Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 28, 2014

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Double Jeopardy; Speedy Trial

Whatley v. State, A13A2246 (3/10/14)

Appellant was charged with several counts of child molestation. After his trial ended in a mistrial, he filed one plea in bar based on double jeopardy and one plea in bar on constitutional speedy trial grounds. The trial court denied them both.

The record showed that appellant was arrested in May, 2008 and originally indicted in December, 2009. He opted-in under O.C.G.A. § 17-16-1, et seq., and was therefore given access to the prosecution's evidentiary file. In reviewing the prosecutor's file, defense counsel noticed that the victim's mother was advised to take the victim for a medical exam. Since no record of the medical exam was in the file, defense counsel assumed that the victim was never taken for the examination. Appellant's trial began in October, 2012. In his opening statement, defense counsel emphasized that despite being advised by law enforcement to take her daughter for a medical exam, the mother had never done so. When the mother then testified during direct examination that she had taken her daughter for the examination, defense counsel moved for a mistrial, based on the fact that the State had failed to inform him that the victim had undergone a medical exam and, as a result, defense counsel's credibility had been compromised by his opening statement. The trial court granted the motion but specifically refrained from making a finding as to whether the prosecutor had acted deliberately, for the purpose of goading a mistrial.

Appellant argued that his second trial was barred by double jeopardy because the trial ended as a result of prosecutorial misconduct. The Court disagreed. When a defendant successfully moves for a mistrial based on alleged prosecutorial misconduct, the general rule is that the Double Jeopardy Clause does not bar a retrial. Retrial will be prohibited, however, where the defendant can show that the prosecutor acted deliberately, in an attempt to goad the defendant into moving for a mistrial. To prevail on such a claim, the defendant must prove that the State was purposefully attempting through its prosecutorial misconduct to secure an opportunity to retry the case, to avoid reversal of the conviction because of prosecutorial or judicial error, or to otherwise obtain a more favorable chance for a guilty verdict on retrial.

The Court noted that whether the prosecutor intended to goad appellant into moving for a mistrial represents a question

of fact, to be determined by the trial court. The trial court found that appellant's double jeopardy claim failed for two reasons. First, the court found that the prosecutor had not, in fact, engaged in any misconduct. The court further found that, even if the prosecutor's conduct could be considered improper, there was no evidence that he engaged in this conduct for the purpose of provoking a mistrial.

With respect to the prosecutor's conduct, the Court found that the record showed that he did not deliberately withhold any information or reports to which the defense was entitled. Instead, the prosecutor's testimony showed that he was unaware that the mother had even been instructed to take the victim for a medical exam until after trial had begun and a jury had been impaneled. Additionally, both the prosecutor's testimony and the documentary evidence showed that the State received no written confirmation of the exam until after opening arguments had occurred and testimony had begun. Moreover, although the prosecutor received oral confirmation from the mother, before putting her on the stand, that she had taken the victim for the recommended medical exam, he was under no obligation to provide this information to the defense. The statutory obligation of O.C.G.A. § 17-16-73 is not triggered when a witness merely makes an oral statement. There can be no "possession, custody, or control" of a witness' statement which has neither been recorded nor committed to writing.

Furthermore, the Court found, defense counsel was at least as equally responsible as the prosecutor for the failure to discover the existence of the victim's medical exam until the morning of trial. Defense counsel admitted that he had noticed, as early as 2008, the note in the prosecution's file directing the mother to take the victim for a medical exam. Despite this knowledge, however, defense counsel failed to ask the prosecutor, the mother, or the medical facility if such an exam had been performed. Rather, he simply assumed that if an exam had been performed, a copy of it would appear in the prosecution's file and/or would be produced during discovery. Under these circumstances, the Court found no error in the trial court's conclusion that the prosecutor did not engage in any misconduct.

But, the Court added, even assuming misconduct by the prosecutor, there was no evidence the prosecutor acted with the intent of provoking a mistrial. The record reflected that, although it was early in the trial, nothing had happened that would have caused the State to desire a mistrial. The only witness to testify, the victim, had given unequivocal testimony that was damaging to appellant. And the State had won a significant evidentiary ruling that allowed it to introduce appellant's use of child pornography. Moreover, the prosecutor had no reason to prompt a mistrial so as to be able to introduce the medical report at a later trial, as that report did nothing to support his case. Additionally, despite appellant's assertions to the contrary, no evidence supported the inference that the prosecutor wanted a second trial because he had learned appellant's trial strategy from defense counsel's opening statement. Rather, the logical inference to be drawn from the evidence was that the prosecutor would benefit more from continuing the original trial because, given defense counsel's representation in his opening statement that no medical exam had occurred, the prosecutor had the opportunity to cause the jury to question defense counsel's credibility.

Appellant also contended that the trial court erred in denying his plea in bar on constitutional speedy trial grounds. The record showed that only five months had elapsed from the date of the mistrial to the date on which the trial court denied appellant's plea in bar. Relying on *Brewington v. State*, 288 Ga. 520 (2011), the trial court held that the five months did not trigger an analysis under *Barker v. Wingo*.

Appellant contended that the trial court erred and that the correct length of time was 59 months; the length of time between his date of arrest and the date on which the plea in bar was denied. The Court again disagreed. The *Brewington* Court held that when a defendant has actually been tried and the trial ends with a mistrial, the relevant time frame for purposes of a motion to dismiss on constitutional speedy trial grounds is from the date of the mistrial through the date the motion was denied. The Court stated that it did not read *Brewington* as standing for the proposition that, for the purpose of analyzing speedy trial claims the clock is automatically reset whenever a mistrial occurs, no matter the reason for the mistrial. Rather, the Court stated, *Brewington* holds that the time for analyzing a speedy trial claim will be calculated from the date of a mistrial only where the mistrial does not result from any misconduct by the State. And here, the record showed that the prosecutor did not engage in any misconduct, deliberate or otherwise. Thus, the mistrial was necessitated not by the actions of the State, but instead was granted by the trial court out of abundance of caution, after defense counsel objected to the giving of a curative instruction and insisted on a mistrial. In fact, the Court noted, granting the mistrial actually benefitted appellant. Accordingly, because the mistrial was not caused by prosecutorial misconduct, the trial court's decision to apply *Brewington* and calculate the relevant time period for appellant's speedy trial claim beginning with the date on which appellant filed his plea in bar. And because the delay between the filing of that motion and the trial court's ruling on the same was less than a year, the trial court correctly found that appellant's speedy trial claim failed at the threshold.

Shoplifting; Fatal Variance

Leonard v. State, A13A2014 (3/13/14)

Appellant was convicted of felony shoplifting. He contended that there was a fatal variance between the indictment and the evidence because he was charged with taking a Dell Streak 7 cell phone, but the evidence showed that the item taken was a Dell Streak 7 tablet. However, the Court stated, Georgia no longer applies an overly technical application of the fatal variance rule, focusing instead on materiality. The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the accused. It is the underlying reasons for the rule which must be served: 1) the allegations must definitely inform the accused as to the charges against him so as to enable him to present his defense and not to be taken by surprise, and 2) the allegations must be adequate to protect the accused against another prosecution for the same offense. Only if the allegations fail to meet these tests is the variance fatal.

Here, the Court found, the indictment adequately informed appellant as to the charge against him. It placed him on notice that the State claimed that he had shoplifted a Dell Streak 7 device from a T-Mobile store on February 7, 2011. To the extent that the

indictment varied from the State's case, it was immaterial and did not affect appellant's ability to defend himself. And as there was no evidence that the particular T-Mobile store carried any other Dell Streak 7 device on February 7, 2011, appellant was protected against another prosecution for the same offense. Thus, the indictment sufficiently informed appellant of the shoplifting charge against him and he failed to show that he was unable to present a viable defense to such charge or that he was surprised or misled at trial by the testimony that a Dell Streak 7 was a tablet.

Identification; Show-ups

Johnson v. State, A13A2242 (3/13/14)

Appellant was convicted of aggravated assault and terroristic threats. The evidence showed that appellant got into an argument with the victim and the victim's friends outside of a nightclub. After about 5 to 10 minutes, appellant stated, "You punks wait right here, cause when I come back, I'm going to get my gun and I'm going to shoot you." Shortly thereafter, the victim saw appellant across the street. Appellant then fired a gun at the victim, hitting him in the leg. Appellant ran off, but was apprehended and brought back to the scene where the victim, now in an ambulance, identified appellant as his assailant.

Appellant contended that the trial court erred in denying his motion to suppress the pretrial and in-court identification testimony. The Court stated that although a one-on-one show-up identification is inherently suggestive, identification testimony produced from the show-up is not necessarily inadmissible. A one-on-one show-up may be permissible in aiding a speedy police investigation and because there may be possible doubts as to the identification which need to be resolved promptly and in order to enhance the accuracy and reliability of identification in order to permit the expeditious relief of innocent subjects.

The Court stated that it must first determine whether the identification procedure was impermissibly suggestive. If the show-up was reasonably and fairly conducted at or near the time of the offense, it is not impermissibly suggestive, and the Court need not determine whether there was a substantial likelihood of irreparable misidentification. Here, the Court found, the evidence showed that officers responded to the scene shortly after the shooting, and appellant was taken into custody after the victim's friend told police that appellant was the one who threatened to shoot the victim. Shortly thereafter, officers brought appellant to the back of the ambulance where the victim identified appellant as the man who shot him.

The victim had multiple opportunities to see appellant prior to the show-up, including one conversation during which appellant and the victim were just a few feet apart on a lighted street, and another encounter during which the victim had enough time to form an opinion that appellant was intoxicated. Although appellant was standing across the street when he returned and shot the victim, the victim was positive that appellant was the man who shot him because appellant's hood fell off when he ran away and the victim could see appellant's face. Since the victim had an opportunity to view appellant at close range on two occasions prior to the shooting and the show-up was conducted at the scene shortly after the shooting, it was not impermissibly suggestive. Accordingly, the Court concluded, the trial court did not err in finding that the victim's identification of appellant was reliable.

But, the Court added, even assuming that the show-up was impermissibly suggestive, appellant still had to show that there was a substantial likelihood of irreparable misidentification. In evaluating the likelihood of misidentification, the Court must look to the totality of the circumstances, including the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Considering the totality of the circumstances, including the victim's prior interactions and face-to-face conversations with appellant, the Court found no substantial likelihood of misidentification. Therefore, the trial court did not err in denying appellant's motion to suppress the pretrial identification.

Finally, the Court stated, notwithstanding any taint in pretrial identification procedures, a witness's in-court identification may still be admitted if it has an independent origin from the illegal identification procedures involved. Here, the victim's in-court identification of appellant was clearly based on his earlier interactions and conversations with appellant, not on his view of appellant at the show-up. Accordingly, the trial court also did not err in denying appellant's motion to suppress the victim's in-court identification of him.

Guilty Pleas; Sentencing

James v. State, A13A2460 (3/13/14)

Appellant pled guilty to burglary, two counts of kidnapping, two counts of aggravated assault, two counts of armed robbery, two counts of robbery by intimidation, two counts of false imprisonment, two counts of theft by taking, criminal damage to property, and possession of a firearm by a convicted felon. He filed a timely motion to withdraw his plea, which the trial court denied.

Appellant argued that under O.C.G.A. § 17-7-93(b) the trial court erred in refusing to allow him to withdraw his plea because the court failed to inform him of his unconditional right to withdraw that plea prior to the pronouncement of the sentence. The Court disagreed. Uniform Superior Court Rule 33.10 requires the trial court to tell a defendant that it intends to reject a negotiated plea and to inform the defendant that he has the right to withdraw his plea. But that requirement only applies when the defendant enters a negotiated plea, which the trial court intends to reject. The Court found that here, however, appellant entered a non-negotiated plea.

Appellant acknowledged that his plea was not "fully" negotiated but nonetheless argued that it was very similar to a negotiated plea because the State agreed to withdraw its petition for recidivist sentencing. But, the Court found, the record showed that there was no agreement between the State and appellant regarding his sentence. His plea therefore was nonnegotiated, the trial court did not reject a negotiated plea agreement, and the trial court thus was not obligated to inform appellant of his right to withdraw the plea before sentencing.

Finally, appellant argued that his two consecutive life sentences was a manifest injustice. However, the Court found, the trial court warned appellant at the plea hearing that he was "facing two life sentences plus 195 years," and appellant acknowledged that warning. Furthermore, his sentence of

two consecutive life sentences was within the range for a conviction of two counts of armed robbery under O.C.G.A. § 16-8-41(b) Moreover, a trial court is authorized to sentence a defendant to life imprisonment for armed robbery, even when the defendant is not a recidivist. Accordingly, the Court found, the trial court did not err.

VGCSA; Sufficiency Of The Evidence

Scott v. State, A13A1658 (3/12/14)

Appellant was convicted of trafficking cocaine (Count 1); possession of cocaine with intent to distribute (Count 2); possession of marijuana with intent to distribute (Count 3); maintaining a dwelling or structure for the distribution of controlled substances (Count 4); and three counts of possession of a firearm during the commission of a crime (Counts 5, 6, and 7). He argued that the evidence was insufficient to support his conviction on each and every count. The Court agreed and reversed.

The evidence showed that appellant lived at 307 MLK Jr. Boulevard, in a house behind his brother, Kenneth, who lived at 307 East Jenkins St. The police conducted a few controlled buys at the East Jenkins St. house and then obtained a search warrant. About 10 minutes prior to the execution of the warrant, one officer, who was on patrol in the area, drove by 307 East Jenkins and observed appellant and the three other co-defendants standing outside in the front yard. When the officer later returned to 307 East Jenkins with the search team, appellant was walking along the side of the house. Officers detained appellant during the search of the house. Officers also detained Anderson, who had been sitting on the front porch, and Holloway, who had been standing near appellant. An officer subsequently searched appellant prior to placing him in a patrol car, and the officer found approximately $254 in cash on his person. The cash was in small denominations, with no bill larger than $20. Upon executing the search warrant, all the drugs and weapons were found inside the house.

The Court stated that in order to prove the three drug charges, the State was required to prove that appellant possessed the requisite drugs. For cocaine trafficking, the State was required to prove that appellant knowingly possessed 28 grams or more of cocaine. O.C.G.A. § 16-13-31(a)(1). Similarly, the State was required to prove that appellant possessed cocaine and marijuana with the intent to distribute. O.C.G.A. § 16-13-30(b), O.C.G.A. § 16-13-30(j)(1).

The Court found that it was undisputed that appellant did not actually possess the drugs. Accordingly, the issue was whether appellant was in joint constructive possession of the drugs, and the question turned on whether he and the other defendants knowingly shared the power and intention to exercise dominion or control over them. Mere spatial proximity to contraband is not sufficient to prove constructive possession. Rather, the State must show that the defendant had the power and intent to exercise control over the drugs, which requires evidence of some meaningful connection between the defendant and the drugs. Moreover, one who intentionally aids or abets in the commission of a crime is a party to it. O.C.G.A. § 16-2-20(b)(3). While it is true that mere presence at the scene of a crime, even coupled with knowledge and approval, is insufficient to convict one of being a party, presence, companionship, and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred. If the totality of circumstantial evidence is sufficient to connect the defendant with the possession of the drugs, the conviction will be sustained, even though there is evidence to authorize a contrary finding.

Here, the Court found, when the police executed the search warrant, they found appellant standing outside 307 East Jenkins. The undisputed evidence showed, however, that he did not own or lease that residence. Consequently, there was no presumption that appellant possessed the drugs. While appellant was seen outside the house on prior occasions, including about 10 minutes prior to the police officers' arrival, there was no evidence that he was inside the house the day the search was conducted. Additionally, police officers did not find anything in the residence that linked appellant to the residence such as clothing, bills, fingerprints, financial statements, photographs, records, books, or other personal belongings. The officers also did not find drugs on appellant or anything on his person linking him to the house or its contents. The fact that appellant had over $250 when arrested was also insufficient to connect him to the drugs found inside the residence.

Furthermore, the Court found, appellant's conviction could not be upheld on the ground that he was a party to the crimes, because the State failed to present evidence that he intentionally caused another to commit the crimes, aided or abetted in the commission of the crimes, or advised or encouraged another to commit the crimes. Notably, although one witness testified that he saw hundreds of drug transactions at the house, there was no evidence that appellant was involved in any of these transactions. Rather, the witness testified that appellant's brother, Kenneth, directed the drug transactions and that another co-defendant supplied the drugs; however, he never specifically identified appellant as being involved. Likewise, while the police purchased drugs at 307 East Jenkins, including a hand-to-hand purchase by an undercover officer, there was no evidence that appellant was involved in these transactions either. In other words, while the circumstantial evidence showed that appellant may have been aware of the drug trafficking at the house, there was no evidence showing that appellant participated in any criminal activity occurring on the property. Consequently, the State's evidence did not show essential links between appellant's proven conduct and the drug trafficking and distribution charges. Accordingly, the Court reversed appellant's convictions for trafficking cocaine (Count 1), possession of cocaine with intent to distribute (Count 2), and possession of marijuana with intent to distribute (Count 3). Since appellant's convictions for possession of a firearm during the commission of a felony (Counts 5, 6, and 7) hinged on these other felony convictions, they were also be reversed.

Finally, appellant also contended that the evidence was insufficient to support his conviction for knowingly keeping a dwelling for the purpose of using controlled substances in violation of O.C.G.A. § 16-13-42(a)(5) (Count 4). The Court again agreed. In order to support a conviction under O.C.G.A. § 16-13-42(a)(5) for maintaining a residence or other structure or place used for keeping controlled substances, the evidence must show that one of the purposes for maintaining the structure was the keeping of the controlled substance. Thus, the mere possession of limited quantities of a controlled substance within the residence or structure is insufficient

to support a conviction under O.C.G.A. § 16-13-42(a)(5). In order to support a conviction under this statute for maintaining a residence or other structure or place used for selling controlled substances, the evidence must be sufficient to support a finding of something more than a single, isolated instance of the proscribed activity. In determining the sufficiency of the evidence in these regards, each case must be adjudged according to its own unique facts and circumstances, and there is no inflexible rule that evidence found only on a single occasion cannot be sufficient to show a crime of a continuing nature.

Here, the Court found, although the evidence showed that the house at 307 East Jenkins was used mainly for the distribution of drugs, there was no evidence that appellant knowingly kept or maintained the house. While appellant told officers that he did yard work at the property, by its plain language, O.C.G.A. § 16-13-42(a)(5) proscribes only the keeping or maintaining of a structure, not grounds-keeping. Moreover, the evidence did not show that appellant was inside the residence prior to the execution of the search warrant or that he had ever been inside the house at all. Consequently, the evidence was insufficient to sustain his conviction under O.C.G.A. § 16-13-42(a)(5).

Search & Seizure; Inventories

Askew v. State, A13A2060 (3/12/14)

Appellant was convicted of possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, attempting to elude a police officer, and a stop sign violation. He contended that the trial court erred in denying his motion to suppress. The evidence showed that an officer noticed that appellant was driving without a seatbelt. When the officer sought to stop appellant's vehicle, appellant attempted to elude the officer. Eventually, appellant came to a dead-end road and a complete stop. Appellant's two passengers jumped out of the car and ran. Appellant was arrested. The drugs were located during an inventory of appellant's vehicle.

The Court stated that in the interests of public safety and as part of what the Court has called "community caretaking functions," automobiles are frequently taken into police custody. The police may inventory the contents of a vehicle that has been lawfully impounded, but they may not use an impoundment or inventory as a medium to search for contraband. The individual's right of privacy is superior to the power of police to impound a vehicle unnecessarily. The ultimate test for the validity of the police's conduct in impounding a vehicle is whether, under the circumstances then confronting the police, their conduct was reasonable within the meaning of the Fourth Amendment. The determinative inquiry, therefore, is whether the impoundment was reasonably necessary under the circumstances, not whether it was absolutely necessary. A police seizure and inventory are not dependent for their validity upon the absolute necessity for the police to take charge of property to preserve it. Furthermore, officers are not required to ask whether an arrestee desires to have someone come and get the car, nor are they required to accede to an arrestee's request that they do so.

Here, the Court found, appellant's car was stopped in a residential, dead-end road, and there was no obvious person to take possession of it. The owner of the vehicle was not present, appellant's companions had fled, and the closest neighbor told the officer that she did not recognize appellant or the car. Therefore, the Court determined, based on the information available to the officers at the scene, the decision to impound the vehicle was reasonable.

Having determined that impoundment was not unreasonable, the Court then addressed the inventory search itself. The Court stated that an inventory search may be "reasonable" under the Fourth Amendment even though it is not conducted pursuant to a warrant based upon probable cause. In this respect, an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence, but instead, the policy or practice governing inventory searches should be designed to produce an inventory. Pursuant to these principles, the first purpose of an inventory search is the protection of the owner's property while it remains in police custody and the second purpose is the protection of the police against claims or disputes over lost or stolen property.

The Court found that here, the record contained sufficient evidence about the police department's policy on inventory searches. The officer who initiated the inventory search testified that once the decision to impound is made, it is the policy of the department to inventory the vehicle according to standard police procedure in order to protect the violator and the police. In so doing, the officer completed a standard inventory form, listing all items of value found in the vehicle other than the contraband. The ziplock bags containing marijuana and cocaine were found in plain view during the inventory search, and the removal of the bags from the console was not unreasonable. Because the impoundment in question was reasonable and there was evidence to support the trial court's finding that the search was conducted pursuant to standard police procedure, the Court concluded that the trial court's denial of the motion to suppress was not in err.

Jury Charges; Lesser Included Offenses

Strapp v. State, A13A2395 (3/14/14)

Appellant was convicted of riot in a penal institution (O.C.G.A. § 16-10-56). He argued that the trial court erred when it denied his requests to charge the jury on simple battery, misdemeanor obstruction of an officer, and justification. The Court stated that a trial court's refusal to give a requested jury charge is not error unless the request is entirely correct and accurate; is adjusted to the pleadings, law, and evidence; and is not otherwise covered in the general charge. Under O.C.G.A. § 16-1-6, "[a]n accused may be convicted of a crime included in a crime charged in the indictment or accusation. A crime is so included when: (1) [the included crime] is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged; or (2) [the included crime] differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission."

The Court first addressed whether the trial court erred as to the charge on simple battery. The Court stated that the refusal to give appellant's requested charge on simple battery was not reversible error unless simple battery is, as a matter of law, included in riot, the crime for which appellant was indicted. If so, then and only then, the issue becomes whether the evidence in the instant case

authorized a factual finding of simple battery and thus, warranted a jury charge as to that crime.

The Court noted that since the severity of the victim's injury was not at issue here, it would consider only whether simple battery by reason of insulting physical contact was established by proof of the same or less than all the facts required to establish proof of riot. The offense of riot in a penal institution has two elements: that the defendant be legally confined to any penal institution in Georgia, and that he or she has committed an unlawful act of violence or any other act in a violent or tumultuous manner. The offense of simple battery requires that the defendant either intentionally make physical contact of an insulting or provoking nature with or intentionally cause physical harm to a victim.

The Court found that riot differs from simple battery in that riot requires the use of violence or tumult and can be committed only by a person confined to a penal institution. And simple battery differs from riot in that simple battery requires an unlawful touching that is insulting, provoking, or intentionally harmful, whereas riot does not require any such personal touching, but only, as the indictment charged, a "violent or tumultuous act." As a matter of law, then, simple battery is not a lesser included offense of riot in a penal institution. Accordingly, because simple battery is not included as a matter of law in the offense of riot, the trial court did not err in refusing to charge the jury as to simple battery as a lesser included offense of riot.

Appellant also argued that misdemeanor obstruction is also a lesser included offense of riot. However, the Court found, misdemeanor obstruction specifically precludes the use of violence. Given that the evidence supported a conclusion that appellant used violence against the officer, a jury instruction on misdemeanor obstruction was also not warranted.

Finally, appellant contended that the trial court erred in refusing his requested charge on justification. But, the Court stated, in order to obtain an instruction on the affirmative defense of justification, a defendant must admit all elements of the crime charged against him with the exception of intent. Here, appellant testified repeatedly that the officer started the confrontation by pushing him, that appellant himself tried only to "restrain" the officer, and that he "grabbed" the officer only to prevent himself from falling. Thus, the Court held, because appellant did not admit using violence against the officer, he was barred from obtaining an instruction on justification.

Evidence; Motions in Limine

Jordan v. State, A13A2079 (3/10/14)

Appellant was convicted of possession of cocaine, driving with a suspended license, and driving without insurance. The evidence showed that after an officer stopped appellant's vehicle, he noticed appellant chewing on something that looked like crack cocaine. When appellant refused the officer's request to spit out the substance in his mouth, a struggle ensued. Some of the substance was spit out and it tested positive for cocaine. Appellant was taken to the hospital for treatment concerning a potential cocaine overdose.

Appellant contended that the trial court erred by denying his motion for a mistrial following testimony elicited by the prosecutor that he argued violated the trial court's pre-trial ruling excluding the results of a blood test on hearsay and confrontation grounds. The record showed that during trial, outside the presence of the jury, the State proffered testimony by a nurse who treated appellant to explain the treatment and other events at the hospital. Appellant's counsel objected on hearsay grounds to the admission of testimony or documents containing the results of the hospital's diagnostic drug screening because the nurse herself did not perform the blood tests. The trial court excluded the documented test results and ruled that the State could not elicit testimony stating the results of the drug screen.

When the nurse was called to testify, she testified that she had observed appellant's condition and that "he was in distress . . . his vital signs were crazy. His heart rate was sky high. His blood pressure was sky high. He was in obvious distress . . . he was in pretty bad distress at that time." The prosecutor then asked, "Based on the lab results that were done[,] did you perform any actions with regard to the defendant?" The nurse replied, "Yes, ma'am. He received activated charcoal by a tube in his nose, which activated charcoal is given for drug overdoses to absorb the drugs that can still be in your stomach, in your system."

Appellant contended that the State circumvented the trial court's ruling by eliciting evidence concerning the results of the drug screening. But, the Court found, appellant's argument ignored the legal basis for the trial court's ruling. The results of the drug screening were deemed inadmissible on hearsay and confrontation grounds because the witness had not performed the drug screening analysis. In contrast, the nurse's testimony about her personal observations and the actions she took did not pose the same problem. Appellant was able to cross-examine the nurse about these aspects of her testimony, and her testimony did not admit any out of court statement consisting of hearsay.

Furthermore, the Court found, to the extent the evidence implied that appellant had used drugs and reflected poorly on his character, the testimony was relevant to appellant's possible ingestion of the drugs he was accused of possessing. The fact that relevant testimony incidentally placed appellant's character in issue by showing that he used illegal drugs does not otherwise require the testimony to be excluded. Accordingly, the Court concluded, the trial court did not abuse its discretion by denying appellant's motion for a mistrial.

False Swearing; O.C.G.A. § 16-10-71

Finch v. State, A13A1922 (3/12/14)

Appellant was convicted of 25 counts of false swearing. The evidence showed that he owned or developed certain parcels of real property that he sold to home buyers. As part of the closing documents he executed for each property, he signed notarized affidavits stating that the materials used on the lots had been paid for and there were no outstanding debts for the construction. However, numerous accounts for materials used in building the properties had not been paid at closing.

Appellant argued that the evidence was insufficient to support a guilty verdict because nobody at the closing law firm swore him in by requiring him to raise his right hand to take an oath, and because the notary arguably did not personally witness his signature. Based on this, he argued that there was no lawful oath violated by his false statements. But, the Court stated, appellant's arguments ignore the plain language of the false swearing

statute, O.C.G.A. § 16-10-71(a) which states as follows: "A person to whom a lawful oath or affirmation has been administered or who executes a document knowing that it purports to be an acknowledgment of a lawful oath or affirmation commits the offense of false swearing when, in any matter or thing other than a judicial proceeding, he knowingly and willfully makes a false statement." Thus, the offense of false swearing is defined to include signing documents that purport to be an acknowledgment of a lawful oath, regardless of whether an oath had actually been administered by an official. Under this broad definition, one who executed a document with knowledge that his mere execution would "purport" to be or would evince his "acknowledgment" that the statements contained therein were being made under lawful oath or affirmation could be held accountable for false swearing.

Appellant conceded that the affidavits in question state that he was "duly sworn," and "on oath deposes and says" the averments in the affidavits. Thus, the Court concluded, his affidavits contained language purporting to be an acknowledgment of an oath or affirmation, and the evidence supported a finding of guilt as to false swearing.

Surveillance Videos; Voir Dire

Carter v. State, A13A1933, A13A2328 (3/12/14)

Appellants, Carter and Alford, were convicted of armed robbery. Alford contended that the trial court erred in allowing a detective, the State's witness, to identify him on the store's surveillance videotape of the robbery. The record showed that during the course of the trial, after viewing the surveillance videos and after the detective gave his initial testimony, a juror sent a note to the trial court inquiring if the trial court would identify the individuals shown in the surveillance videos. The trial court then instructed the jury that "a witness is not permitted to identify a person in a photograph or a video other [than] himself or herself. Rather, identity is an ultimate question of fact to be determined by the jury." After this instruction, the detective was then allowed to testify for a second time regarding the surveillance videos. This testimony included, over Alford's objection, that one of the perpetrators was Alford.

The Court stated that it is improper to allow a witness to testify as to the identity of a person in a video or photograph when such opinion evidence tends only to establish a fact which average jurors could decide thinking for themselves and drawing their own conclusions. Indeed, such identification testimony should be admitted for the jury's consideration only if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the video or photograph than is the jury, as when the witness is familiar with the defendant's appearance around the time a surveillance video or photograph was taken and the defendant's appearance has changed prior to trial, or when the witness knows about some other distinctive but presently inaccessible characteristic of the defendant's appearance. Thus, a witness's familiarity with the defendant, in and of itself, does not make his or her identification testimony based on a video or photograph admissible.

Here, the Court found, there was no evidence that the detective was familiar with Alford prior to his viewing of the surveillance video or that Alford's appearance had changed prior to trial. Although both Alford and Carter were seen with covered faces in the surveillance video of the robbery, the State presented no evidence as to why the detective would be more likely to identify the defendant than the jury. Therefore, the trial court erred in permitting the detective to identify Alford in the videotape.

However, the Court found, this error was harmless. Prior to the detective's testimony, another co-defendant testified, identifying Carter and Alford as his accomplices in the robbery, describing their respective roles during the robbery, and detailing the clothing worn by each before the robbery, as well as the changes made to their clothing when the robbery took place. Further, both two witnesses testified that they saw Carter and Alford near their homes shortly after the robbery and that the men discarded their clothes nearby. The police recovered clothing matching the items worn by Alford in the surveillance video of the robbery. Additionally, Alford's cell phone records placed him in the area of the robbery at the time the robbery occurred. Accordingly, the trial court's error in allowing the detective to testify as to Alford's identity on the videotape was rendered harmless in light of the overwhelming evidence of his guilt.

Appellant Carter argued that the trial court erred by not striking a juror for cause. The Court stated that only upon a finding of "manifest abuse" of discretion may a trial judge's decision concerning juror qualification be reversed. But even given this latitude, the potential impact of juror bias must not be underestimated. Running through the entire fabric of our Georgia decisions is a thread which plainly indicates the broad general principle intended to be applied in every case: Each juror shall be so free from either prejudice or bias as to guarantee the inviolability of an impartial trial.

Here, the Court quoted a colloquy between the juror and defense counsel in which the juror suggested that he could hold it against a defendant if the defendant did not take the stand and testify in his own defense. Carter's defense counsel moved to strike the juror. The State argued that the juror was ignorant of the law until instructed by the Court regarding a defendant's right not to testify, and that he never affirmatively stated that he would not follow the law as instructed by the trial court.

The Court found that the juror never indicated that he could set aside his doubts as to a defendant's innocence if that defendant elected not to testify. Thus, the Court held, it was "forced to conclude" that the trial court improperly failed to strike the juror for cause. The trial court never questioned the juror and the juror never gave an affirmative response that he would be able to follow the court's instructions that the State had to prove a defendant's guilt beyond a reasonable doubt and that he had no burden to put forth proof of his innocence. Therefore, Carter was entitled to a new trial on this basis.

DUI; Source Code

Parker v. State, A13A2100 (3/13/14)

Appellant was found guilty of DUI (per se) and speeding. He contended that the trial court erred in denying his motion for a Certificate of Materiality under the Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. §§ 24-13-90 et seq. so that he could obtain the testimony of a witness regarding the source code for the Intoxilyzer 5000. The record showed that at the hearing on his motion, appellant proffered a transcript of his expert witness' testimony from another proceeding, as well as two affidavits by that expert and

three scholarly articles. The State objected to the proffer, arguing that it was hearsay, and that under O.C.G.A. § 24-1-2(b), the rules of evidence applied to the motions hearing. The trial court agreed.

Appellant argued that the trial court erred and, citing *Arnold v. State*, 228 Ga.App. 137, 138 (1997), analogized the requirements for obtaining a continuance in the absence of a subpoenaed witness with the requirements for obtaining a certificate of materiality to secure the attendance of an out-of-state witness. In the former situation, O.C.G.A. § 17-8-25 lists the requirements for obtaining the continuance, which include a showing that the witness was under subpoena, that his testimony would be material, and the facts expected to be proved by the absent witness. The Court noted that in *Arnold*, it addressed continuances under O.C.G.A. § 17-8-25 and held that a trial counsel's proffer as to the absent witness's materiality was sufficient, absent a counter-showing by the State. Thus, appellant argued, a proffer should also be sufficient to establish the materiality of a witness in a hearing seeking a Certificate of Materiality to secure the attendance of an out-of-state witness. But, the Court stated, a motion for continuance is not "a fact-finding proceeding" under O.C.G.A. § 24-1-2(b) to which the rules of evidence apply; it is a criminal procedure motion under O.C.G.A. § 17-8-25. Accordingly, because appellant presented no admissible evidence during the hearing on his motion seeking a Certificate of Materiality, the trial court did not err in denying the motion.

Appellant also argued that the State has the source code in its possession, custody, or control, and he should be able to acquire it through an out-of-state subpoena under both O.C.G.A. §§ 17-16-23 and 40-6-392, citing *State v. Smiley*, 301 Ga.App. 778 (2009). The Court disagreed. First, the Court noted, *Smiley* is not binding precedent but rather is physical precedent only. Second, *Smiley* explicitly did not address whether the State was obliged to produce the source code, noting that "the [S]tate is not obligated to produce information that is not within its possession, custody or control." Instead, absent a transcript of the evidentiary hearing on the motion to suppress, the *Smiley* Court was obliged to assume that the trial court properly exercised its judgment and discretion in granting the motion and suppressing evidence in light of a bad faith discovery violation by the State. In fact, the Court stated, it had held that a trial court did not abuse its discretion in denying a defendant's motion seeking discovery of the source code when the defendant failed to provide evidence that the State owned, possessed or controlled it.

Finally, appellant argued, under the Public Function Test, the State was obligated to turn over the source code. The Court again disagreed. The Court noted that appellant's arguments included no citations to the record to support his factual contention that "CMI has been acting as an arm of law-enforcement," that "CMI is the exclusive provider of the Intoxilyzer; the only breath-testing machine used by Georgia law enforcement," that "CMI and the State of Georgia have jointly fought to restrict access to the Intoxilyzer source code," and that the State and the private company are joint participants in an enterprise. Accordingly, the Court refused to address his argument that CMI's actions should be imputed to the State under the Public Function Test, under which "the actions of private parties are imputed to the State where the functions are traditionally the exclusive prerogative of the State."

Venue; Ineffective Assistance of Counsel

Grant v. State, A13A1794 (3/12/14)

Appellant was convicted of aggravated assault and attempting to elude a police officer. The evidence showed that appellant, the manager of a restaurant, shot his short order cook after an argument following an argument between them. Appellant then left the restaurant in his vehicle. An officer, who received a BOLO concerning appellant, saw the vehicle and attempted to pull appellant over. Appellant attempted to elude the police officer. After leading several officers on a chase, appellant was eventually captured.

Appellant argued that the evidence supporting his conviction for attempting to elude was insufficient because the State failed to prove venue. The Court agreed. The Court found that several police officers gave extensive testimony identifying the streets over which they traveled in their successful pursuit of appellant. After his arrest, appellant told a detective which streets he had driven down and the location where he threw his gun from the car window. But neither appellant nor the officers identified the county where appellant refused to stop when signaled to do so or the county or counties through which the chase occurred.

The State argued that it proved venue for this count under O.C.G.A. § 17-2-2(h), which provides that "[i]f in any case it cannot be determined in what county a crime was committed, it shall be considered to have been committed in any county in which the evidence shows beyond a reasonable doubt that it might have been committed." But, the Court stated, the purpose of subsection (h) is to provide for establishment of venue in situations in which there is either some doubt as to which county was the scene of the crime or where the crime in fact occurred in more than one county. The offense of eluding an officer is complete when a defendant refuses to stop his vehicle despite visual and audible signals to do so. Here, the location where appellant refused to stop when signaled to do so was known. The officer from whom appellant fled could have established which county they were in when appellant refused to stop his car, and any of the officers could have identified the county or counties through which appellant was pursued and taken into custody, but they were never asked to do so. The evidence did not establish that it was difficult to determine where the crime was committed, or that the crime could have been committed in more than one county; the State simply failed to present any evidence about counties except that the shooting took place in Chatham County.

Nevertheless, the State argued, testimony identifying which streets appellant traveled and that the officers worked with the Savannah-Chatham Metro Police Department was sufficient, noting that appellant did not move for a directed verdict on the issue of venue. It also argued that the evidence of venue was not conflicting and that under these circumstances, slight evidence was sufficient to prove venue. But, the Court stated, *Jones v. State*, 272 Ga. 900 (2000) specifically held that "slight evidence" is not sufficient to prove venue, that venue is an element of each crime, and that it must be proven beyond a reasonable doubt. Thus, while appellant and several police officers testified about the streets on which they traveled, a street name, standing alone, is never sufficient to establish

venue. The only other alleged evidence of venue consisted of the testimony of the four law enforcement officers who tried to stop appellant or responded to the scene, each of whom stated that they were employed by the Savannah-Chatham Metro Police Department. Merely identifying the names of streets and the arresting officers' place of employment is insufficient to prove venue beyond a reasonable doubt, and therefore, the Court held, appellant's conviction for fleeing and eluding was be reversed.

Appellant also argued that his trial counsel was ineffective for failing to object to the admission of evidence concerning his 1981 guilty plea to two counts of armed robbery, without which he would not have been sentenced under O.C.G.A. § 17-10-7(c) as a recidivist ineligible for parole during his incarceration. Specifically, appellant argued that his trial counsel's failure to object constituted deficient performance because the evidence established affirmatively that his plea was not knowing and voluntary. He further contended that but for the deficient performance, there was a reasonable probability that his sentence would have been different.

The Court stated that the burden of proof for establishing that a guilty plea was entered freely and voluntarily differs depending on whether the challenge is to the plea itself or to the use of the plea to aggravate a sentence. In the direct appeal of a guilty plea, the State must affirmatively show that the defendant validly waived the constitutional rights affected by entering the plea, including his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. But in a collateral attack on a felony guilty plea used to impose a recidivist sentence, such as the one here, the State's initial burden is to prove only that the plea existed and that the defendant was represented by counsel when he entered the plea. After making this showing, the State may then rely on the "presumption of regularity" that attaches to final judgments. At that point, the burden shifts to the defendant to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant presents affirmative evidence of a constitutional infirmity, the burden shifts back to the State to prove the constitutionality of the plea.

The record showed that at sentencing, the State introduced a certified copy of the entire record related to the 1981 plea of guilty to two counts of armed robbery, which included the indictment signed by appellant and his attorney, the order sentencing appellant to serve eight years in prison, a one-page document with questions and answers titled "Transcript," and a one-paragraph document signed by the trial court titled "Certificate," which stated that the defendant answered in open court the questions in the "Transcript" and entered his plea freely and voluntarily. Thus, the Court found, the State met its initial burden to show that appellant was represented by counsel when he entered this guilty plea. The State could then rely on the presumption of regularity in judgments and the burden shifted to appellant to establish affirmative evidence showing an infringement of his rights or a procedural irregularity in entering his plea.

Appellant argued that the "Transcript" and "Certificate" forms that are part of the record in his 1981 armed robbery plea establish that he was advised of only one of his three *Boykin* rights, which was his right to trial by jury. The Court noted that the forms did not establish that he was informed of his right to the assistance of counsel at trial or of his right to avoid self-incrimination at trial. Additionally, the record showed that appellant submitted an affidavit of the court reporter, who averred that he could not locate the transcript of the guilty plea hearing or any notes from which the transcript could be recreated. Thus, the Court found, appellant made an affirmative showing of a constitutional infirmity in the taking of his plea. And, having produced affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea, the burden shifted back to the State to prove the constitutionality of the 1981 plea. Accordingly, the Court found, since the State has not yet had an opportunity to make such a showing, there is a reasonable probability that, but for trial counsel's deficient performance in failing to object to the use of this plea, appellant might have received a different sentence. Therefore, the Court vacated appellant's sentence and remanded the case for further proceedings consistent with its opinion.

Ex Parte Continuances; Witness Bolstering

Hoke v. State, A13A1997 (3/10/14)

Appellant was convicted of three counts of child molestation and one count of aggravated child molestation. He contended that the trial court erred by excusing the jury after an ex parte conference with the State about a problem with the State's witnesses. The record showed that late in the day after the first day of trial (Monday), the State learned that one of its expert witnesses, who was located in Ohio, was at the airport to fly to Georgia to testify the next day, but was called back to the office by his employer. The employer had refused to allow the witness to testify absent a valid subpoena from an Ohio court. The next morning, the State reported the problem to the court and to appellant's counsel. Appellant's counsel agreed to a one-day or two-day delay to allow the State to address the problem. Later that same afternoon, the State gave the court an update outside the presence of appellant or his counsel, and the court dismissed the jury, which had been selected but not sworn in. Two days later, on Thursday, the court convened a hearing on the State's motion for a continuance, and appellant opposed the continuance, citing his readiness, the lack of a valid subpoena, and his speedy trial demand. The trial court granted the continuance and at the end of the hearing, after the court had dismissed the parties, appellant's counsel requested clarification as to whether the court was granting a mistrial or continuing the case with the same jury. The court informed appellant's counsel for the first time that it had already dismissed the jury. Over counsel's continued objection to the ex-parte dismissal, the trial court granted the State a continuance.

Citing *Mora v. State*, 292 Ga.App. 860 (2008), the Court stated that while it applies the strict terms of O.C.G.A. § 17-8-255 (addressing the grounds for a continuance based on the absence of a witness) in reviewing the denial, as opposed to the grant, of a motion for continuance, the grant of a continuance despite the absence of a subpoena does not automatically constitute error. O.C.G.A. § 17-8-33(a) authorizes a court to grant a continuance whenever required by the absence of a material witness or the principles of justice. Here, the Court found, prior to

and during the hearing on the continuance, the State set forth its reasons why the absent witness' testimony was relevant and material to the case. The grant or denial of a motion for continuance is within the sole discretion of the trial judge, and absent a showing that such discretion was abused, it will not be controlled. The fact that the continuance was granted ex parte does not change this result. Here, the Court found, the original jury was not sworn, so jeopardy had not attached; the State had shown that the absent witness was material; trial resumed one month later; and appellant was not surprised by the presence of the witness at issue. "Accordingly, while we do not condone the ex parte nature of the trial court's actions in this case, we discern no error requiring reversal."

Appellant also contended that the trial court erred by admitting an unredacted audio recording and transcript of appellant's police interview. He challenged statements from the detective such as "why would this precious little girl tell a lie?" and "I just know that this little child does not lie," and argued that they impermissibly commented on the victim's credibility. And, since appellant's trial counsel failed to object to this testimony, appellant also argued that the failure to object constituted ineffective assistance of counsel.

The Court stated that comments made in such an interview and designed to elicit a response from a suspect do not amount to opinion testimony, even when evidence reflecting the comments is admitted at trial. The question, therefore, was not whether appellant's lawyer should have objected to the officer offering opinion testimony, but instead whether he should have objected that the testimony was without probative value or was too prejudicial to be admitted. In this regard, like any other evidence, testimony reflecting comments made by an officer in the course of an interview ought not be admitted if the probative value of the testimony is substantially outweighed by its tendency to unduly arouse emotions of prejudice, hostility, or sympathy.

Here, the Court found, appellant had initiated contact with police and requested to explain his version of the allegations against him. He admitted to certain general circumstances surrounding the abuse, such as locations and times, but he adamantly denied any inappropriate behavior. In this context, the officer's comments reflected an aggressive interrogation technique designed to test the truthfulness of appellant's story. Furthermore, the probative value of this testimony was not substantially outweighed by its prejudicial effect. Thus, the Court stated, it hardly would have surprised anyone observing the trial to learn that the interviewing officer was not satisfied with appellant's story and believed instead that appellant was not telling the whole truth about what had happened to the victim, and any rational juror could have surmised as much without being told explicitly. "Such comments upon the patently obvious generally pose little, if any, danger of prejudice, and they are not, we think, comparable to the specific and detailed commentary found inadmissible in [Georgia case law]." Therefore, the Court concluded, if objection had been made to the unredacted interview, the trial court properly would have overruled the objection and thus, the failure to object was also not deficient performance.