

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 11, 2014

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THIS WEEK:

- **Out of Time Appeals; Guilty Pleas**
- **Mutually Exclusive Verdicts**
- **Search & Seizure; DUI**
- **Police Misconduct; Qualified Immunity**
- **Search & Seizure**
- **Jurors**
- **Jury Charges; Judicial Commentary**

Out of Time Appeals; Guilty Pleas

Lewis v. State, A13A1847 (3/26/14)

Appellant pled guilty to multiple counts of VGCSA, a firearms offense, being a recidivist and being a habitual violator. He contended that the trial court erred in dismissing his motion for an out of time appeal because his plea was not knowingly and voluntarily entered and because his counsel failed to advise him that he was subject to recidivist sentencing under O.C.G.A. § 17-10-7(c) based on his prior felony convictions. The Court disagreed.

A criminal defendant has no unqualified right to file a direct appeal from a judgment of conviction and sentence entered on a guilty plea, and an appeal will lie from a judgment entered on a guilty plea only if the issue on appeal can be resolved by facts appearing in the record. The Court found that appellant was not entitled to an out of time appeal because the record established that his plea was knowingly and voluntarily entered, and he understood that he could be sentenced as a recidivist. Notably, all of the charges against appellant were read into the record by the

State. The trial court then determined on the record that appellant was represented by hired counsel, he could read and write, he was not under the influence of any drugs or alcohol, and he had no mental or physical problems. During a thorough plea colloquy, the trial court inquired whether appellant understood his right to remain silent, right to counsel, right to confront witnesses, right to present evidence and right to testify on his own behalf. Appellant answered affirmatively to each question posed by the trial court. The trial court further inquired whether appellant understood that he was presumed innocent and the State had the burden of proof. Again, appellant answered affirmatively. The trial court also had appellant complete a guilty plea petition and confirmed that appellant conferred with his counsel regarding the questions and statements in that petition.

The trial court also confirmed on the record that appellant understood the maximum fine and sentence for each count, that he was charged with being a recidivist, that the trial court could impose consecutive sentences and that the trial court could take his prior offenses into consideration in deciding whether to probate all or part of his sentence. Finally, the trial court confirmed on the record that appellant was not threatened, intimidated or coerced into pleading guilty, and that he was satisfied that his counsel had considered all the facts and possible defenses in the case.

Based on this record, the Court concluded that appellant failed to demonstrate that a manifest injustice would result unless his guilty plea was invalidated. Moreover, it appeared from the record that appellant's arguments regarding the validity of his plea and his counsel's assistance could all be resolved adversely to him. Consequently,

appellant could not show that the trial court abused its discretion in denying his motion for an out of time appeal.

Mutually Exclusive Verdicts

State v. Sawyer, A13A1687 (3/26/14)

A jury convicted Sawyer of involuntary manslaughter as a lesser included offense of felony murder (O.C.G.A. § 16-5-3), aggravated assault (O.C.G.A. § 16-5-21(a)), and possession of a firearm during the commission of a felony-aggravated assault (O.C.G.A. § 16-11-106(b)(1)). The evidence showed that Sawyer, while sitting in the back seat of a vehicle with a gun in his hand, shot the front seat passenger in the head. The trial court granted Sawyer's motion for new trial, setting aside his aggravated assault conviction, finding that it was mutually exclusive with the offense of involuntary manslaughter. The State appealed and the Court reversed.

The Court stated that verdicts are mutually exclusive where a guilty verdict on one count logically excludes a finding of guilt on the other. A mutually exclusive verdict may be rendered in a particular case where the offenses or acts alleged in the indictment as underlying the aggravated assault and involuntary manslaughter counts reflect that the jury, in order to find the defendant guilty on both counts, necessarily reached two positive findings of fact that cannot logically mutually exist. To determine whether this occurred, the alleged underlying offenses or acts must be carefully scrutinized.

Aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), may be committed either by attempting to commit a violent injury to the person of another, O.C.G.A. § 16-5-20(a)(1), or by committing an act which places another in reasonable apprehension of immediately receiving a violent injury, O.C.G.A. § 16-5-20(a)(2). A verdict of guilty as to aggravated assault based on O.C.G.A. § 16-5-20(a)(1) requires a finding of an intentional infliction of injury, which precludes the element of criminal negligence in reckless conduct. A verdict of guilt predicated on O.C.G.A. § 16-5-20(a)(2) does not.

In determining whether Sawyer's convictions for involuntary manslaughter and aggravated assault were mutually exclusive, the Court stated that it must look

to the indictment, the evidence, the jury instructions and the verdict form. Here, the Court found, the indictment charged Sawyer with aggravated assault based on his actions in knowingly shooting the victim with "a pistol, a deadly weapon." Additionally, the verdict form returned by the jury did not specify which assault subsection served as the basis for Sawyer's convictions. Nevertheless, the Court found, the record showed that the trial court only charged the jury on O.C.G.A. § 16-5-20(a)(2).

Under the specific circumstances of this case, the Court concluded that the jury instructions only gave the jury the choice of finding Sawyer guilty of aggravated assault based on O.C.G.A. § 16-5-20(a)(2), which does not require a finding of specific criminal intent toward the victim. Accordingly, there was no reasonable probability that the jury found that Sawyer acted with specific criminal intent in committing the aggravated assault. Moreover, there was no risk that the jury returned verdicts for aggravated assault and involuntary manslaughter that were mutually exclusive.

Search & Seizure; DUI

State v. Gauthier, A13A2430 (3/21/14)

Gauthier was charged with two counts of DUI. The trial court granted her motion to suppress, finding that the officer lacked articulable suspicion for the stop and that the officer stopped her for "no legitimate reason." The State appealed and the Court reversed.

The evidence showed that an officer observed a vehicle drive into a shopping center parking lot in the early morning hours. The vehicle drove through the lot in a circular manner, and then stopped in a parking space next to a closed business. The officer waited a minute and then drove to the vehicle without activating his vehicle's blue lights or siren, intending to ask the driver what she was doing in the parking lot of a closed business. The officer approached the driver's side of the vehicle. Gauthier, the vehicle's sole occupant, lowered her window. The officer asked Gauthier what she was doing. Gauthier replied that she was waiting for her boyfriend. The officer asked Gauthier for identification, and she handed him her driver's license. The officer detected a strong odor of alcohol emanating from the vehicle; he believed the

odor was coming from Gauthier's breath. A second officer arrived "just minutes" after the first officer had made contact with Gauthier. The second officer approached, noticed an odor of alcohol emanating from inside the vehicle, and observed that Gauthier's eyes were bloodshot and watery; she was crying and seemed distraught. When asked whether she had been drinking, Gauthier replied that she had drunk "one mixed drink." The second officer administered three field sobriety evaluations and Gauthier's performances on all three evaluations indicated that she was impaired. She was then arrested for DUI.

The Court stated that at least three types of police-citizen encounters exist: verbal communications involving no coercion or detention; brief "stops" or "seizures" that require reasonable suspicion; and "arrests," which can only be supported by probable cause. A first-tier encounter never intrudes upon any constitutionally protected interest, since the purpose of the Fourth Amendment is not to eliminate all contact between police and citizens, but simply to prevent arbitrary and oppressive police interference with the privacy and personal security of individual citizens. On the other hand, a second-tier encounter may violate the Fourth Amendment if the officer briefly "stops" or "seizes" a citizen without an articulable suspicion. Articulable suspicion requires a particularized and objective basis for suspecting that a citizen is involved in criminal activity. Moreover, a "seizure" within the meaning of the Fourth Amendment only occurs when, in view of all the circumstances surrounding the incident, a reasonable person believes that he is not free to leave.

The actions of an officer approaching a stopped vehicle, requesting to see a driver's license, and inquiring about possible criminal or suspicious activity clearly fall within the realm of the first type of police-citizen encounter and do not amount to a stop. Thus, the Court found, the first officer's actions fell within the realm of the first type of police-citizen encounter and did not amount to a stop.

During this first-tier encounter, the officers noticed the odor of alcohol emanating from the vehicle (and possibly Gauthier's breath) and that Gauthier's eyes were bloodshot and watery, and Gauthier admitted that she had consumed an alcoholic beverage. The

alcoholic smell provided the officer reasonable grounds to conduct a second-tier investigatory detention and the officers were authorized to conduct field sobriety evaluations as part of that investigatory detention. The fact that “a matter of minutes” elapsed between the first officer’s initial contact with Gauthier and the second officer’s arrival did not convert the investigative detention into an arrest. The Court determined that under the totality of the circumstances, a reasonable person in Gauthier’s position would conclude that her freedom of action was only temporarily curtailed and that a final determination of her status was simply delayed.

Finally, the Court found, at the time Gauthier was arrested, the officers had observed that an odor of alcohol emanated from Gauthier’s vehicle and possibly her breath, Gauthier had watery, bloodshot eyes, she admitted to having consumed a “mixed drink,” and her performance on all three field sobriety evaluations indicated she was impaired. Therefore, her arrest was supported by probable cause and gave officers the authority to request from Gauthier a chemical test under the implied consent statute.

Police Misconduct; Qualified Immunity

Gennusa v. Canova, 2014 U.S. App. LEXIS 6410 (11th Cir. 2014)

In 2009, while investigating an alleged misdemeanor violation of a domestic violence injunction, Detective Marmo and Sgt. Canova monitored, intercepted, and listened to privileged conversations between their suspect, Mr. Studivant, and his attorney, Ms. Gennusa, who were in a police interview room. They did so without any notice to Mr. Studivant and Ms. Gennusa, and without a warrant. The lawyer and her client then sued the two officers in federal court under 42 U.S.C. § 1983, alleging a violation of their Fourth Amendment rights. The federal district court denied the officers qualified immunity and they appealed.

The Court stated that the doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Qualified immunity gives

government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law. Because it was undisputed that Det. Marmo and Sgt. Canova were acting within the scope of their discretionary authority, Mr. Studivant and Ms. Gennusa bore the burden of establishing that qualified immunity was not appropriate. To satisfy this burden, they had to show two things — first, that Det. Marmo and Sgt. Canova violated the Fourth Amendment, and second, that at the time of the incidents in question it was clearly established that the challenged conduct was unconstitutional.

The Court found that because society recognizes as reasonable an expectation of privacy for confidential conversations between individuals, the government needs a warrant to intercept or record such conversations. The only question, then, was whether the subjective expectation of privacy held by Mr. Studivant and Ms. Gennusa about their privileged attorney-client conversations was one that society recognizes as reasonable. An expectation of privacy is deemed reasonable, if it has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property or to understandings that are recognized and permitted by society. The Court found that Mr. Studivant and Ms. Gennusa have such a source: The attorney-client privilege, which is the “oldest of the privileges for confidential communications known to the common law.” And although an analysis of whether an expectation of privacy is “legitimate” or “reasonable” requires a balancing of interests, the Court found that the balance weighed in favor of Ms. Gennusa and Mr. Studivant. Thus, the Court determined, the government has no weighty law-enforcement, security, or penological interest in recording, without a warrant, the attorney-client conversations of a person who has not been arrested, even if those conversations take place in a police interview room. On the other hand, the need for privacy is very strong when a person who is not under arrest or otherwise in custody is speaking to his attorney on privileged matters, even within the confines of a police interview room. One threat to effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel

because of the fear of being overheard. So, the Court concluded, Mr. Studivant and Ms. Gennusa had an objectively reasonable expectation of privacy when they discussed privileged matters in the interview room.

Nevertheless, the officers argued, citing numerous cases in support, there is no reasonable expectation of privacy in police stations. The Court distinguished those cases because they involved individuals who had been arrested, were in police custody, and/or had some indication that they were being monitored. Here, Mr. Studivant was not arrested and was not in custody. Furthermore, there were no posted signs that the police were recording conversations and thus, Mr. Studivant and Ms. Gennusa were completely unaware that the officers were eavesdropping on their privileged communications. Therefore, the Court “easily concluded” that there was a Fourth Amendment violation.

The Court next addressed whether in 2009, it was clearly established that the Fourth Amendment prohibited the warrantless recording of attorney-client conversations between a non-incarcerated suspect and his attorney under the circumstances presented here. The Court concluded that it was. The fact that the monitoring and recording took place in the context of a police interview room did not materially distinguish this case from U. S. Supreme Court precedent on electronic surveillance of private conversations. Therefore, the Court concluded, the district court properly held that Det. Marmo and Sgt. Canova were not entitled to qualified immunity for their warrantless monitoring and recording of the privileged attorney-client conversations between Mr. Studivant and Ms. Gennusa.

Search & Seizure

State v. Holmes, A13A2164 (3/21/14)

Holmes was charged with DUI (less safe), DUI (per se) and DUI (under age 21). The trial court granted his motion to suppress and the State appealed. The evidence showed that an officer received a dispatch that “several people were basically destroying the baseball field[].” The officer went to the area, noticed a vehicle driving at a high rate of speed and stopped it. While he was attending to this vehicle, a second vehicle approached and stopped and a second officer engaged

that driver. Meanwhile, a third officer also responded to the scene based on the dispatch report about vandalism at the baseball field and reckless driving on an adjacent road. He briefly investigated the fields and then drove to the scene where the other officers were parked with the stopped vehicles. The third officer observed the headlights of a third vehicle, driven by Holmes, approaching from the same direction as the first two vehicles. As the vehicle approached, the third officer activated his emergency lights and shined his spotlight on Holmes to stop the vehicle. The officer spoke to Holmes, noticed an odor of alcohol, and learned that Holmes had consumed several beers prior to driving. Holmes was eventually charged with DUI.

The Court stated that Georgia law requires that an investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. This specific, articulable suspicion must be based on the totality of the circumstances, e.g., objective observations, information from police reports, the modes or patterns of certain kinds of lawbreakers, and the inferences drawn and deductions made by a trained law enforcement officer. Here, the Court found, the third officer who stopped Holmes testified that he responded to the scene based on a dispatch call about damage to the baseball field and reckless driving. By the time he stopped Holmes, the officer had briefly visited the baseball field, but he did not observe anyone there. During his direct testimony, the officer described stopping Holmes's vehicle as soon as he saw its headlights because, "[f]irst and foremost, [I noticed] that it was on that road that time of the morning. Because around 2:20 in the morning, there's no traffic on that roadway. And also it was the 911 call that the people that were tearing up the baseball fields were also driving on that roadway." But on cross-examination, he added a new reason, "I noticed [Holmes] was coming at a pretty rapid pace. And I'm not sure if you can tell from the video or not, but he was actually straddling the yellow line when he came around the curve." Challenging this testimony, Holmes's counsel highlighted the fact that the deputy did not state those facts in his written incident report. In light of these weaknesses in the officer's testimony, the trial court's order explicitly found that "[t]he vehicle was

only stopped because of the alleged [baseball field] damage." Thus, the Court noted, the trial court did not find credible the officer's testimony that he observed Holmes commit potential speed or lane violations which would have justified a traffic stop.

In light of the trial court's findings, and in the absence of some other particularized suspicion, the Court concluded that the officer lacked authority to stop Holmes. Accordingly, based on the Court's deference to the trial court's credibility determinations and factual findings, the Court found no reversible error in the trial court's grant of Holmes's motion to suppress.

Jurors

Williams v. State, A13A2486 (3/20/14)

Appellant was convicted for burglary and forgery arising from a home invasion and, after the jury deadlocked on his armed robbery charges, he pled guilty to two lesser counts of robbery. He contended that the trial court erred in replacing one of the jurors during deliberations. The Court disagreed.

Here, the Court found, the record showed that after the case had been submitted to the jury, one of the jurors stopped participating in the deliberations. The juror told the court that she suffers from post-traumatic stress disorder, that she had taken the maximum dose of prescribed medication for her mental health issue, that the stress of the jury deliberations was causing her to shut down mentally and emotionally, that she had broken down and cried during the deliberations, and that she had physically removed herself from the group by sitting on the floor in the corner. The Court noted that O.C.G.A. § 15-12-172 provides that if at any time, whether before or after final submission of the case to the jury, a juror dies, becomes ill, upon other good cause shown to the court, is found to be unable to perform his duty, or is discharged for other legal cause, the first alternate juror shall take the place of the first juror becoming incapacitated. This Code section gives the trial court discretion to discharge a juror and replace him or her with an alternate at any time. Here, the Court found, the juror's mental health concerns, stated inability to deliberate further, and her admitted actions during jury deliberations, constituted legal cause for removal. Accordingly, the trial court

did not abuse its discretion in removing the juror and replacing her with an alternate juror.

Jury Charges; Judicial Commentary

McNeal v. State, A13A1925 (3/21/14)

Appellant was convicted of trafficking in cocaine, possession of marijuana with intent to distribute and obstruction. The evidence showed that appellant was driving a rental truck with his codefendant passenger when it was stopped for failing to maintain lane. The officers smelled marijuana and noticed marijuana on the front floorboard in plain view. A subsequent search of the interior of the vehicle revealed more marijuana and a kilogram of cocaine.

Appellant contended that the trial court erred by instructing the jury on the permissive presumption of possession against him as the driver of the vehicle, where there was clear evidence of equal access and the passenger/co-defendant requested the charge. He also argued that, if the permissive presumption charge were appropriately given, the trial court erred by failing to charge equal access also. The Court stated that evidence that appellant was the driver of the car gave rise to a rebuttable presumption that he exercised possession and control of the drug contraband found inside the car. And, it is true that the presumption of possession flowing from a defendant's status as driver of a vehicle may be rebutted if the driver presents evidence that other people had equal access to the vehicle and contraband. However, the equal access rule does not apply to eliminate the presumption of possession where all persons allegedly having equal access to the contraband are alleged to have been in joint constructive possession of the contraband. Since both appellant and his codefendant passenger were charged with joint possession of the marijuana and cocaine, the equal access rule did not apply. Even though the presumptive possession charge was requested by his codefendant instead of the State, the Court did not find that the trial court plainly erred in giving it.

Appellant also contended that the trial court erred by making an improper comment as to the circumstantial evidence of possession. The Court disagreed. The record showed that during trial, the prosecutor asked the officer "[w]as there any doubt in your mind that this

stuff, the cocaine and the marijuana, belonged to these two individuals?” The trial court sustained defense counsels’ objections, but then stated that “I’m not necessarily sustaining it because I don’t think there’s any evidence linking this to anyone. I have nothing to say about that. I’m just sustaining the objection because I think it’s speculative right now.”

The Court stated that to constitute an improper comment under O.C.G.A. § 17-8-57, the trial court’s statement must express an opinion about whether the evidence has proven a material issue in the case, whether a witness was credible, or whether the defendant was guilty. However, this rule does not generally extend to colloquies between the judge and counsel regarding the admissibility of evidence. Furthermore, remarks of a judge assigning a reason for his ruling are neither an expression of opinion nor a comment on the evidence. Here, the Court found, the statement was made by the trial judge in the context of a colloquy concerning an evidentiary objection and the ruling of the court on that objection. Accordingly, the statement did not amount to an expression of an opinion of the proof or the guilt of appellant.

