

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 1, 2016

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THIS WEEK:

- **Violations of Oath of Office; Voir Dire**
- **Business Records; Store Receipts**
- **Sentencing; Rule of Lenity**
- **Motions to Suppress; Timeliness**
- **Medicare Fraud; Special Demurrers**

Violations of Oath of Office; Voir Dire

Reynolds v. State, A15A1248 (11/13/15)

Appellant, a former police officer, was convicted of two counts of violation of oath of office as a public officer. He contended that the evidence was insufficient to support his convictions. The Court disagreed.

Appellant was convicted under O.C.G.A. § 16-10-1, which makes it illegal for any public officer to “willfully and intentionally violate[] the terms of his oath as prescribed by law.” To convict an officer of violating O.C.G.A. § 16-10-1, the State must prove that the defendant was actually administered an oath, that the oath was prescribed by law, and that the officer violated the terms of that oath. Appellant did not dispute the terms of the oath, that he was administered the oath, or that the oath was one prescribed by law. Rather, he contended that the State failed to prove that he violated that part of the oath which required him to “faithfully observe all the rules, orders[,] and regulations of the DeKalb County Police Department.” Specifically, he argued that the State could not prove a violation of this part of his oath without introducing into evidence a certified copy of the rule, order, or regulation he allegedly violated.

But, the Court noted, the cases relied upon by appellant each involved the attempted enforcement of a city or county ordinance or regulation. Thus, each of these cases was applying the well-established rule that neither the superior courts nor the appellate courts of this State can adjudicate a claim or defense based on a city or county ordinance unless the ordinance has been properly presented. Appellant, however, was not being prosecuted for a violation of a county rule, ordinance, or regulation. The State, therefore, was not required to introduce into evidence the terms of any such rule, ordinance, or regulation. Instead, the prosecution had to prove only that appellant engaged in the conduct alleged in the indictment and that such conduct violated his oath of office. Here, appellant admitted he took an oath that required him to “faithfully observe all the rules, orders[,] and regulations of the DeKalb County Police Department.” Additionally, there was testimony that these rules, orders, and regulations were contained in an employee manual given to all recruits, including appellant, at the time they entered the police academy; that appellant completed the 26-week-long police academy training course, during which these rules, orders, and regulations were reviewed in-depth; and that the conduct of which appellant was accused would constitute a violation of those rules, orders, and regulations. Moreover, appellant himself admitted at trial that the conduct of which he was accused would constitute a violation of his oath of office. Accordingly, the evidence was sufficient to sustain his convictions for violating O.C.G.A. § 16-10-1.

Appellant also contended that the trial court erred in limiting the number of his general voir dire questions to no more than ten.

The record showed that prior to jury selection, the trial court informed both parties that a number of general questions had been posed to the jury by way of a written questionnaire and that the responses of each potential juror would be provided to counsel. The trial court further informed the parties that each could ask no more than ten questions during general voir dire. The court imposed no limit on the number of questions that either side could pose to a potential juror when questioning that juror individually.

The Court found that appellant failed to show any abuse of discretion by the trial court. Although appellant objected at trial to the ten-question limit for general voir dire, he did not identify for the trial court any questions he wished to ask during general voir dire that would have put him over the ten-question limit. Moreover, appellant was allowed to pose as many questions as he liked when each of the potential jurors was questioned individually. And a review of the record showed that the relatively lengthy voir dire which occurred in this case was sufficient to ascertain the fairness and impartiality of the prospective jurors.

The Court found that appellant failed to show any abuse of discretion by the trial court. Although appellant objected at trial to the ten-question limit for general voir dire, he did not identify for the trial court any questions he wished to ask during general voir dire that would have put him over the ten-question limit. Moreover, appellant was allowed to pose as many questions as he liked when each of the potential jurors was questioned individually. And a review of the record showed that the relatively lengthy voir dire which occurred in this case was sufficient to ascertain the fairness and impartiality of the prospective jurors.

Business Records; Store Receipts

Wallace v. State, A15A0789 (11/16/15)

Appellant was convicted of felony shoplifting. He contended that the trial court erred in admitting the store receipt as evidence of felony value. The Court disagreed.

Under new O.C.G.A. § 24-8-803(6), a business record is admissible as an exception to the hearsay rule if: the record was made at or near the time of the described act; the record was made by a person with personal knowledge and a business duty to report; the

record is admitted through the testimony of a qualified witness; the record was kept in the course of a regularly conducted business activity; the record was made as part of the store's regular business activity; and the source of information or the method or circumstances of preparation do not indicate a lack of trustworthiness. At trial, a security officer testified that after appellant left the store, he took the items in the cart to customer service and had them provide an itemized receipt for all of the merchandise. After customer service provided the itemized receipt, the officer retrieved the merchandise and the receipt and then compared them to make sure that all of the merchandise was on the receipt. The officer identified the itemized receipt at trial, and he confirmed that it listed all of the merchandise that appellant shoplifted from the store. The officer also confirmed that the pre-tax total for all of the shoplifted items was \$538.73.

The Court found that the security officer was competent to testify regarding the reliability and trustworthiness of the merchandise receipt because he had personal knowledge of the store's process for determining the value of shoplifted items and he personally compared the merchandise in the cart to the items listed on the receipt. Moreover, the officer's testimony sufficiently authenticated the receipt, which showed that appellant shoplifted more than \$500 in merchandise, and the officer confirmed that the receipt was created right after appellant left the store. Finally, the officer's testimony showed that he followed the store's normal course of business in having a cashier scan the shoplifted items and then comparing the items to the itemized receipt to ensure that the receipt accurately reflected the value of the stolen merchandise. Under these circumstances, the trial court did not abuse its discretion in admitting the merchandise receipt as a business record. Furthermore, the officer's testimony, combined with the value of the stolen merchandise as shown on the receipt, was sufficient to establish felony value for purposes of O.C.G.A. § 16-8-14(b)(1).

Sentencing; Rule of Lenity

Gordon v. State, A15A1052 (11/18/15)

Appellant pled guilty to one count of hit and run, but entered into a stipulation of facts on a felony charge of making a false

statement, arguing that the rule of lenity applied to the charged offense. The trial court found appellant guilty of the charged offense of making a false statement and, based on *Reese v. State*, 296 Ga.App. 186 (2009), rejected appellant's argument that he should be sentenced for the misdemeanor of making a false report of a crime under the rule of lenity.

The Court initially stated that the "required evidence" test of *Drinkard* is not the test that determines whether the rule of lenity applies. But, in *Selge v. State*, 290 Ga.App. 857 (2008), the Court relied upon *Drinkard* to conclude that the rule of lenity did not apply. Therefore, the Court disapproved of *Selge* to the extent that it can possibly be read to hold that the *Drinkard* "required evidence" test is the test to be used for rule-of-lenity analysis. And in *Reese*, the Court relied solely upon *Selge's* use of the *Drinkard* analysis to conclude that the rule of lenity did not apply to the same statutes at issue in this case. Therefore, the Court overruled *Reese*.

Instead, citing *Quawey v. State*, 274 Ga.App. 657 (2005), the Court stated that the essential requirement of the rule of lenity is that both crimes could be proved with the same evidence. Here, the State accused appellant, via indictment, of making a false statement in violation of O.C.G.A. § 16-10-20, in that he "did knowingly and willfully make a false statement, to wit: that his vehicle had been hit by another vehicle near Dalton High School, in a matter within the jurisdiction of the government of a city, to wit: the City of Dalton Police Department . . ." The Court stated that upon review of the two statutes at issue, although there are many ways that the crime of making a false statement may be committed, appellant's conduct, as charged, subjected him to prosecution and sentencing under both O.C.G.A. § 16-10-20 and O.C.G.A. § 16-10-26. Indeed, appellant willfully and knowingly made a false statement to law-enforcement officers by falsely reporting to those officers a crime that he alleged to have occurred in their jurisdiction. Thus, because these two statutes provide different grades of punishment for the same criminal conduct, appellant was entitled to the rule of lenity. Accordingly, the Court reversed appellant's conviction for felony false statement and remanded for resentencing under the misdemeanor false-report-of-a-crime statute.

Motions to Suppress; Timeliness

Gonzales v. State, A15A0833 (11/19/15)

Appellant was convicted of trafficking in methamphetamine. He contended that the trial court erred in refusing to hear his motion to suppress because it was untimely. The record showed that on Aug. 27, 2010, trial counsel filed a motion to suppress which was bereft of any facts, but requested that the court suppress “1. Any and all evidence illegally obtained and/or seized by the State. 2. Any and all evidence of pre-trial and in-court identification of the Defendant. 3. Any and all statements made by the Defendant.” The motion also reserved the right to be amended. Appellant then waived arraignment on September 3, 2010. In October, appellant filed a more particularized motion to suppress which the State opposed as untimely and the trial court agreed.

The Court stated that under O.C.G.A. § 17-7-110 and USCR31.1, a motion to suppress must be filed within ten days of the date of arraignment unless the trial court extends the time for filing the motion. The purpose of this time requirement is fundamental fairness to all parties and those who must attend trial. Whether the motion has merit is not an issue; the rule does not apply only to non-meritorious motions. And where, as here, the defendant waives arraignment, the ten-day period in which the defendant must file pretrial motions begins on the date that the waiver of arraignment is filed. Accordingly, because appellant failed to move for and obtain an extension of time, the pretrial motions in this case should have been filed by September 13, 2010.

Moreover, the Court stated, under O.C.G.A. § 17-5-30(b), all motions to suppress, whether based on statutory or non-statutory grounds must state facts and not merely conclusions. But here, the Court found, appellant’s original motion, although timely, failed to provide any factual statement, much less any factual support for the arguments he raised in his amended motion to suppress. Thus, because the original motion did not meet the statutory requirements, it was subject to dismissal. And, appellant’s proffered amendment of the motion to suppress, which was tendered more than one month after he waived arraignment, was untimely. Moreover, the Court found, appellant had the benefit of

the State’s witnesses in the case at a probation revocation hearing in July, 2010. Therefore, he was not denied a meaningful opportunity to challenge the traffic stop; rather, he failed to take timely advantage of the opportunity to do so. Accordingly, the Court found no abuse of discretion by the trial court in refusing to hear the motion to suppress.

Medicare Fraud; Special Demurrers

Cole v. State, A15A1534 (11/19/15)

Appellant was indicted for Medicaid fraud and theft by taking. Count 1 alleged that appellant committed Medicaid fraud in that “beginning on or about November 1, 2010[,] and continuing through on or about December 27, 2013, [she] did unlawfully and intentionally obtain and keep for herself medical assistance payments in an amount greater than that to which she was entitled from the Georgia Medicaid Program by means of a fraudulent scheme[.]” Count 2 charged that appellant committed theft by taking in that, “between on or about November 1, 2010, and continuing through on or about December 27, 2013,” she unlawfully took more than \$1,500 from the State of Georgia.

At the hearing on appellant’s special demurrer to the indictment, the State’s investigator testified that he reviewed claims constituting “what [appellant] would have submitted to Medicaid and what she was paid by Medicaid,” and he compared patient files and patient records with the claims data. As part of the investigation, he reviewed approximately 3,000 claims. According to the investigator, the range of dates covered by the claims was from November 2010 through the end of December 2013. Claims were submitted by appellant “continuously throughout ... that time frame.” He further testified that appellant submitted the claims electronically, with each claim submitted for a specific date and a billing amount for that specific date. He agreed that he determined that “some dates were evidence of thefts and some dates [were] not.” And, he “used those specific dates to come up with a number, \$297,831.39” which was the alleged amount of Medicaid fraud.

Appellant first contended that the trial court erred in finding that it was sufficient for the indictment to identify the individuals

named therein merely by their initials. According to the indictment, the patients listed in Exhibit “A” were the patients who did not receive the extent of services billed, and the persons listed in Exhibit “B” were the patients for which appellant billed for services for which there was no substantiating documentation. The Court stated that generally, if a charging instrument charges the defendant with committing a crime against a person, the injured person should be identified in the charging instrument. Here, however, the indictment did not charge appellant with committing a crime against a person but against the State of Georgia. The omission of individuals’ names from an indictment is not a ground for sustaining a special demurrer where, as in the case of these patients, the individuals are only collaterally involved in the alleged offense.

Appellant also contended that the trial court erred in overruling her special demurrer with regard to portions of the indictment that contended that the range of dates alleged by the State was overly broad. The Court agreed. The Court found that the investigator’s testimony suggested that the State could have identified, by date, each of the electronically filed claims that appellant had found to be acts of Medicaid fraud and theft by taking. The State did not present evidence showing that it could not more specifically identify the date of each criminal act. Furthermore, appellant was not apprised by the indictment of the claims that the State contended were fraudulent, leaving her uncertain of which of the thousands of claims she submitted to Medicaid over a more than three year period were pertinent to her defense. And, the State was able to use the electronic information available to the investigator to calculate the amount of the alleged overcharges down to the penny, but, the State did not show that it was unable to more narrowly state the dates of the crimes. Thus, the Court concluded, because the indictment alleged that the crimes of Medicaid fraud and theft by taking were committed over a range of dates and the State did not establish that it was unable to more narrowly identify those dates, the trial court erred in denying appellant’s special demurrer to the indictment.