Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 1, 2015

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Chuck Olson
General Counsel

Lalaine Briones
State Prosecution Support Director

Sharla Jackson
Domestic Violence, Sexual Assault, and Crimes Against Children Resource Prosecutor

Todd Hayes
Sr. Traffic Safety Resource Prosecutor

Joseph L. Stone
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Leah Hightower
State Prosecutor

Kenneth Hutcherson
State Prosecutor

Nedal S. Shawkat
State Prosecutor

Robert W. Smith, Jr.
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

Search & Seizure; GPS Devices

Grady v. North Carolina, No. 14-593 (U.S. Supreme Court 3/30/15)

Grady was convicted of two sex crime convictions, and served his sentence as to each offense. Grady was thereafter ordered in a state- action civil proceeding to wear a device that was satellite-based and would monitor his whereabouts for the rest of his life. Grady did not contest the fact that he was a recidivist, but argued that the satellite-based monitoring (SBM) was a search under *United States v. Jones*, 565 U. S. ___ (2012) and violated his Fourth Amendment rights. North Carolina held that the holding in *Jones* did not control because Grady was ordered to wear the GPS device in a civil proceeding.

The U.S. Supreme Court reversed. The Court stated that that the Fourth Amendment's protection extends beyond the sphere of criminal investigations and the government's purpose in collecting information does not control whether the method of collection constitutes a search. Here, the Court found, the SBM program was plainly designed to obtain information. And since it did so by physically intruding on a subject's body, it is a Fourth Amendment search.

Nevertheless, the Court stated, this conclusion does not decide the ultimate question of the program's constitutionality. The Fourth Amendment prohibits only unreasonable searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. Since North Carolina did not examine whether the SBM program was reasonable – when property viewed as a search – the case must be remanded for such a determination.

Due Process; Jury Instructions

Scott v. State, A12A2293 (3/20/15)

This case was remanded to the Court of Appeals after the Supreme Court, in *Scott v. State*, 295 Ga. 39 (2014), overruled a long line of cases on the knowledge required to prove trafficking in cocaine under the former version of O.C.G.A. § 16-13-31(a)(1). On remand, the Court of Appeals found that the evidence was sufficient to prove beyond a reasonable doubt that appellant knew that the cocaine he possessed weighed 28 grams or more. Nevertheless, appellant argued that he should be retried by a jury that was properly charged on the "new element" of knowledge of weight of the cocaine, specifically contending that otherwise he would be denied his right to a trial by jury and his due process rights would be abridged. The Court disagreed.

The Court noted that appellant did not challenge the trial court's instructions to the jury in his initial appeal to the Court, and thus could not now be heard to complain

that the jury was improperly charged. But the Court found, in any event, the transcript revealed the trial court defined trafficking in cocaine under the former statute as follows: "Any person who is knowingly in possession of 28 grams or more of cocaine commits the offense of trafficking in cocaine. . . . As with all other elements of the prosecution, the State has the burden of proving weight." Moreover, in addition to charging generally on the State's burden of proof and proof of guilt beyond a reasonable doubt, the trial court also gave a specific charge on proof of knowledge.

And, importantly, nowhere in the charge did the trial court instruct the jury that the State was not required to prove knowledge of the weight of the cocaine. Thus, considering the charge as a whole, the jury was informed that the State had to prove that appellant was in knowing possession of 28 grams or more of cocaine, and neither his right to be tried by a jury nor his due process rights were denied under the circumstances of this case.

Ineffective Assistance of Counsel; Plea Bargaining

State v. Lexie, A14A1667 (3/20/15)

After a jury convicted Lexie of aggravated sodomy, armed robbery, kidnapping, burglary, and three counts of aggravated assault, he was sentenced to a mandatory life term, with 25 years to serve. However, the trial court subsequently granted Lexie's motion for new trial on the ground that he received ineffective assistance of counsel during the plea process. The State appealed.

The evidence showed that Lexie was arrested on September 21, 2012, but he consistently maintained that he was innocent and that the victim had wrongfully identified him. On November 7, 2012, an assistant public defender ("Counsel") entered an appearance on his behalf, and that representation continued throughout the pre-trial proceedings and at trial. On March 14, 2013, the State e-mailed Counsel a plea offer for credit for time served and twelve years of first-offender probation, in exchange for Lexie's plea to two counts of aggravated assault, with the State agreeing to nolle prosse the remaining charges. Without contacting Lexie about the offer, Counsel responded to that e-mail five minutes later, indicating that there would be no plea in the case. Although Counsel did not relay the specific offer to Lexie, he testified that Lexie and he previously had discussed the issue and Counsel had advised against accepting a plea offer. Lexie had indicated in that conversation that he was going to follow his counsel's advice.

On April 1, 2013, the trial court held a hearing to put the plea offer on the record. At the hearing, the State announced that it had offered Lexie a twelve-year sentence, with credit for time served and the balance to be served on probation in exchange for a plea on two counts of aggravated assault with a deadly weapon. Lexie told the trial court that he had not made a decision about whether to take the offer, and the court allowed Counsel and Lexie to confer off the record. During that conference, Lexie told Counsel he wanted to accept the offer, but Counsel talked him out of it because he believed that Lexie was innocent. Counsel told Lexie that they had a very good chance to win and to get the matter expunged from his record. Lexie rejected the plea offer based solely on Counsel's advice, and Counsel said that Lexie made that decision only after Counsel "twisted his arm." Subsequently, Counsel received a letter from Lexie, dated the same day as the hearing, stating that he wanted to accept the State's offer if it was still open. Counsel once again strongly advised against it, and although Lexie continued to resist this advice, Counsel "pressured" Lexie to reject the offer. He told Lexie that he had the best case he had ever seen and that no reasonable jury would convict him. When Lexie asked Counsel how certain he was, Counsel said that if he lost the case, he would "turn in his bar card."

The Court agreed with the trial court that Counsel's performance was deficient by failing to reasonably advise Lexie of the consequences of the choices confronting him. The Court further found that the deficient performance prejudiced Lexie. The trial court found that there was no reason evident from the record that the State's offer in this case would not have been acceptable to the Court and no indication that the State would have not adhered to the agreement. In fact, the Court noted, while Lexie and his counsel were conferring during the plea hearing, the trial court asked the State whether its offer was "open for a set period of time or does it expire?" The prosecutor replied that the State would "be willing to leave it open for a few days for him to talk about it," thus supporting an inference that the State intended to follow through on its offer. Accordingly, the Court affirmed the granting of Lexie a new trial.

Habitual Violators; Constitutional Right to Speedy Trial

Munna v. State, A14A1713 (3/20/15)

Appellant was convicted of two counts of habitual impaired driving, DUI and failure to maintain lane. The record showed that he was arrested for DUI under the name "Sewdatt Munna" and had on his person at the time a valid driver's license in that name. Shortly after his arrest, however, it was determined that appellant had previously been declared and personally served with notice of his habitual violator status pursuant to O.C.G.A. § 40-5-58 (the Drivers' License Act) under the name "Sewdatt Muthura," and that his driver's license had been revoked for a minimum of five years.

Appellant contended that that the evidence was insufficient to sustain his conviction for habitual impaired driving because he possessed a valid driver's license in the name "Sewdatt Munna." Specifically, he argued, even if he was a habitual violator with a revoked license, he was permitted to drive under O.C.G.A. § 40-5-58(c) if he was subsequently issued a valid driver's license, irrespective of whether the license was under a different name. The Court disagreed. The Court stated that the essence of the offense of driving while an habitual violator is driving after being notified that one may not do so because, by doing so, one is flouting the law even if one or more of the underlying convictions is voidable or void. The State is required to prove only that the accused was declared an habitual violator and operated a vehicle without having obtained a valid driver's license. Thus, although appellant was able to navigate the system to obtain the purportedly "valid" "Munna" license, the evidence demonstrated that he was also known to use the "Mathura" name, and had been notified after his third DUI violation as "Mathura" that he was prohibited from driving as a habitual violator. That he had a presumptively "valid" license in another name was no defense to his habitual violator status. The incontrovertible evidence demonstrated

that appellant and Mathura were the same person and, as such, appellant was under notice that he was prohibited from driving as a habitual violator. Further, there was no evidence that the "Mathura" license was restored after being revoked. Under these circumstances, the evidence was sufficient to sustain his conviction.

Appellant also contended that the trial court erred in denying his motion for discharge based on a constitutional speedy trial violation. The Court found that the trial court's findings in this regard were deficient and remanded for a proper order. Specifically, the trial court failed to make findings of fact regarding its conclusion that the delay was not uncommonly long; the trial court failed to indicate whether it attributed the reason for the delay to the State or appellant and what weight it gave to this factor; and the trial court failed to indicate what weight, if any, it gave to the fact that appellant's motion was made eight days before trial. Absent such findings, there was no exercise of discretion for the Court to review.

DUI; Discovery

Massey v. State, A14A2173 (3/20/15)

Appellant was charged with DUI. The evidence showed that immediately after he refused to submit to the State's requested test, the officer obtained a search warrant and forcibly obtained appellant's blood and sent it to the GBI Crime Lab for analysis. Appellant filed a pre-trial discovery request pursuant to O.C.G.A. § 40-6-392(a)(4) seeking information concerning the results of the test. The trial court denied his request and the Court of Appeals granted appellant an interlocutory appeal.

The Court stated that the discovery provisions of O.C.G.A. § 40-6-392(a)(4), broadly grant access to "full information concerning the test," for alcohol or drugs in a person's blood, urine, breath, or other bodily substance, and are consistent with the broad right of cross-examination embodied in O.C.G.A. § 24-6-611(b). The "full information" provisions of O.C.G.A. § 40-6-392(a)(4) have been construed to grant discovery of the test results generated by a gas chromatography instrument used to test for blood alcohol concentration, including the right to obtain instrument printouts, memos, notes, graphs, and other data relied on by the State Crime Lab employee to generate the test results. The production of discovery granted under O.C.G.A. § 40-6-392(a)(4) may be obtained by subpoena or by a request directed to the State. But, discovery pursuant to O.C.G.A. § 40-6-392(a)(4) is expressly limited by the terms of subsection (a)(4) to "the person who shall submit to a chemical test or tests at the request of a law enforcement officer. . . ." O.C.G.A. § 40-6-392 is part of the statutory scheme for implied consent chemical testing, which makes clear that "the person who shall submit to a chemical test or tests at the request of a law enforcement officer," as set forth in subsection (a)(4), refers to a driver who submits at the time of arrest to a chemical test requested by the arresting officer pursuant to the implied consent provisions of O.C.G.A. § 40-5-55. Therefore, because appellant refused to submit to the chemical testing requested by the arresting officer pursuant to O.C.G.A. § 40-5-55, he was excluded from the discovery provisions of O.C.G.A. § 40-6-392(a)(4), and the trial court correctly denied appellant's discovery request made pursuant to those provisions. Nevertheless, in so holding, the Court stated that it was not rendering an "opinion as to whether a defendant charged with a misdemeanor violation of O.C.G.A. § 40-6-391, who refused to submit to the chemical testing requested by the arresting officer pursuant to O.C.G.A. § 40-5-55, may be entitled by means other than O.C.G.A. § 40-6-392(a)(4) to obtain a copy of a gas chromatograph printout or other scientific work product relied on to generate alcohol concentration test results for the State."