Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 12, 2013

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THIS WEEK:

Statements; Miranda

Davis v. State, A12A2349 (3/25/13)

Appellant was convicted of three counts of aggravated assault. The evidence showed that an altercation occurred when two men were returning home from a party and shots were fired into their Corolla from a silver Jeep Cherokee. One of the men called his uncle, a private investigator who was trained in the use of firearms and licensed to carry one, to tell him about the situation. When the uncle arrived on the scene, he saw the Corolla parked with no one in it, and blood on the dashboard and the seats. He then heard gunfire, saw the Jeep Cherokee coming toward him with gunfire coming out of the windows, and was struck by two shots. He began firing back as the Jeep approached him, and saw two people in the front seat and at least one person in the back seat who was firing at him, and whose face he saw by the light of a muzzle flash. The uncle was certain that he hit the shooter, and identified appellant as the shooter at trial.

Appellant argued that the trial court erred by allowing the admission of allegedly custodial statements when he was not given *Miranda* warnings. The evidence showed that the officers located appellant in the emergency room being treated for a gunshot wound. According to appellant, his first interaction with a police officer was 45 minutes after he arrived at the hospital when a uniformed officer asked who had shot him. Appellant replied that he did not know, and the officer said "okay" and left the room. A detective was sent to "locate the victim of the crime, look at his injuries," and get a written statement. When he located appellant in a trauma room, he was not restrained in any way and was free to leave if he had wanted to get up and leave. Appellant also did not state at any point in his testimony that he expressed the desire to leave or was told that he could not leave; his only assertion was that he was told by one of the officers that he needed to wait and talk to the detective. Appellant waited and when the detective came back, he made statements later admitted at trial.

Appellant argued that *Miranda* warnings were required because he had been told that he was only free to leave after he gave his statement, and because visitation with him was restricted. The Court did not agree. There was no evidence that appellant was isolated, and moreover he was initially questioned as a victim and not as a potential suspect. Thus, appellant was not in custody for the purposes of *Miranda* at

the time he made his initial statement to the detective. He was fully advised of his *Miranda* rights when he summoned another detective to talk to him at the hospital, and gave him the custodial statement used at trial.

Search & Seizure

State v. Andrews, A12A2107 (3/26/13)

The State appealed from a grant of a motion to suppress evidence from a pat down search. The evidence showed that a patrolling officer was contacted by another officer and informed that "there was a subject…walking to a known drug dealer's residence." The officer made contact with the subject near the yard of the dealer's residence and identified the subject as appellant. He testified that he knew appellant, and after making small talk with him, asked him if he had anything illegal on him. When the appellant replied no and began to empty his pockets, the officer exited his vehicle and asked appellant if he "had a problem" with being patted down. Appellant responded "no." During the pat down, the officer felt a "hard chunky substance" in the pocket of appellant's sweatshirt. Believing the substance to be contraband, the officer reached into the pocket and seized a small baggie containing an off white substance that was later determined to be cocaine. Appellant also testified that he had consented to the pat down. The parties disputed whether appellant's consent to the pat-down encompassed the officer's further intrusion into his pocket to retrieve the cocaine.

First, the State argued that the search was based on valid consent that appellant gave to the officer. Appellant contended that the officer did not ask for consent to search appellant's clothing or pockets, and thus when he patted appellant down, the encounter was elevated to a second tier investigation, which requires articulable suspicion. The Court stated that in a first-tier encounter, police may approach citizens, ask for identification, ask for consent to search, and otherwise freely question the citizen without any basis or belief of criminal activity so long as the police do not detain the citizen or convey the message that the citizen may not leave. It was undisputed that the officer asked for, and appellant gave, consent to a pat down search. Thus, the search was valid.

Second, the State argued that the scope of the search itself was for anything illegal. Appellant contended that consent was limited to the items he voluntarily removed from his pockets. The Court noted that generally, when a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there is no invasion of the suspect's privacy beyond that already authorized pursuant to *Terry*. The Court explained further that if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context. Moreover, an officer need not conclusively identify what type of drug the defendant was carrying in order for the plain feel doctrine to make seizure of the contraband lawful. Thus, when consent is given for a pat down search, such consent extends to those items already authorized by the officer's search for weapons pursuant to *Terry*, including any contraband discovered under the plain feel doctrine. The officer testified that when he patted appellant down, he felt a "hard chunky substance" that he believed "based on his experience" to be contraband, specifically crack cocaine. As a result, the officer was authorized to remove the bag from appellant's pocket. In this circumstance, the search did not exceed the scope of the consent given, and thus the trial court erred in granting appellant's motion to suppress.

Miranda; Indictments

Bryant v. State, A12A2204 (3/27/13)

Appellant was convicted of possession of cocaine, two counts of possession of a tool for the commission of a crime, riding a bicycle without a light, and failure to surrender a license after suspension. The evidence showed that two officers observed appellant riding his bicycle at night without a headlight. They initiated a traffic stop, and upon approaching appellant, observed a big bulge in one of his pockets. When the officers asked appellant about the headlight, he acted nervous, did not make eye contact, and kept reaching for the bulge in his pocket. After checking appellant's identification information, the officers learned that appellant's license had been suspended. When they asked appellant if he was aware that his license was suspended, he responded in the affirmative and again moved his hand towards the bulge in his pocket. At this time, the officer asked appellant for consent to search. Appellant refused, and the officers then placed him under arrest for operating a bicycle at night without a headlight and failing to surrender his driver's license after suspension. Before transporting him to the jail, the officers searched appellant for weapons or contraband, and found a digital scale, two cellular telephones, over $270 in U.S. currency, and a small plastic bag containing 27 rocks of crack cocaine.

Appellant challenged his conviction for possession of cellphones as instrumentalities to commit a crime, contending that such possession was innocuous. The Court disagreed. O.C.G.A. § 16-7-20(a) provides that "[a] person commits the offense of possession of tools for the commission of crime when he has in his possession any tool, explosive, or other device commonly used in the commission of burglary, theft, or other crime with the intent to make use thereof in the commission of a crime." There was no dispute that appellant possessed two cell phones when he was arrested, and the officer testified that based upon his experience and training, possession of multiple cellphones was consistent with someone involved in drug distribution. The Court noted that while mere possession of a common instrument, by itself, is not a crime, such possession may become a crime when there is intent to use the instrument to commit a crime. Intent is a question of fact for jury resolution which may be proven by circumstantial evidence. The circumstances here showed that at the time appellant was arrested, he possessed 27 rocks of crack cocaine, over $272 in U.S. currency, and a digital scale. Based on these circumstances, the jury was authorized to find appellant intended to use the cell phones with the intent to commit a violation of the Georgia Controlled Substances Act.

Appellant also contended that his conviction for possession of a controlled substance was improper because he was not charged with this offense, but was instead charged with possession of a controlled substance with intent to distribute. The record showed that Count 1 of the indictment was denominated as "possession of a controlled substance with intent to distribute." But, the indictment actually charged appellant with "knowingly, intentionally and unlawfully, … possess[ing] a Schedule II controlled substance, to wit: cocaine, in violation of the Controlled Substances Act[.]"

The Court stated that an accused may challenge the sufficiency of an indictment by

filing a general or special demurrer. A general demurrer challenges the sufficiency of the substance of the indictment, whereas a special demurrer challenges the sufficiency of the form of the indictment. Under O.C.G.A. § 17-7-110, a special demurrer must be filed within ten days after the arraignment, unless the trial court extends the time for filing. But a general demurrer, in which a defendant contends that the charging instrument fails altogether to charge him with a crime, may be raised at any time before the trial court.

The Court noted that because appellant did not file a special demurrer in this case, he waived his right to a perfect indictment. Appellant did, however, file a general demurrer. In determining the sufficiency of an indictment to withstand a general demurrer, the following test is applied: If all the facts which the indictment charges can be admitted, and still the accused be innocent, the indictment is bad; but if, taking the facts alleged as premised, the guilt of the accused follows as a legal conclusion, the indictment is good. An indictment which charges the offense in the language of the defining statute and describes the acts constituting the offense sufficiently to put the defendant on notice of the offense with which he is charged survives a general demurrer. Moreover, it is immaterial what the offense is called, if the averments of the presentment are such as to describe an offense against the laws of the State. The Court also stated that an inconsistency between the denomination and the allegations in the indictment is an imperfection, but one that is subject to a harmless error test on appeal; and a defendant who was not at all misled to his prejudice by any imperfection cannot obtain reversal of his conviction on this ground. Here, the Court found, although the challenged offense was denominated as "possession of a controlled substance with intent to distribute," the allegations tracked the language of possession of a controlled substance and fully apprised appellant of the offense charged. Appellant therefore failed to show that his defense was prejudiced in any way by the inconsistency between the denomination of the offense and the allegations in the indictment. Moreover, the Court noted, appellant himself requested a jury charge on the offense of possession of a controlled substance as a lesser included offense of possession of a controlled substance with intent to distribute. Given his specific request for the lesser included offense, he cannot show that any imperfection in the indictment prejudiced him because an indictment not only charges the defendant with the specified crime, it also embraces all lesser included offenses of the charged offense. Accordingly, since appellant could not establish prejudice in the charge in the indictment, his claim afforded no basis for reversal.

Insanity; Delusional Compulsion

Simon v. State, A12A2041 (3/28/13)

Appellant was found guilty but mentally ill of two counts of aggravated assault, two counts of aggravated battery, three counts of obstruction of an officer, and two counts of shoplifting. Appellant argued that the trial court erred in failing to direct a verdict of not guilty by reason of insanity pursuant to O.C.G.A. §16-3-3 (delusional compulsion). The evidence showed that on September 14, 2008, appellant was observed on two separate instances where he carried merchandise out of a convenience store and a gas station without paying; appellant ignored the requests to pay in one instance and cursed at the owner in another. When the owners of the respective franchises walked out to the parking lot in order to write down appellant's tag number, he drove forward and struck each of them, then drove away. Police responded to the incidents, and a vehicle pursuit ensued. After appellant's car was disabled, appellant got out of his car, approached the nearest police vehicle, and started punching the officer through the open car window. Appellant struggled with several officers until he was subdued. While in custody, appellant apologized and told the police that a friend had given him "laced" marijuana.

Appellant argued that he was insane, acting under a delusional compulsion, and thus not responsible for his actions under O.C.G.A. §16-3-3. The Court disagreed. In Georgia, a person is not legally insane simply because he suffers from schizophrenia or a psychosis. Rather, under O.C.G.A. §16-3-2 and §16-3-3, a defendant is not guilty by reason of insanity if, at the time of the criminal act, the defendant did not have the mental capacity to distinguish between right and wrong in relation to such act, or a mental disease caused a delusional compulsion that overmastered his will to resist committing the crime. When a delusional compulsion is the basis of an insanity defense, the delusion must be one that, if it had been true, would have justified the defendant's actions.

Appellant's mother testified at trial that appellant had not had any treatments for mental health issues prior to 2008, but that he had started exhibiting disturbing behavior a couple of weeks prior to the incidents. She further testified that appellant's behavior changed dramatically in September 2008, and he was hospitalized after he banged on his parents' bedroom door, proclaiming that "he was Jesus, that he had been hiding inside [appellant]'s body until now." Appellant's mother later found him in the hospital parking lot and he told her that he had been released, so she took him home, but spent the night away from home because he continued to refer to her as "Lucifer" and her husband was fearful for her. The morning of the incident, appellant told his mother that he was at a friend's house, that he had a very bad headache, and that he wanted to be baptized and "saved;" she did not hear from him again until the police called her after his arrest. Appellant's expert forensic psychologist diagnosed him with schizophrenia, schizoaffective disorder, and cannabis dependency. He testified that although appellant told him he had smoked marijuana heavily since he was 17, the use was incidental to the schizophrenia diagnosis. The State's expert testified that he was unable to conclude that appellant was insane because appellant confessed that he had smoked marijuana, and any "psychotic features" were "masked by the fact that he voluntarily altered his state of mind."

The Court noted that jurors are not bound by the opinions of expert witnesses regarding a defendant's sanity; instead, they may rely on the rebuttable presumption of sanity, unless the proof in insanity is overwhelming. The Court added that appellant's apology to the police and statement that he was acting under the effects of "laced" marijuana suggested a guilty conscience, and a rational awareness of actions rather than actions driven by a delusional compulsion. Because the evidence did not clearly establish a delusion "as to a fact which, if true, would justify the act," the Court held that appellant was not entitled to a directed verdict of acquittal on the basis of his insanity defense.

Speedy Trial; O.C.G.A. § 17-7-170

Williamson v. State, A12A2446 (3/28/13)

Appellant appealed from the denial of his motion to dismiss based on statutory speedy trial grounds. The record showed that the county had six terms of court, beginning on the first Monday of January, March, May, July, September, and November. Appellant was charged by accusation filed on July 27, 2011, with DUI. On Wednesday, November 2, 2011, two days before the end of the September term of court, appellant filed a statutory demand for speedy trial pursuant to O.C.G.A. § 17-7-170. On January 25, 2012, appellant filed a motion for discharge and acquittal on the ground that the State failed to try him during the term in which his demand was made or the next succeeding term. After a hearing on the motion, the trial court ruled that appellant's demand for speedy trial was untimely, and denied the motion.

O.C.G.A. § 17-7-170(a) provides that "[a]ny defendant against whom a true bill of indictment or an accusation is filed with the clerk for an offense not affecting the defendant's life may enter a demand for speedy trial at the court term at which the indictment or accusation is filed or at the next succeeding regular court term thereafter…" Once a defendant files a demand, O.C.G.A. § 17-7-170(b) directs that "[i]f the defendant is not tried when the demand for speedy trial is made or at the next succeeding regular court term thereafter, *provided that at both court terms there were juries impaneled and qualified to try the defendant,* the defendant shall be absolutely discharged and acquitted of the offense charged in the indictment or accusation. . . ." (Emphasis supplied) Appellant filed his Demand for Speedy Trial at 11:16 a.m., two and one-half days before the end of the September term. The trial found that because there were only five jurors available to try appellant's case before the end of the term on November 4, 2011, the demand was untimely and denied the motion.

The Court stated that although the trial court found that there was no jury impaneled at the time appellant filed his demand, it erred in concluding that the demand was untimely. O.C.G.A. § 17-7-170 (a) does not require that jurors be impaneled at the time the demand is entered in order for the demand to be timely; it simply requires that the demand be entered either at the term of court at which the accusation was filed or at the next succeeding regular term thereafter. Appellant filed his demand within the two terms stipulated by O.C.G.A. § 17-7-170(a) - in the September term, which was the next succeeding term after the term in which his accusation was filed - and, thus, it was timely filed.

However, whether jurors are impaneled during a term of court is relevant to whether that term will be counted as one of the two regular terms of court, after the term when the demand for trial is entered, during which subsection (b) of O.C.G.A. §17-7-170 requires the State to give the defendant a trial or an absolute discharge and acquittal after an appropriate demand for such has been filed. Thus, the time within which the State must try appellant is affected by the availability of jurors. In computing the time allowed by the two-term requirement of O.C.G.A. § 17-7-170(b), terms or remainders of terms during which no jury is impaneled and qualified to try the defendant are not counted. Here, the Court noted, the September 2011 term of court, during the final week of which appellant filed his demand, would count for purposes of O.C.G.A. § 17-7-170(b) only if jurors were impaneled and qualified at the time of his demand, or thereafter in the term.

Appellant contended that the trial court erred in finding that there were only five potential jurors available on Thursday, November 3, instead of 23. He argued that the evidence showed that one of the judges excused the 18 jurors she requested; thus, he maintained, there were 23 potential jurors available if his case had been called for trial on Thursday. He further contended that had the clerk been notified before 4:30 on Wednesday that more jurors were needed, she could have called in another group of potential jurors for Thursday. However, the Court held, it must defer to the trial court's findings absent clear and convincing evidence to the contrary. Moreover, the Court noted, jurors were summoned for one day or one trial, and even if jurors were in the building on November 3, 2011 sitting as jurors on other trials, they would not be a "jury panel" that would trigger the two term provisions of O.C.G.A. § 17-7-170. A "jury panel" is defined as the group of prospective jurors who are summoned to appear on a stated day and from which a grand jury or petit jury is chosen. The clerk impanels the jury but does not select or choose it; that act of winnowing is up to the parties. Any jurors in the courthouse would have been actively sitting as jurors on the trial of another case and would not be available to the jury clerk for placement on a jury panel. At the conclusion of the ongoing trial, they would not have become available to the jury clerk for placement on another jury panel, because their term of service would have been concluded, and they would be excused by the trial judge presiding over the trial for which they served on.

Thus, the Court found, while appellant might have shown that potential jurors were in the courthouse on Thursday, November 3, he did not show by clear and convincing evidence that the trial court erred in finding that only five jurors were not already committed to other courtrooms that day. Moreover, that the demand was filed on Wednesday did not ensure that the trial court would or should be immediately notified of the filing, or that the court would have immediately communicated the need to the clerk for jurors that same day. Likewise, in considering the practical realities of the trial process, the State must be given a reasonable time frame in which to prepare and try its case against the accused. The statute does not operate to force the State to impanel a jury for one defendant who makes a late demand.

Thus, as there was no clear and convincing evidence demonstrating that the trial court erred in concluding that no jury qualified to try appellant was impaneled during the remainder of the September term in which his demand was filed, the September term did not count for purposes of triggering the two term provisions of O.C.G.A. § 17-7-170(b). As such, appellant's January 25, 2011 motion for discharge and acquittal was premature because the November 2011 term must be treated as the "next succeeding term" for purposes of O.C.G.A. § 17-7-170(b). Accordingly, the first of the two terms in which appellant could have been tried was the November 2011 term, and thus the State had that term and the next succeeding term, January 2012, in which to try him. Therefore, the trial court did not err in denying appellant's motion for discharge and acquittal.

Juror Misconduct; Defense of Habitation

Chambers v. State, A12A1906 (4/11/13)

Appellant was charged with aggravated assault (by use of a deadly weapon), felony murder, and murder. A jury found him guilty of aggravated assault, felony murder, and voluntary manslaughter as a lesser included offense of murder. The evidence showed that appellant drove his vehicle into a parking lot. Shortly thereafter, while still in the car, appellant got involved in a verbal altercation with a group of people who were standing in the parking lot. The victim approached the car and was shot by appellant. Evidence was presented that the victim allegedly reached into the car in order to pull appellant out. According to the appellant's witnesses, the man also attempted to pry open the door of appellant's car. Appellant shot the man through the open car window. At trial, appellant pursued the affirmative defenses of justification, as well as the defense of habitation as applicable to motor vehicles.

Appellant contended that the trial court erred by denying his motion for new trial on the ground of juror misconduct. He argued that the prosecution failed to disprove, beyond a reasonable doubt, by competent evidence, that the juror misconduct of introducing extra-judicial information did not prejudice him. The record showed that about three hours after the jury retired to deliberate, the jury sent a note to the court that asked, "May we have a copy of the definitions & requirements of charges?" The jury was brought back into the courtroom, and the court explained its general practice of not sending out with the jury a copy of any portion of the final charge, but promised to provide a copy to them the following morning, then recessed for the day.

The next morning, the jury reconvened in the deliberations room. Before the court provided the promised copy of the instructions, another juror ("Juror 38") announced that she had conducted her own legal research and thereupon shared with the jurors various definitions. The prosecutor testified at the new trial hearing that hours after the jury returned its verdict, Juror 38 called her and revealed what had happened. Essentially, Juror 38 had used Google to search the internet regarding the definition of defense of habitation. Juror 38's "findings" were introduced at the motion for new trial as State's Exhibit No. 2. The record showed that one page of Exhibit No. 2 contained the entirety of O.C.G.A. § 16-3-23, concerning the use of force in defense of habitation. The trial court had not charged the jury on the entirety of this Code section. Further, a sentence appeared at the bottom of the page of Exhibit No. 2 which did not appear in O.C.G.A. §16-3-23. The sentence said "As used in Code Sections 16-3-23 and 16-3-24, the term 'habitation' means any dwelling, motor vehicle, camper or other similar shelter *generally used for occupation overnight*." The Court noted that this was not in O.C.G.A. § 16-3-23 and O.C.G.A. § 16-3-24.1 provides: "As used in Code Sections 16-3-23 and 16-3-24, the term 'habitation' means any dwelling, motor vehicle, or place of business, and 'personal property' means personal property other than a motor vehicle." But, the Court stated, even O.C.G.A. § 16-3-24.1 contains no requirement that the "habitation" constitute "shelter generally used for occupation overnight." Instead, "habitation" does not require a showing of "shelter generally used for occupation overnight." Correctly, the trial court's instruction concerning O.C.G.A. § 16-3-23 (the use of force in defense of habitation) did not include any such requirement. The other page of the two-page document emailed to the prosecutor was a memo wherein Juror 38 pertinently explained the context of her search and her intent to clearly understand the legal term and to share it with her fellow jurors.

The Court noted that allowing jurors to decide a case based on "law" provided by a juror during deliberations patently violates a defendant's Sixth Amendment rights not only to be present at all critical stages of his trial, but also to be tried by a fair and impartial jury. The Court also added that the law contemplates that no outside influence shall be brought to bear on the minds of the jury, and that nothing shall occur outside of the trial which shall disturb their minds in any way. And where, as here, misconduct of a juror or of the jury is shown, the presumption is that the defendant has been injured, and the burden is on the prosecution to prove beyond a reasonable doubt that no harm has occurred.

Here, to remove the presumption of prejudice that arose as a result of juror misconduct, the State introduced in evidence at the new trial hearing affidavits from all jurors except Juror 38. Each affiant stated that, in reaching the verdicts, he or she had relied upon the definitions provided by the court. But, the Court stated, even accepting that the trial court found credible the eleven jurors' affidavit testimony that they had not relied upon any extra-judicial information from Juror 38, nothing in the record allowed for such a finding for the twelfth juror, Juror 38. Undisputedly, that juror collected extrajudicial "law" that she found compelling enough to share with fellow jurors (before she herself necessarily assented to the unanimous guilty verdicts). Juror 38's email to the prosecutor was not sworn; but even if it had been, Juror 38 did not state that she had relied only on the court's definitions and not on her own extrajudicial information. Therefore, the Court found, it could not agree with the State's contention that there was no evidence that any of the jurors were influenced by the extrajudicial information.

Instead, the evidence authorized a potential finding that, at the time appellant inflicted the victim's fatal wound, the victim was unlawfully entering, or attempting to enter, appellant's car in a violent and tumultuous manner for the purpose of assaulting appellant or offering him personal violence. Considering the evidence produced by the State at trial, the affirmative defenses pursued by appellant, the jury's request for supplemental instructions hours after retiring to deliberate, Juror 38's usurping the province of the trial court by presenting fellow jurors with "law" she found using Google to search the Internet, together with the evidence adduced at the new trial hearing, the Court found that there was at least a reasonable possibility that the extra-judicial information contributed to the conviction and that the verdict must therefore be deemed inherently lacking in due process. "This misconduct cannot be ignored and requires a reversal of the judgment based on the jury's verdict in this case."

DUI; Nonresident Motorists

State v. Barnard, A12A2445 (3/28/13)

Barnard was charged with DUI. The State appealed from a trial court order granting Barnard's motion in limine to exclude the results of an Intoxilyzer 5000 breath test. The State argued that the trial court erred in excluding the test results on the basis of finding that the arresting officer had informed Barnard that her out-of-state license would be suspended if

she did not submit to the state-administrated breath test, and its finding that the officer did not read the correct implied consent notice to Barnard.

The record showed that Barnard was stopped for making an illegal U-turn. After observing signs of intoxication, the officer asked Barnard for her driver's license, and she produced a North Carolina license. After Barnard failed some roadside field sobriety tests, the officer arrested her for DUI. Prior to administering the breathalyzer test, the officer read Barnard the Georgia Implied Consent Notice For Suspects Age 21 and Over verbatim from a copy of a card he kept inside of his shirt. The card stated, in part: "IMPLIED CONSENT NOTICE/SUSPECTS AGE 21 OR OVER: Georgia law requires you to submit state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse your testing, *your Georgia drivers license or privilege to drive on the highways of this state will be suspended* for a minimum period of one year…" (Emphasis supplied)

The State first argued that the trial court erred in in excluding the breath test results based on the court's finding that the arresting officer had informed Barnard that her out-of-state license would be suspended if she did not submit to the state-administered breath test. The Court agreed. The Court stated that the determinative issue with the implied consent notice is whether the notice given was substantively accurate so as to permit the driver to make an informed decision about whether to consent to testing. O.C.G.A. § 40-5-51(a) pertinently provides that the privilege of driving a motor vehicle on the highway of this state given to a nonresident under this chapter shall be subject to suspension or revocation by DDS only when suspension or revocation is required by law for the violation. Consequently, DDS has no authority to suspend or revoke the driver's license of a nonresident motorist. After reviewing the record transcript, the Court found the officer's testimony provided no evidence from which the trial court could have concluded that the officer had told Barnard that her North Carolina driver's license would be suspended if she did not submit to the breath test. Thus, there was no substantial basis for the trial court's exclusion of the results of the breath test.

The State also argued the trial court erred in excluding the results of the breath test on the basis of the court's finding that the officer did not read the correct notice to Barnard when she presented a North Carolina driver's license. The Court again agreed. O.C.G.A. § 40-5-671 provides that an arresting officer shall select and read to a person arrested for violation of O.C.G.A. § 40-6-391 one of three implied consent notices; the first to be read to suspects under the age of 21, the second to be read to suspects over the age of 21, and the third to be read to suspects driving commercial vehicles. Thus, there was no appropriate implied consent notice that the officer could have read other than the notice he did read to Barnard - that for suspects age 21 or older. The Court noted that this notice appropriately notified Barnard that her privilege to drive on the highways of the state would be suspended if she refused the testing. Thus, the trial court's order granting the motion to exclude the breath test results was reversed.

DUI; Implied Consent Rights

State v. Gaggini, A12A2454 (3/28/13)

Gaggini was charged with DUI (less safe) and DUI (per se). The State appealed from a trial court order granting Gaggini's motion to suppress her breath test results and the DUI (per se) charge. First, the State contended that the trial court erred in excluding the breath test results. The trial court found that Gaggini did not have a Georgia driver's license and thus, should have been told that her privilege to drive in Georgia, and not her license, would be suspended.

The Court held that the trial court erred in finding that Gaggini did not have a Georgia driver's license because there was no evidence in the record to support this finding. Moreover, O.C.G.A. § 40-5-67.1(b) pertinently provides that an arresting officer shall select and read to a person arrested for violation of O.C.G.A. § 40-6-391, one of three implied consent notices. The first is to be read to suspects under the age of 21; the second notice is to be read to suspects age 21 or over; and the third notice is to be read to suspects driving commercial motor vehicles. Gaggini did not assert that she was under 21 or that she occupied a commercial motor vehicle. Thus, there was no appropriate implied consent notice that the officer could have read to Gaggini other than the notice he did read to her. That notice pertinently provided that a suspect's "Georgia driver's license or privilege to drive on the highways of this state" would be suspended if she refused to submit to testing. Accordingly, there was no substantial basis for the trial court's ruling that Gaggini was not given the proper implied consent warning, even if evidence had been admitted that her license was out-of-state.

The State also contended that the trial court erred in basing its ruling on the charge of DUI (per se) that there was no admissible evidence that Gaggini had driven within three hours of consuming alcohol, because the officers had testified that they had not seen Gaggini driving her vehicle and the hearsay testimony of other witnesses was not admissible. However, the Court stated, the test is not whether Gaggini "had *driven* within three hours of *consuming alcohol*." (Emphasis in original) The test is found in O.C.G.A. § 40-6-391(a)(5), which provides that "A person shall not drive or be in actual physical control of any moving vehicle while: (5) the person's alcohol concentration is 0.08 grams or more at any time within three hours after such driving or being in actual physical control from alcohol consumed before such driving, or being in actual physical control ended." The Court held that it was not necessary for probable cause in a warrantless arrest that the driver actually be seen behind the wheel driving while under the influence. Such facts, as any others, may be shown by circumstantial evidence. Moreover, hearsay is admissible in determining the existence of probable cause.

Here, the Court noted, evidence showed that the first officer received a complaint about a woman slumped in her car in the roadway at 3:49 a.m., but when he arrived at the scene, appellant's vehicle was located off to the side of the road, parked in a curb, and that she smelled like alcohol. The arresting officer testified that Gaggini was sitting in the driver's seat with her keys in the ignition; she swayed when she stepped out of the car; she looked lost and confused and at 5:14 a.m. the breath test results showed that her blood-alcohol concentration level was at .187. Even without the first officer's testimony of the complaint about "a woman slumped over in her car in a roadway," the evidence, although circumstantial was sufficient to show that Gaggini drove or was in actual physical control of a moving vehicle while her blood concentration was 0.08

grams or more within three hours after driving or being in actual physical control from alcohol consumed before such driving or being in actual physical control ended. Accordingly, the trial court erred in granting appellant's motion to suppress.

Child Abuse Accommodation Syndrome

Haithcock v. State, A12A1905 (3/28/13)

Appellant was convicted of child molestation. He contended that the trial court erred in failing to exclude testimony of a licensed psychologist regarding child abuse accommodation syndrome. Appellant argued that such testimony was not relevant and improperly bolstered the victim's testimony. The Court disagreed. Under Georgia law, it is well-established that an expert may express an opinion as to whether medical or other objective evidence in the case is consistent with the victim's story. However, an expert may not express an opinion as to whether the victim is telling the truth. The evidence showed that the victim's behavior changed as a result of the molestation, and the psychologist testified that the victim's demeanor, disclosure, and behavior were consistent with that of a child who has been sexually abused. Thus, the testimony was permissible under Georgia law.

Finally, appellant contended that hospital records should have been admitted to evidence. Appellant argued that the records were exculpatory because the results of the victim's medical examination contained therein indicated that there was no physical evidence of molestation or intercourse. The Court stated that although the records were properly authenticated by the hospital's custodian of records, such authentication does not eliminate the rule against hearsay. Appellant did not call as a witness the person who performed the examination to testify as to their findings, and thus the records were properly excluded on the basis of hearsay.

Appellant also argued that records should have been admitted into evidence because the records were offered for impeachment purposes. However, the Court found, the record showed that trial counsel was permitted to use the records for this purpose through oral testimony. Accordingly, the trial court did not err in refusing to allow the records to be admitted into evidence.

Bond Forfeitures; Similar Transactions

Wise v. State, A12A2509 (3/28/13)

Appellant was convicted of possession of cocaine with intent to distribute. The record showed that appellant was arrested in 2002, but failed to appear in 2005 and a bench warrant was issued. Appellant was subsequently arrested and he was convicted in 2009. Appellant contended that the trial court erred by allowing the State to present evidence of his bond forfeiture to the jury as the reason for the seven year delay between his arrest and trial. The Court stated that evidence of a defendant's appearance bond forfeiture is admissible as tending to show flight. The State is entitled to offer evidence of flight while a defendant is awaiting trial to argue that it demonstrates consciousness of guilt. Thus, the Court could not find any plausible reason why the same evidence could not be used for the much less prejudicial purpose of explaining a delay in bringing a case to trial. Although appellant maintained that the fact that the 2005 trial notice was returned showed that he did not know about his trial date, the Court stated that it was appellant's responsibility to keep the trial court informed as to his address when he was aware of pending criminal cases and therefore, he could not maintain that he did not know about the trial date when the trial notice was returned.

Next, appellant contended that the trial court erred in allowing the State's witness to testify about cocaine she had tested in a similar 2004 possession transaction. The cocaine was unrelated to the charges in the current trial, other than showing that a prior transaction of appellant's also involved cocaine. The State withdrew an attempt to admit the actual cocaine from the 2004 transaction after appellant's initial objection and introduced the test reports instead. Generally, the Court stated, to show a chain of custody adequate to preserve the identity of fungible evidence, the State must prove with reasonable certainty that the evidence is the same as that seized and that there has been no tampering or substitution. However, presenting evidence merely to establish the basis of a charge in a similar transaction as opposed to guilt or innocence does not. Here, the Court found, the State presented this evidence merely to establish the basis for the charge in the pending similar transaction, rather than appellant's guilt or innocence in the present case. In this circumstance, there was no requirement that the chain of custody account for the safekeeping and transportation of the evidence from seizure to trial. Moreover, in a drug possession case, the concept of corpus delicti requires that there be proof by the State that the accused possessed the illegal drug; there is, however, no invariable requirement that the drug itself be produced. Thus, the Court held, as the testimony was offered as proof of the possession charge in the 2004 case, rather than proof of the cocaine that appellant possessed in the present case, the trial court did not err in allowing the chemist to testify about the substance she tested.

Mistake of Fact; Authentication

Castaneira v. State, A12A2149 (4/8/13)

Appellant was convicted of attempt to commit child molestation, attempt to entice a child for indecent purposes, computer pornography, and child exploitation, obscene Internet contact with a child, and misdemeanor possession of marijuana. The record showed that appellant contacted on a website an undercover officer posing as "April," a 15 year old girl. Through online chats, the two arranged to meet for sexual relations. When appellant showed up at the arranged meeting site, he was arrested. Appellant's defense was that he lacked the requisite intent to commit the crimes at issue, because he did not believe he was in contact with, or going to meet a 15 year old girl. Specifically, appellant and his wife each testified that they were "swingers" and they liked to participate in sexual "role play." Appellant testified that he did not go to meet "April" looking for an adolescent girl; rather, he believed that the detective was part of a couple that enjoyed role play, and that the female in the couple liked to play the role of a 15 year old, home-schooled girl.

Although appellant did not ask for a charge on mistake of fact, he contended that the trial court erred in failing to give such a charge because it was his "sole defense." The Court stated that mistake of fact is an affirmative defense, under which a person shall not be found guilty of a crime if the act constituting the crime was induced by a misapprehension of fact, which, if true, would have justified the

act or omission. A defendant is not entitled to a jury charge on this defense, however, where the evidence shows that his ignorance or mistake of fact was induced by the defendant's own fault or negligence.

The Court stated that this was not a case where an adolescent led the defendant to believe that she was an adult; rather, this is a case where the intended victim told the defendant that she was underage. And, having been made aware of that fact, appellant nevertheless continued his contact with "April," engaging her in sexually explicit conversations and arranging to meet her for a sexual encounter. Even though appellant claimed that he believed "April" was an adult playing the role of an adolescent, he took no steps to confirm this belief. Specifically, after being informed that "April" was fifteen, appellant never asked her if she was, in fact, an adult posing as a child before arranging to meet her. Thus, any mistake or ignorance on appellant's part resulted from his own failure to inquire further into "April's" actual age. Thus, a charge on mistake of fact under O.C.G.A. § 16-3-5 was not authorized. Moreover, the Court noted, even assuming that the evidence did raise the affirmative defense of mistake in fact, there was still no error in the trial court's failure to give the mistake of fact charge where, as here, the trial court's entire charge fairly presented the issues, including the defendant's theory, to the jury.

Appellant also argued that under O.C.G.A. § 24-5-4(a), the trial court erred in admitting transcripts of all the online conversations between him and the undercover detective. The detective testified that although she could print out copies of her computer screen as an online chat occurred, she did not preserve conversations in this fashion. Instead, she prepared a transcript of each internet chat by copying text that appeared in the "instant message box" on her computer screen and then pasting that text into a word processing document. She stated that she always copied and pasted the text so that the conversation appeared in the transcript in the order in which it actually occurred. In cases such as this, when more than one conversation occurred, the detective always numbered each transcript and wrote on it the date that the particular conversation took place.

The Court stated that under Georgia law, transcripts of conversations that occurred via online instant messaging are admissible provided that they are created and or authenticated by someone who participated in that conversation and who testifies that the transcript accurately represents the online conversation. Here, the detective clarified that she participated in all of the online conversations with appellant; that she created the transcripts by copying the text exactly as it appeared on her computer screen, without making any additions, omissions, or other alterations to that text; and that the transcript reflected the exact words used in the conversation, as well as the online names used by the persons who typed those words. Under these circumstances, the detective's testimony was tantamount to that of a witness to an event and thus was sufficient to authenticate the transcript.

Search & Seizure

Hinton v. State, A12A2216 (3/25/13)

Appellant was one of four men who were tried together and each convicted of armed robbery, hijacking a motor vehicle, and two counts of possession of a firearm during the commission of a crime. The evidence showed after the men robbed the victim, a co-defendant took the keys to the victim's Monte Carlo and drove it away while the rest of the men drove away in appellant's Lincoln Town Car. The victim promptly called law enforcement, and a BOLO was put out for both cars. Officers soon located the Lincoln Town Car with appellant and three others as passengers.

Appellant contended that the trial court erred in denying his motion to suppress because the State used only hearsay evidence to establish the police officer's reasons for believing he could lawfully stop appellant's car. Specifically, he argued that the only evidence regarding the reason for the stop was another officer's recitation of a hearsay statement that had been made by the stopping officer. The Court disagreed. The record showed that although the officer who stopped appellant's vehicle did not testify, the officer who did testify never testified as to what the stopping officer told him. At the suppression hearing, the officer testified that he arrived on the scene after appellant's car was stopped. When asked why the Lincoln Town Car was stopped, the officer, without attributing any of his knowledge to statements made by the stopping officer, testified that appellant's vehicle had been stopped because it had an altered drive-out tag. He further testified that officers on patrol that night had been told via radio dispatches to be on the lookout for an older-model, cream-colored Lincoln Town Car with altered drive-out tags, in which four black males were riding. Thus, the Court stated, "the hearsay statement is inapt."

Properly viewed, the Court found, the evidence presented showed that the State met its burden as to the justification for the initial stop. Although stopping a car with a drive-out tag solely to ascertain whether the driver was complying with the vehicle registration laws is not authorized, an officer has satisfied the requirement of reasonable, articulable suspicion needed to justify a brief investigative stop where the vehicle has a drive-out tag that has been altered and is invalid. Given the additional information in the radio dispatches about the make, model, and color of the vehicle, and the description of its four occupants, the police also had probable cause, which can rest on the collective knowledge of the police when there is, as here, some degree of communication between them, instead of on the knowledge of the arresting officer alone. Here, the Court found, the stop was lawful because it was based on reliable information from 911 and police radio dispatches, and was shortly corroborated by officers' sighting of a car and its occupants matching the description provided, giving police reasonably trustworthy information sufficient to warrant a prudent person's belief that a suspect had committed an offense.

Jury Charges; Accident Defense

Irving v. State, A12A2327 (3/27/13)

Appellant and her co-defendant boyfriend were convicted of one count of aggravated assault, three counts of cruelty to children in the first degree, and two counts of aggravated battery arising from the beating of her three year old daughter. She contended that the trial court erred by actively participating in the trial and conducting an ex parte hearing concerning the mental health of her co-defendant. The record showed that in response to a motion filed by appellant's co-defendant immediately before the start of the trial, the trial court requested that a mental health expert appear to give testimony regarding the co-defendant's

mental condition and his competency to stand trial. With appellant and her counsel present in the courtroom, the co-defendant's counsel asked that the hearing be conducted outside the presence of the prosecution, the public, and all non-essential court personnel. The trial court granted the request, and it directed all persons to exit the courtroom. Appellant did not object, and she was escorted to a holding cell until the conclusion of the hearing.

The Court stated that embodied within the Constitution is a criminal defendant's right to be present and see and hear, all the proceedings which are had against him on the trial before the court. Although a defendant has a fundamental right to be present at all proceedings which are conducted at her trial, the right to be present belongs to the defendant, and the defendant is free to relinquish it if he or she so chooses. The right is waived if the defendant personally waives it in court; if counsel waives it at the defendant's express direction; if counsel waives it in open court while the defendant is present; or if counsel waives it and the defendant subsequently acquiesces in the waiver. Here, the record showed that appellant and her counsel were present in the courtroom when the trial court granted her co-defendant's request for an ex parte hearing regarding his competency to stand trial, and neither appellant nor her counsel objected to her leaving the courtroom. Thus, the Court found, at the very least, appellant acquiesced in her counsel's waiver of her right to be present at this hearing. Accordingly, the trial court's ex parte hearing did not warrant reversal of appellant's convictions.

The Court also found meritless appellant's argument that the trial erred in calling the mental health representative to the stand and questioning this witness concerning the status of her co-defendant's mental health. A trial court has a constitutional duty to inquire into a defendant's competency when the issue appears to be in question at the time of trial. Furthermore, it is not improper for the trial court to question a witness for the purpose of developing fully the truth of the case, and the extent of such an examination is a matter for the trial court's discretion. However, the trial court, in questioning the witness, cannot intimate any opinion or become argumentative. Here, the record indicated that the trial court's examination into the co-defendant's competency was in accordance with these principles.

Appellant also argued that the trial court erred in denying her request to reopen the case to allow her to introduce statements that her co-defendant had previously made to the trial court regarding their respective involvement in the incident. The record showed that prior to the State resting its case, the trial court inquired into whether the co-defendant was going to testify in his own defense. Outside the presence of the jury, the trial court advised him about his right to remain silent and his choices regarding testifying. He indicated that he wanted to make a statement, but that he did not want to testify. The trial court advised him that he could not make a statement, at this point, without being placed under oath and subjecting himself to cross-examination. The co-defendant then reaffirmed that he did not want to testify, but then stated, "I just want to say that [appellant] didn't do this." Appellant's counsel then stated during a colloquy with the court that, "I've heard him twice say that he wants to tell that he did it; that [Irving] is not responsible." At this point, the co-defendant interjected and said, "I didn't say that." And then, re-stated, "I didn't say that I'm going to tell them that I did it. I didn't say that. . ." Thereafter, appellant did not attempt to introduce the co-defendant's statements when she presented her case to the jury. On the morning after the close of evidence, appellant moved to reopen the case to introduce her co-defendant's statements as admissions in judicio. The trial court denied the request, finding that the statements were not made under oath and that reading the statements from the record to the jury would deprive the State of its right to cross-examination.

The Court noted that whether to reopen the case after the close of the evidence rests within the sound discretion of the trial court, and a trial court's ruling in this regard will only be reversed if, in the totality of the circumstances, the record on appeal demonstrates that the trial court abused its discretion. Considering the overwhelming evidence of appellant's guilt, together with her co-defendant's recanting of his unsworn statements, the Court found that it appeared highly improbable that the statements would have led to a different verdict. Under these circumstances, the Court concluded that the trial court did not abuse its discretion in denying the motion to reopen the case.

Juror Qualifications

Hines v. State, A12A2455, (4/9/13)

Appellant was convicted of armed robbery, aggravated assault, concealing the identity of a motor vehicle, and two counts of contributing to the delinquency of a minor. Appellant contends that the trial court erred in denying her motion to strike a juror on the ground that she was P.O.S.T. certified. She further asserted that the trial court abused its discretion in removing another juror from the jury because he was distracted by pre-existing business concerns. The record showed that defense counsel asserted that the first juror testified that she was a P.O.S.T. certified peace officer. But the trial court corrected counsel's description of the juror's testimony, noting that she testified that she was a former corrections officer, not a current peace officer and that she worked in private security. The trial court said that the juror testified that she had no arrest powers, although she retained her P.O.S.T. certification. The Court noted that the Supreme Court of Georgia had already decided this issue unfavorably to appellant, holding that a trial court does not err by failing to excuse a member of the jury pool who was certified as a Georgia Peace Officer. In order to be subject to dismissal for cause, a member of the venire who is a law enforcement officer must be a full-time sworn police officer with arrest powers. Since the prospective juror was working as a security guard at a convention center, the trial court did not err in denying the motion to strike.

Appellant also asserted that the trial court erred in dismissing another juror because he was distracted by his need to make a flight to St. Louis on the fifth day of trial. Under O.C.G.A. § 15-12-172, "[i]f 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." The record showed that when the issue was first brought to the trial judge's attention around 10:30 a. m. on a Friday, at the beginning of the second day of jury deliberations, the court questioned the foreperson who stated that the particular juror was "a little itchy" and was trying to speed up the decisional process. The trial court then

questioned the juror who said that he either had to leave around noon to make the flight to St. Louis for a trade show or drive nine to ten hours overnight to get there by the next day. He stated that the staffing at his company was lean, so apparently no one was available to take his place. The juror said that he told the attorneys about this flight during voir dire. Nevertheless, the juror felt that he could continue deliberating for a while longer, so the trial court sent him back to the jury room with the instruction that he should notify the bailiff "[i]f it gets to the point where you're concerned about your flight and it starts to distract you." Later, around noon, the juror notified the bailiff of his continuing time pressure, and the trial judge questioned him again. The juror said that he was "a little pissed" by other jurors talking about the same thing over and over again, and he ultimately admitted that his impending flight was distracting him. Both the prosecution and counsel for co-defendant deferred to the trial court's judgment on a decision whether to excuse the juror, but appellant' attorney objected, asserting that the juror's civic duty should take priority over his job. The trial judge decided to excuse the juror and substitute the alternate based upon the juror's admission that he would be distracted and that he was irritated with the other jurors for their repetitive discussions. The trial court concluded that "this person would be worried about his flight and his work and his job and not giving this case his full attention." The Court found no abuse of discretion and also noted that appellant did not contend that the alternate replacement juror was not qualified to serve.