Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 18, 2010

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THIS WEEK:

Speedy Trial; Barker v. Wingo

State v. Lattimore, S10A0172

Lattimore was indicted for malice murder, aggravated assault and other related crimes. The trial court granted his motion to dismiss the indictment on constitutional speedy trial grounds and the State appealed. The Court, in a 4-3 decision, affirmed. Under *Barker v. Wingo*, the Court held that the delay of five years was presumptively prejudicial. The reason for the delay was attributed by the State to staffing shortages in the D.A.'s Office. Another reason was the assignment of the case from one judge to another. The Court found that the trial court's finding that the delay was attributable to the negligence of the State was not an abuse of discretion. The Court also found that the failure of Lattimore to timely assert his rights was not to be weighed against him because for over two years, various prosecutors had told his counsel that the case was indicted improperly and would be re-indicted on lesser charges. Finally, the Court found that even though Lattimore did not show that he was specifically prejudiced by the lengthy delay, Lattimore went two years after his arrest before counsel was appointed and "[a]s the trial court noted, '[e]xcessive delay has a tendency to compromise the reliability of trials in ways that neither party can prove or, for that matter, identify.'" Therefore, under the circumstances, the Court could not say that the trial court abused its discretion in granting the motion to dismiss.

Miranda, OCGA § 24-3-50

Sosniak v. State, S10A0335

Appellant contended that the trial court erred in denying his motion to suppress statements given on three separate dates. Specifically, he contended that all three violated his *Miranda* rights and/or OCGA § 24-3-50. On the day of his first statements, Appellant contended that he was in custody and therefore, anything he said should have been suppress because he had not been read his *Miranda* warnings. The record showed that the police got him out of bed in the middle of the night and brought him down to the station in handcuffs. However, once at the station, the handcuffs were removed, he was not restrained in any way and he was told by the interviewing officers that he was not under arrest. After a lengthy review of the facts, the Court found that the trial court did not abuse its discretion in determining that based on the totality of the circumstances, a reasonable person in appellant's position would not have believed he was in custody. In so holding, the Court also noted that there was no merit to appellant's contention that, because the officers did not inform him that they considered him to be a suspect and did not

apprise him of the nature of the crimes he was suspected of being involved in, his statements are inadmissible. "[A] police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of *Miranda*."

Appellant claimed that his statements on the second day of interviewing violated his rights under *Edwards v. Arizona*, 451 U. S. 477, 101 SC 1880, 68 LE2d 378 (1981). The record showed that appellant and his lawyer met with the officers. The officers then wanted appellant to accompany them to a lake where the murder weapon was located and then afterwards return to the station for more questioning. Appellant and his counsel discussed this and agreed to let appellant do this without the accompaniment of defense counsel. Appellant made incriminating statements during this period. The Court stated that under *Edwards*, once an accused has invoked his Fifth Amendment right to have counsel present during custodial interrogation, any subsequent waivers are insufficient to justify police-initiated interrogation. But, while *Edwards* bars police-initiated interrogation in counsel's absence, it does not bar police-initiated interrogation in the presence of counsel. Therefore, counsel's presence at the first interview rendered *Edwards* inapplicable because a review of the record supported the trial court's finding that appellant was given access to his lawyer and that, in his lawyer's presence, he was read his *Miranda* rights, indicated that he understood them, and waived the presence of counsel during the visit to the lake and the crime scene and during the interview afterward.

Appellant claimed that the statements given during the third day of interviewing were in violation of OCGA § 24-3-50 because they were induced by a hope of benefit or a fear of injury. The Court disagreed. The record showed that an officer said to appellant, "Right now, you need to be thinking about you and what's . . . going to get you out of jail so you can see your kid out in California, not wearing a Georgia Department of Corrections outfit." Appellant argued that this remark was intended to imply that, if he cooperated, he could go free. But the Court, looking at the totality of the interview, and noting that appellant was represented during the interview by counsel, determined that this was not a hope of benefit but simply an exhortation to tell the truth. The Court also found no merit to appellant's contention that his statement was induced by a threat of injury because an officer told him and his counsel that the prosecution was "already looking at a death penalty case" and that appellant could "get a needle." The Court found that these statements amounted to no more than an explanation of the seriousness of appellant's situation.

Notice of Appeal; Supersedeas

Moon v. State, S10A0674

Appellant was charged with murder. He moved prior to trial for a change of venue which the trial court granted. Thereafter, the State appealed from a ruling granting appellant's motion to suppress. When the case returned to the trial court, the State moved for reconsideration of the order changing venue. The motion for reconsideration was granted and appellant was granted leave to appeal the interlocutory ruling.

The Court found that the trial court was not authorized to grant the motion for reconsideration, because it was not made until after expiration of the term of court in which the order changing venue was entered. In civil cases, an interlocutory ruling does not pass from the control of the court at the end of the term if the cause remains pending. OCGA § 9-11-6 (c). In criminal cases, however, the pre-CPA rule continues to apply, and a trial court's inherent power to revoke interlocutory rulings still ceases with the end of the term. Where the State files an immediate, direct appeal as of right from a trial court's grant of a motion to suppress evidence illegally seized, the filing of the notice of appeal generally acts as a supersedeas. OCGA § 5-6-45. Under that statute, the notice of appeal in criminal cases "shall serve as supersedeas in all cases where a sentence of death has been imposed or where the defendant is admitted to bail. . . ." OCGA § 5-6-45 (a). But, the Court found, as neither condition was met in this case, the notice of appeal filed by the State did not act as a supersedeas and therefore, did not prevent the trial court from hearing a timely motion for reconsideration. Moreover, even if the notice of appeal did serve as supersedeas, it still did not preclude the simultaneous hearing of a timely motion for reconsideration in the trial court, as the order to be reconsidered would not have involved the execution of a sentence and would not have directly or indirectly affected the issue on appeal. The filing of a notice of appeal may deprive a trial court of its power to execute the sentence but it does not supersede every other activity of a trial court.

Therefore, because the State could have filed the motion for reconsideration during the same term in which the order changing venue was entered, but failed to do so, the trial court was not authorized to vacate that order.

Voir Dire; Continuing Witness Rule

Dockery v. State, S10A0326

Appellant was convicted of murder and related charges. He contended that the trial court abused its discretion by not granting his motion to strike for cause a prospective juror whose native language was Spanish. The Court held that although the juror expressed concern that he might not understand legal terminology, he also testified that he had lived in America for 22 years, demonstrated his ability to speak and understand English by his responses in voir dire, and affirmed that he believed he could be a fair and impartial juror. Therefore, there was no error.

Appellant also argued that the trial court erred by allowing certain exhibits to go out with the jury during deliberations in violation of the continuing witness rule. The four exhibits complained of were pre-printed forms filled out by each of four eyewitnesses who testified to having identified appellant as the shooter from a pretrial photo lineup. The Court noted that each of the forms contain the following, limited information: the witness' name and signature, the number of the photograph the witness selected from the lineup, the date and time of the selection, and the name of the detective who conducted the lineup. The Court determined that here, the photographic lineup file was not a testimonial account of the witness' identification of appellant but was documentary evidence of the event itself. Accordingly, the admission of these exhibits did not violate the continuing witness rule.

Chemical Field Testing; Harper v. State

Fortune v. State, A10A0224

Appellant was convicted of trafficking in cocaine. He contended that the trial court

erred in admitting evidence of a chemical field test without requiring the State to present expert foundational testimony showing the scientific reliability of the test under *Harper v. State*, 249 Ga. 519, 525 (1) (1982). The Court held that under *Harper*, scientific evidence is not admissible in criminal cases unless the procedure or technique in question has reached a scientific stage of verifiable certainty. But, once a procedure has been recognized in a substantial number of courts, a trial judge may judicially notice, without receiving evidence, that the procedure has been established with verifiable certainty. Hence, if a scientific procedure or technique is not novel, and has been widely accepted in Georgia courts, the trial court is entitled to take judicial notice that the procedure or technique meets the *Harper* standard for admissibility. Applying these principles, the Court found that chemical field tests of suspected cocaine are not novel, and have been widely accepted in Georgia courts. "Moreover, in addition to such testing being recognized as admissible evidence, we have held that a chemical field test alone is sufficient to support a conviction for selling or possessing cocaine." Therefore, the Court held, the trial court did not abuse its discretion in concluding that the chemical field testing of suspected cocaine had reached a scientific state of verifiable certainty justifying its admission in the absence of expert foundational testimony.

Voluntary Manslaughter; Sufficiency of Evidence

Cantera v. State, A10A0081

Appellant was convicted of voluntary manslaughter (OCGA § 16-5-2), possession of a firearm during the commission of a crime (voluntary manslaughter) (OCGA § 16-11-106), aggravated assault (OCGA § 16-5-21), possession of a firearm during the commission of a crime (aggravated assault) (OCGA § 16-11-106), and concealing the death of another (OCGA §16-10-31). He contended that with the exception of concealing the death of another, the evidence was insufficient to support his convictions. The State conceded that there was not any evidence of a "sudden, violent, and irresistible passion" resulting from a "serious provocation" to prove voluntary manslaughter. Therefore, the Court reversed the first two convictions.

However, the Court affirmed the remaining convictions. The evidence showed that no witnesses saw appellant kill the victim. Appellant told his daughter that he killed the victim to protect the family. The Court held that a defendant's explanation of homicide must be accepted where the State relies on no other evidence to show the intent to commit the crime charged. However, here the State also presented the testimony of appellant's son who stated that appellant told him that he shot the victim, the victim then ran, but appellant gave chase and caught him. The victim begged for his life and appellant shot him again. Thus, where the defendant's statement is not consistent with and does not explain the other direct and circumstantial evidence, as here, the rule requiring that the defendant's exculpatory explanation of a homicide does not apply.

Given the other evidence in the case, the remaining convictions were supported by the evidence.

Custodial Arrest; Miranda

State v. Curles, A10A0086

Curles was charged with DUI. The State appealed from an order granting Curles' motion to suppress his statements to police and the results of field sobriety, breathalyzer, and blood alcohol tests. The evidence showed that in the early hours of the morning, a concerned citizen followed Curles' SUV and watched Curles hit a neighbor's mailbox while parking in his driveway and then stagger into his house. The police responded. Although the evidence was in dispute, at least two officers knocked on the door. Curles' mother answered and allowed the officers to come inside to get out of the rain. They asked for the teenager who was driving the car and was told he was upstairs sleeping. At the officers' request, Curles came downstairs (still fully dressed) and the officers smelled alcohol on him. They requested that he come outside and he complied. They showed him the mailbox and he said he thought he only hit some bushes. He was arrested thereafter. Curles testified that four officers came into his house, demanded he come outside and refused to allow him to use the bathroom. The trial court determined that the police were in Curles' home at an unreasonable hour; the officers were in full uniform and gear, including weapons; they refused to allow him to use the restroom; and they ordered him to come outside his home for questioning "while it was dark, cold, and rainy." The trial court concluded that "[a] reasonable person would not have believed he was free to leave[,] . . . and Mr. Curles should have been advised of his *Miranda* rights prior to questioning."

The Court reversed. It held that a person is considered to be in custody and *Miranda* warnings are required when a person is (1) formally arrested or (2) restrained to the degree associated with a formal arrest. Unless a reasonable person in the suspect's situation would perceive that he was in custody, *Miranda* warnings are not necessary. The relevant inquiry is how a reasonable person in the suspect's position would perceive his situation. Here, the Court found, although Curles stated that he believed that he had to go downstairs to talk with the police instead of continuing down the hall to use the bathroom, he admitted that he never told the officers that he needed to use the bathroom. Furthermore, even if the officers told Curles to step outside rather than requesting that he do so, the evidence did not authorize the trial court's conclusion that a reasonable person in Curles' position would have believed that his freedom of movement was restrained to the degree associated with a formal arrest. Accordingly, because the officers' requests did not render Curles in custody for purposes of *Miranda*, the trial court erred in excluding evidence of what occurred after he left his house on the ground that he was not then given *Miranda* warnings.

Inconsistent Verdicts; Cell Phone Images

English v. State, A10A1119

Appellant was convicted by a jury of possession of less than one ounce of marijuana, possession of marijuana with the intent to distribute, possession of marijuana with the intent to distribute within 1,000 feet of a school, and possession of marijuana with the intent to distribute within 1,000 feet of a housing project. The jury acquitted him of possessing more than one ounce of marijuana. He contended that the evidence was insufficient to support his convictions for possession with intent to distribute because the jury found him guilty of possessing less than one ounce of marijuana and not guilty of possessing more than one ounce of marijuana. In other words, the jury could not find him guilty of possession with intent to distribute without also finding him guilty of possessing more than one ounce of

marijuana. The Court disagreed. It noted that the inconsistent verdict rule had been abolished and therefore, the way in which the jury reaches its verdict does not have to be explained, nor does it have to be completely logical. Since the evidence supported the jury's verdict finding appellant guilty beyond a reasonable doubt of possession with intent to distribute, the Court would not disturb that ruling.

Appellant also argued that the trial court erred in admitting his cell phone into evidence because the State failed to establish a proper chain of custody. However, the Court held, a cell phone is a distinct item that does not require proof of the chain of custody. Appellant also contended that even if the cell phone itself was distinct and recognizable, it contained fungible electronic images of cash and drugs, and the State should have been required to prove chain of custody regarding these fungible images. The Court noted that appellant acknowledged that no Georgia case has determined whether electronic images should be considered fungible and it declined to find that the electronic images in this case were inadmissible, especially given the fact that they were authenticated in court and the Supreme Court has held that when determining whether the evidence presented was sufficient to authorize a jury to conclude beyond a reasonable doubt that the defendant was guilty of a crime charged, even evidence wrongfully admitted due to lack of authentication may be considered. Moreover, at trial, an officer testified that he obtained the cell phone and followed the proper evidentiary procedures to preserve its integrity. When handed the cell phone in court, the officer testified that it was the same phone he seized from appellant and another witness testified that he was familiar with the images on the cell phone and even took several of them. Therefore, there was no error.

HGN; Harper v. State

Bravo v. State, A10A0363

Appellant was convicted of DUI (less safe). He contended that the trial court erred by denying his motion in limine to exclude the arresting officer's testimony regarding his estimate of appellant's blood alcohol concentration ("BAC") based on a Horizontal Gaze Nystagmus ("HGN") evaluation. At trial, the arresting officer testified that appellant failed all six clues on the HGN and that in his expert opinion, appellant's BAC was 0.25. The Court held that under *Harper v. State*, 249 Ga. 519, 525 (1) (1982), scientific evidence is not admissible in criminal cases unless the procedure or technique in question has reached a scientific stage of verifiable certainty. But, once a procedure has been recognized in a substantial number of courts, a trial judge may judicially notice, without receiving evidence, that the procedure has been established with verifiable certainty. While it is well-settled in Georgia "that the HGN test is an accepted, common procedure that has reached a state of verifiable certainty in the scientific community and is admissible *as a basis upon which an officer can determine that a driver was impaired by alcohol*," the technique of using an HGN test to determine whether an individual is impaired by alcohol is not the same as the method the officer employed here, which was to identify a specific numeric BAC based on an HGN. Therefore, the Court held, the trial court erred in concluding that the officer's procedure had been recognized in court as reaching the requisite scientific stage of verifiable certainty. Although the officer was well-versed DUI detection and had extensive experience and training, the Court noted that none of the materials referred to by the officer were admitted into evidence. Further, it appears that the NHTSA studies that the officer referenced, studied the reliability of using an HGN and other field sobriety tests to determine if a person was impaired by alcohol or that their BAC exceeded the legal limits; it was not clear that the studies found the method of estimating a precise BAC based on field studies to be reliable; and the officer's testimony that "to his knowledge" the method was reliable in approximating BAC was simply insufficient. Therefore, the Court concluded that the State failed to establish the scientific validity and reliability of the procedure.

The Court also held that given the evidence was not overwhelming, the error was not harmless and thus, the conviction must be reversed.