C) was reversed.

General Demurrers

State v. McDowell, A09A2388

The trial court granted McDowell’s general demurrer against an indictment charging him with three counts of child molestation. The State appealed and the Court reversed. The relevant Code section, OCGA § 16-6-4, states in pertinent part: “A person commits the offense of child molestation when such person . . . [d]oes any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person.” The Court found that the State tracked the statutory language in each of the three counts against McDowell alleging, in pertinent part, that McDowell “did commit an immoral act in the presence of a child, to wit: [A. M.], a child under the age of 16 years, with the intent to arouse and satisfy the sexual desires of said accused by fondling his own penis in the presence of [A. S., A. L., and I. R.]” A demurrer may properly attack only defects which appear on the face of indictment; a demurrer which seeks to add facts not so apparent but supply extrinsic matters must fail as a speaking demurrer. Here, the indictment set out all the essential elements of the crime and McDowell could not admit to those allegations without being guilty of a crime. Therefore, the indictment was sufficient against a general demurrer.

McDowell argued 1) the indictment implied that A. S., A. L., and I. R. were the alleged child molestation victims, yet they were all women; 2) the child identified in the indictment, A. M., was too young to have had any understanding of his alleged acts; 3) the front page of the indictment listed the three women as witnesses and further claimed as significant that this list included neither the child nor the child’s mother; and 4) the sum-

moned police officer did not charge him at the scene with the crime of child molestation. The Court held that none of these arguments would authorize the trial court to grant the general demurrer.

Circumstance of Arrest; Relevance

Haywood v. State, A09A1989

Appellant was convicted of possession of marijuana with intent to distribute and possession of cocaine with intent to distribute. He contended that the trial court erred by excluding testimony concerning the circumstances surrounding his co-defendant’s arrest. The evidence showed that appellant and his co-defendant drove to a hotel to sell drugs. The co-defendant got out to go into the hotel, but fled from the scene when he spotted the officers who were there waiting on him. Appellant was caught literally holding the bag of drugs while sitting in the passenger seat of the vehicle. His co-defendant was caught some two weeks later.

According to appellant’s proffer before trial, an officer would have testified that the co-defendant had cocaine in the car with him at the time of his arrest. Appellant argued that the trial court should have allowed this testimony because it would have supported his claim that the co-defendant alone was the drug dealer and that the drugs seized in this case belonged exclusively to the co-defendant. The Court stated that evidence of the circumstances surrounding an arrest is subject to the same standards of relevancy and materiality that govern the admission of all other evidence, and the decision whether to admit evidence connected to an arrest lies within the discretion of the trial court. At trial, the State proceeded under the theory that appellant and the co-defendant jointly possessed the seized marijuana and cocaine. The Court held that fact that the co-defendant was found with drugs at an entirely different time and place two weeks after the charged crimes had no “logical relation” to whether appellant jointly possessed the seized marijuana and cocaine or actively participated in the attempted drug deal at the hotel. Accordingly, the trial court acted within its discretion in concluding that the testimony concerning the arrest was not relevant for the proffered purpose and in excluding the testimony.

Statements; Implied Consent

State v. Carder, A09A2083, A09A2084

Carder was charged with vehicular homicide and DUI (less safe). The State appealed from the suppression of Carder’s statements and from the suppression of her refusal to take the State-administered test. The evidence showed that Carder was involved in a two car accident. After briefly speaking with the investigating officer she was taken to the hospital. The officer arrived later and directed that she not be allowed to leave although she had refused medical treatment. He then interviewed her before reading her the implied consent rights. The State first argued that the trial court erred in suppressing the statements made during the interview. The Court held that a reasonable person in Carder’s position would have believed that she was being restrained to the degree associated with a formal arrest, when pursuant to the officer’s request, hospital staff prevented her from leaving the hospital after she refused medical treatment. The investigator then located Carder and a nurse in the emergency room and escorted them to a hospital trauma room, where he questioned Carder about the accident for 48 minutes. Thus, the Court held, trial court was authorized to conclude that Carder’s presence in the trauma room was more investigative than medical. As such, the interrogation before the giving of the mandated warnings was in violation of *Miranda*.

The State also appealed from the suppression of Carder’s refusal to take the State-administered test. The trial court found that the officer should have read her the warnings at the scene because the officer had knowledge that Carder was the driver of her vehicle, smelled of alcohol, and had recently consumed wine at lunch. But, the Court found, the trial court’s finding was erroneous because the mere consumption of alcohol is insufficient to show probable cause for DUI-less safe. Instead, the investigator did not have probable cause to arrest Carder for DUI-less safe until he interviewed her in the trauma room, which was the next available opportunity he had to speak with her. During that conversation, Carder repeated questions to the officer and had a flushed face, glassy eyes, slurred speech, and a lingering odor of alcohol about her person. The fact that Carder was the only person in her

vehicle at the accident scene and her admission that she had been drinking at that time, together with her physical manifestations at the hospital, provided the officer with probable cause to believe that Carder had been driving under the influence. Moreover, the officer's failure to give *Miranda* warnings during his questioning of Carder did not vitiate his testimony about her physical manifestations.

Accordingly, the Court reversed the trial court's suppression of Carder's refusal to submit to a State-administered blood test.

Finally, Carder cross-appealed to challenge the trial court's refusal to suppress the statement she gave to the nurse who was with the investigator during the interview in the trauma room. Carder said to the nurse, "I know why you want blood, I'm not giving you my blood" Carder argued that the statement was inadmissible because she had not been Mirandized yet. The Court held the statement admissible. It found that there was no evidence that the nurse was acting under the investigating officer's direction when she sought to draw Carder's blood for medical diagnostic purposes. When Carder blurted out the foregoing statement in response to the nurse's attempt to take her blood, the officer had not yet read implied consent warnings or initiated questioning to Carder about the accident. Although the officer was present in the room and overheard Carder's statement, her statement was volunteered and not the product of any questioning by him. To the extent Carder argued that her statement was protected by the privilege against self-incrimination, the Court also disagreed. The privilege against self-incrimination protects an accused only from being compelled to testify against herself or otherwise to provide the State with evidence of a testimonial or communicative nature. Given that the nurse was not attempting to secure a communication from Carder when she asked to draw her blood, Carder's privilege against self-incrimination was not implicated.

Reopening Evidence

Sirmans v. State, A09A2237

Appellant was convicted of possession of marijuana. He contended that the trial court erred in reopening the evidence to allow the State to put in impeachment evidence against his defense witness. The evidence showed that appellant was approached by an officer after

appellant parked his car in a handicap spot. When the officer asked appellant to take his hand out of his pocket, appellant lunged at the officer and was subdued by a taser. Appellant called a female witness who claimed to have seen the incident from across the street. She testified that she did not know appellant and that the officer tasered appellant for no reason. After she testified, the evidence was closed and a lunch break called. During the break, some information surfaced that the witness did in fact know appellant. The trial court granted the State's request to reopen the evidence and continued the trial to permit both sides to look further into what the court viewed as newly discovered impeachment evidence. When the trial reconvened the next afternoon, the state called the investigating officer and several other witnesses whose testimony collectively authorized a finding that the defense witness had been untruthful during her testimony.

The Court held that Georgia has adopted a liberal rule in this regard, granting trial courts very broad discretion in permitting parties to offer additional evidence at any stage of the trial. The Court noted that leniency in this area is very unlikely to constitute an abuse of discretion, as the appellate courts are guided by OCGA § 24-1-2, which provides that "[t]he object of all legal investigation is the discovery of truth." Therefore, the trial court did not abuse its discretion in reopening the evidence.

Batson

Duffie v. State, A09A2281

Appellant was convicted of selling cocaine. He contended that the trial court erred by rejecting his *Batson* challenge to the State's use of peremptory strikes against the only two potential jurors who were black. A trial court must follow a three-step test for evaluating challenges to peremptory strikes on *Batson* grounds: First, the opponent of a peremptory challenge must make a prima facie showing of racial discrimination. Second, the burden of production then shifts to the proponent of the strike to give a race-neutral reason for the strike. Third, after hearing from the opponent of the strike and considering the totality of the circumstances, the trial court then decides whether the opponent of the strike carried his burden of proving that discriminatory intent in fact motivated the strike.

Here, the prosecutor explained that

she struck the first of the prospective jurors at issue because she seemed overly friendly towards appellant but ignored the prosecutor. She struck the second of those jurors because the woman stated that she knew appellant's grandmother and "was the only person in the panel who knew anybody in [appellant's] family." The Court held that these were valid reasons because perceived hostility towards the State and, conversely, perceived favoritism towards the defendant, constitute race-neutral reasons for striking a prospective juror. The Court also found meritless appellant's argument that the trial court should have found that the State was motivated by discriminatory intent despite the race-neutral reasons it offered for its peremptory challenge because that discriminatory intent was demonstrated by the fact that the State struck the only two members of the jury pool who were black. The Court held that "numbers alone may not establish a disproportionate exercise of strikes sufficient to raise a prima facie inference that the strikes were exercised with discriminatory intent." Moreover, appellant offered no additional evidence of discriminatory intent, such as showing that the State failed to strike potential white jurors who were similarly situated to the potential black jurors —i.e., who knew either appellant or his family, who had displayed signs of favoritism towards appellant, or who had displayed signs of hostility towards the prosecutor. Furthermore, the State did not confine its use of peremptory strikes to the two prospective black jurors; the State also used peremptory challenges against seven white jurors on the jury panel.