Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 27, 2014

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THIS WEEK:

Jury Charges; Medicaid Fraud

Wright v. State, A14A0535 (5/16/14)

Appellant was convicted of Medicaid fraud. The evidence showed that she billed Medicaid for services she never performed. Appellant testified at trial and admitted to the conduct. However, she stated that she did it after a program had been initiated for therapy and to secure the recipients' "access to the program." She stated that she intended to provide those services and it was not her intent to violate Medicaid policies and procedures when she submitted the bills.

She argued that the trial court erred by instructing the jury that it could convict her of the crime in a manner not charged in the indictment. Specifically, the indictment charged her with Medicaid Fraud in violation of O.C.G.A. § 49-4-146.1(b)(1), in that she obtained and attempted to obtain medical assistance payments to which she was not entitled by engaging in a "fraudulent scheme and device." In its charge to the jury, however, the court defined Medicaid fraud as follows: "It shall be unlawful for any person or provider to obtain or attempt to obtain for herself or any other person any medical assistance payments under the Georgia Medicaid program, or under a managed care program operated, funded, or reimbursed by the Georgia Medicaid program, to which the person or provider is not entitled, or in an amount greater than that to which the person or provider is entitled, when the medical assistance payment is obtained or attempted to be obtained by knowingly and willfully making a false statement or false representation, deliberate concealment of any material fact, or any fraudulent scheme or device." Appellant contended that the jury should only have been charged on "fraudulent scheme or device" because that was the charge in the indictment and it required the jury to conclude that she had a criminal intent when she billed for services that were not provided. She further contended that because she admitted to billing for services that were not performed, the jury could have convicted her of knowingly making a false statement or misrepresentation without finding that she had the requisite intent of obtaining payments through a fraudulent scheme or device.

The Court stated that as a general rule, it is not error to charge an entire Code section even though part of the section may be inapplicable. But, when the indictment specifies the commission of a crime by only one of several methods possible under the statute,

it may be reversible error to charge the entire Code section if a reasonable possibility exists that the jury may convict the defendant of committing the crime in a manner not alleged in the indictment. Jury instructions must be read and considered as a whole however; and, when an entire statutory definition is given, there is no error if the instructions sufficiently limit the jury's consideration to the elements of the offense as charged in the indictment.

Here, the Court found, the trial court read the indictment to the jury; instructed them that the State had the burden to prove every material allegation alleged in the indictment beyond a reasonable doubt; that they could only convict if they found the defendant guilty of the crimes "as charged;" and a copy of the indictment was sent out with the jury. Because the trial court properly limited the elements of the crime to that charged in the indictment, there was no error.

Forfeitures; Continuances for Good Cause

Bullock v. State of Georgia, A14A0180 (6/19/14)

In this in rem drug forfeiture action filed pursuant to O.C.G.A. § 16-13-49, appellant appealed after the trial court denied his motion to dismiss the State's complaint for failure to hold a hearing within the required time frame. The Court agreed and reversed.

Under O.C.G.A. § 16-13-49(o)(5), the State is required to hold a hearing within 60 days of service of the complaint, unless continued for good cause. If a case is continued, it may not be continued for more than 60 days from the date of the last scheduled hearing. Here, the record showed that the case was initially scheduled in a timely manner on March 28, 2013. Without objection, the case was continued for good cause until April 18, 2013. Defense counsel stated that he might have a conflict on that date, but no conflict arose and both parties were prepared to appear for the April 18 hearing. However, because the trial court (by admitted administrative error) erroneously thought that defense counsel had a conflict, the court continued the hearing on its own without a motion by either party. The State subsequently obtained another hearing date on June 14, 2013 (within 60 days after the April 18 continuance) on the theory that the trial court's April 18 continuance was for good cause, and therefore a timely hearing could be held during the 60-day period after April 18. Because the trial court was occupied with a jury trial on June 14, the court continued the hearing from that date (acting again on its own without a motion by either party) and rescheduled the hearing for June 21, 2013.

The Court found that the trial court's own continuance of the hearing from April 18 was not for good cause. In fact, the Court noted, the trial court conceded in its order denying the motion that it continued the hearing from April 18 because of administrative error. Therefore, the last good cause continuance was obtained by the State from the March 28, 2013 hearing date, and that, under O.C.G.A. § 16-13-49(o)(5), the State had a duty to invoke a hearing within the 60-day period after March 28, or rely upon another good cause continuance granted within that 60-day period. A failure to comply with the mandatory requirement for a hearing within the 60-day period set forth in O.C.G.A. § 16-13-49(o)(5) requires dismissal of the forfeiture complaint. Because there was no hearing or good cause continuance within 60 days after the March 28, the trial court erred by denying appellant's motion to dismiss the forfeiture complaint.

Search & Seizure; Severance

Cupe v. State, A14A0289 (6/19/14)

Appellant was charged with robbery, burglary, and terroristic threats. The evidence showed that on Aug. 15, appellant robbed Fowler of her purse while she was outside a store. On November 27, appellant burglarized the home of Joseph. The following day, when he was arrested on the burglary, appellant made terroristic threats to one of the arresting officers. The jury convicted appellant of the robbery and burglary, but acquitted him of the terroristic threats.

Appellant argued that the trial court erred in denying his motion to suppress. The evidence showed that Joseph lived "two houses up" from appellant and when the police came to investigate, Joseph identified appellant as the person he suspected broke into his home. The officers decided to go from Joseph's house directly to appellant's house to talk with appellant. The officers decided to walk rather than going back out to the street and taking their car because one officer knew of a path that led from Joseph's property to a road which was adjacent to appellant's home. This was a commonly known path and led right up close to appellant's back door. An officer also testified that he had been to appellant's residence at least 4 or 5 times and had always gone to the back door. While walking along the path, the officers passed a vehicle parked between five and ten feet from appellant's home. The officers looked in the window with the assistance of a flashlight and notice two briefcases, one of which was open and had paperwork with Joseph's name printed in bold letters. The information was used to obtain a search warrant of the vehicle and evidence linking appellant to the burglary and robbery was subsequently found in the vehicle.

The Court stated that police officers do not violate the Fourth Amendment by entering upon private property only to the extent of knocking on outer doors. Although the police had elected to talk with appellant at his back door, as opposed to walking around to the front door, the trial court could properly conclude that the rear of appellant's property and the back door were normal means of access to and egress from the house. Thus, the particular set of circumstances justified the officers' approach to the back door, and the initial intrusion which afforded the view of the briefcases was lawful. Moreover, law enforcement officers have the right to look into automobiles, so long as they have a legitimate reason and are looking from a place in which they have a right to be. Accordingly, because the briefcases came within the plain view exception to the search warrant requirement, the trial court did not err in denying appellant's motion to suppress.

Appellant also argued that the trial court erred in denying his motion to sever the burglary count from the robbery count, and both of those counts from the terroristic threats count. The Court disagreed. A defendant has a right to severance where the offenses are joined solely on the ground that they are of the same or similar character because of the great risk of prejudice from a joint disposition of unrelated charges. But here, the Court noted, physical evidence of both the robbery and the burglary were found in the vehicle, and the same witnesses would be required to testify as to how the evidence was discovered. Thus, the two crimes were intertwined such that some of the same evidence would be required at separate trials on each charge. Therefore,

it could not be said that the burglary and robbery offenses were joined solely because they were of the same or similar character, and severance was not required.

The terroristic threats charge arose from a statement allegedly made by appellant to one of the officers who went to appellant's residence and discovered the evidence in the vehicle. As the vehicle contained physical evidence incriminating appellant in both the burglary and the robbery, the officer was a State's witness to both crimes. Evidence of an act by an accused, intended to obstruct justice or avoid punishment for the crime for which he or she is on trial, is admissible if the act constitutes an admission by conduct. Accordingly, evidence of appellant's threat against the officer was admissible in a separate robbery or burglary trial. Thus, the Court concluded, appellant was not entitled to severance of the terroristic threats count from either the burglary or the robbery charges.

Armed Robbery; Sufficiency of the Evidence

Bradford v. State, A14A0647 (6/18/14)

Appellant was convicted following a bench trial on three counts of armed robbery. The evidence showed that appellant and a co-defendant robbed a gift shop. Appellant was wielding a meat cleaver and threatened the store employee and two customers, both of whom were playing video poker machines. Appellant ordered the store employee to empty the contents of the register into a trash bag and his co-defendant took $50 from one of the two customers. The second customer was knocked to the ground, but nothing was stolen from her.

Appellant contended that the evidence was insufficient to support the armed robbery conviction of each of the three victims. The Court noted that under O.C.G.A. § 16-8-41(a), armed robbery occurs "when, with intent to commit theft, [a person] takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon." Thus, the Court noted, among other elements, the statute requires that the accused take property of another from the person or the immediate presence of another.

Here, the Court found, the evidence was sufficient to support the conviction for armed robbery against the store employee and the customer who had the $50 taken from her. However, the same could not be said as to the second customer. The Court found that as to this customer, the record lacked any evidence of a taking of property belonging to her or over which she exercised some level of control. Instead, the State relied upon evidence that this second customer was simply in the vicinity when property belonging to the two others was taken. However, the Court found, this evidence is insufficient because armed robbery requires a taking of "property of another" from the person or the immediate presence of another. In so holding, the Court stated that this was a close question and distinguished *Avila v. State*, 322 Ga. App. 225, 227 (2013); *Ward v. State*, 304 Ga. App. 517, 522 (1) (a) (2010); and *Harp v. State*, 302 Ga. App. 17, 18 (2010) upon which the State relied. Nevertheless, the Court found, because appellant's convictions were imposed following a bench trial, the case was remanded and the trial court directed to consider any lesser included offenses of which may be warranted by the evidence as to the second customer.

Right to Counsel; Untimely Pre-trial Motions

Preston v. State, A14A0028 (6/1214)

Appellant was charged with DUI and misdemeanor possession of marijuana. The record showed that appellant appeared pro se for his arraignment on Feb. 6, 2013. He requested the assistance of a public defender but was disqualified from receiving such assistance for financial reasons. He then told the court that he would hire an attorney and was cautioned that pre-trial motions must be made within 10 days of arraignment. On April 16, 2013, retained counsel entered an appearance and filed pre-trial motions for discovery and a motion to suppress. The court found they were untimely and denied them. The Court of Appeals granted an interlocutory appeal.

Appellant argued that the trial court erred in denying his motion to allow pre-trial motions because he was arraigned without the benefit of counsel or a valid waiver of counsel. Citing *Ledford v. State*, 247 Ga. App. 885 (2001), he contended that a defendant's right to counsel extends to arraignment proceedings and that he did not knowingly waive his right to counsel. The Court, however, found that *Ledford* was distinguishable because after *Ledford*, USCR 31.1 was amended to provide that "[a]ll motions, demurrers, and special pleas shall be made and filed at or before the time set by law unless time therefor is extended by the judge in writing prior to trial." Further, the legislature passed O.C.G.A. § 17-7-110 in 2003, amending former USCR 31.1's deadline by granting defendants a period of 10 days after arraignment in which to file motions. These changes meant that defendants no longer waive their right to file pre-trial motions by being arraigned prior to obtaining counsel.

Thus, unlike the defendant in *Ledford*, appellant did not waive his right to file pre-trial motions simply by appearing for arraignment pro se. Further, unlike the defendant in *Ledford*, who was not asked at arraignment why she was appearing pro se, whether she wanted a lawyer, or whether she could afford one, appellant informed the trial court that he intended to hire counsel. He was also repeatedly told by the trial court of the importance of obtaining an attorney and of the 10-day deadline in which to file pre-trial motions or else his right to do so would be waived. Appellant also signed documents which stated that he "fully understood the Judge's instructions and what my rights are." He also signed documents advising him of his rights and the importance of having an attorney. Further, the trial court noted that appellant did not use reasonable diligence to obtain counsel prior to his arraignment. For a non-indigent defendant, such as appellant, the constitutional right to counsel only entitles him to be defended by counsel of his own selection whenever he is able and willing to employ an attorney and uses reasonable diligence to obtain his services. But here, the trial court implied at the hearing on appellant's out-of-time motion to file pre-trial motions that appellant had not exercised reasonable diligence in obtaining counsel prior to his arraignment because he had approximately eight months after the time of his arrest in which to hire an attorney to represent him at arraignment. Whether a defendant has exercised reasonable diligence in procuring counsel is a factual question, and the grant

or denial of a request for continuance on grounds of absence of retained counsel is a decision within the sound discretion of the trial judge, reversible only for an abuse of that discretion. Accordingly, the Court found, the trial court did not abuse its discretion in refusing to consider appellant's untimely pre-trial motions.

Motions for New Trial; O.C.G.A. §§ 5-5-20 and 5-5-21

Copeland v. State, A14A040 (6/11/14)

Appellant was convicted of felony possession of marijuana, possession of marijuana with intent to distribute, possession of a firearm during the commission of a crime, and reckless conduct. He contended that the trial court erred when it ignored his post-trial request to weigh the "general grounds" on his behalf as to the sufficiency of the evidence.

The Court stated that O.C.G.A. § 5-5-20 authorizes the trial court to grant a new trial "[i]n any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity," and O.C.G.A. § 5-5-21 empowers the trial court to grant a new trial "where the verdict may be decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding." Read together, the statutes provide the trial court broad discretion to sit as a thirteenth juror and weigh the evidence on a motion for new trial alleging the foregoing general grounds. It is therefore incumbent upon the trial judge to consider some of the things that she cannot when assessing the legal sufficiency of the evidence, including any conflicts in the evidence, the credibility of witnesses, and the weight of the evidence. A trial court's discretion should be exercised with caution, and the power to grant a new trial on this ground should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.

In interpreting the language of an order overruling a motion for a new trial, it must be presumed that the trial judge knew her obligation under the law, and that in overruling the motion she exercised her discretion, unless the language of the order indicates to the contrary and that the court agreed to the verdict against her own judgment and against the dictates of her own conscience, merely because she did not feel that she had the duty or authority to override the findings of the jury upon disputed issues of fact.

The Court found that, taken together, the trial court's findings confirmed that the trial court properly exercised its discretion as the thirteenth juror and rejected appellant's "general grounds" argument. Moreover, appellant failed to identify anything in the record suggesting that the trial court failed to apply the proper standard of review.

DUI; Source Code

Collins v. State, A14A0304 (6/17/14)

Following a stipulated bench trial, appellant was found guilty on one count of failure to maintain her lane and two counts of driving under the influence of alcohol, one each for DUI (less safe) and DUI (per se). The trial court merged the DUI (per se) count into the DUI (less safe) count for purposes of the conviction and sentence.

The record showed that in an attempt to secure production of the Intoxilyzer 5000 source code from the machine's manufacturer in Kentucky, appellant filed a motion seeking a determination of materiality, relevance, and necessity of the Intoxilyzer 5000 source code under the Uniform Act to Secure the Attendance of Witnesses from Without the State (the "Uniform Act"), O.C.G.A. § 24-13-90 et seq. The trial court entered an order granting the motion and directing appellant to take the next steps required under the Uniform Act in a Kentucky court in order to obtain an out-of-state subpoena to secure the specific information requested. Appellant contended that although she took the necessary steps in the Kentucky court, she was ultimately unable to obtain full and unencumbered access to the Intoxilyzer 5000 source code. She also contended she had appealed the Kentucky court's decision and was awaiting a decision.

Nevertheless, the record showed that on May 2, 2012, appellant moved for a continuance and stated to the court that she "now has access to the source code of the Intoxilyzer 5000 pursuant to [the Kentucky court's] Order." She requested time to identify and hire an expert to review the source code, and she stated that she intended to complete the process within 90 days. The trial court granted the continuance. Five months later, however, appellant moved to exclude or suppress the breath test results, asserting violations of several constitutional rights. The trial court addressed the constitutional claims and denied the motion, in part because the trial court found that "the failure to examine the source code now appears to come, not from any obstacle erected by the State, this Court, or the Kentucky Court, but from Defendant's own decision not to avail herself of the opportunity afforded by [signing a protective order as a prerequisite to obtaining access to the source code in the Kentucky court]." Subsequently, the trial court placed the case on its trial calendar.

Appellant raised three issues, all of which pertained to the measurement of her breath-alcohol concentration by the Intoxilyzer 5000, evidence of which was introduced at her trial. However, the Court noted, although appellant was found guilty on both DUI counts, she was only convicted of DUI (less safe). Therefore, because all of appellant's enumerations of error related specifically to the count of DUI (per se) they were moot. Furthermore appellant could show no harm with regard to her conviction of DUI (less safe) from any evidence related to the Intoxilyzer 5000. Her conviction of DUI (less safe) was therefore affirmed.

Special Demurrer; Range of Offense Dates

O'Rourke v. State, A14A0123 (6/19/14)

Appellant was convicted of two counts of child molestation. Count 1 alleged a molestation that occurred on June 25, 2010. Count 2 alleged that appellant committed molestation of the victim between December 1, 2009 and June 25, 2010. The evidence showed that appellant was seen performing the June 25 offense and that the victim stated that appellant had committed the same act of molestation five times previously, beginning in December, 2009, but she could not provide specific dates.

Appellant contended that the trial court erred in overruling his special demurrer as to Count 2 of the indictment because the State presented no evidence showing that it could not more specifically identify the date of the offense. The Court stated that generally, an indictment which fails to allege a specific date on which the crime was committed is not perfect in form and is subject to a timely

special demurrer. However, where the State can show that the evidence does not permit it to allege a specific date on which the offense occurred, the State is permitted to allege that the crime occurred between two particular dates. However, the exception to the specific-date requirement is not applicable where the State fails to present evidence to the trial court to show that the State is unable to identify the specific date on which the offense occurred, as, for example, when the victim is a child who is incapable of adequately articulating exactly when the offense occurred.

In Count 2 of the indictment, the State alleged that appellant molested the victim "between December 1, 2009, and June 25, 2010," by touching her on the buttocks with the intent to arouse and satisfy his sexual desires. To show that it was unable to identify specific dates, or to narrow the range of dates, the State relied on its response brief to the special demurrer. In its brief, the State argued that the date range in Count 2 of the indictment was based on the recorded statement of the victim, which had been previously provided to appellant, in which she stated that the molestation began in December 2009 and ended on June 25, 2010. Her statement also indicated that, other than the last incident, she was unable to provide any specific dates for the acts of molestation that occurred within that date range.

Citing *Mosby v. State*, 319 Ga. App. 642 (2013), appellant argued that the State was required to present evidence to show that it was unable either to identify a specific date on which an offense occurred or to narrow the range of possible dates, and that the State could not meet this burden by merely relying upon the argument in its brief. However, the Court found, appellant's argument was misplaced because here, the record indicated that appellant agreed to have the trial court rule on his special demurrer based on the parties' respective briefs, without the necessity of an evidentiary hearing. A party cannot participate and acquiesce in a trial court's procedure and then complain of it. Furthermore, unlike in *Mosley*, the State's argument concerning its inability to specify an exact date for the offense or to narrow the date range was based on specific evidence that both parties had in their possession, albeit not tendered to the trial court, that clearly showed that the victim was unable to specify any exact dates within the date range that she provided for the offense alleged in Count 2 of the indictment.

Finally, the Court held, to the extent that the State nevertheless was required to introduce such evidence at a hearing, its failure to do so in this case did not warrant reversal. In a post-conviction appeal of a trial court's pre-trial ruling denying a special demurrer, the Court applies a "harmless error" standard of review. And here, there was nothing in the record to indicate that the State could have narrowed the dates in Count 2 any further. Accordingly, having reviewed all of the evidence, the Court concluded that appellant was not surprised or otherwise prejudiced by any alleged deficiency in Count 2 of the indictment.

Joinder; Restitution

Graf v. State, A14A0530 (6/17/14)

Appellant was convicted of arson and possession of cocaine and marijuana. She contended that the trial court erred when it granted the State's motion to have the drug cases and the arson case consolidated for trial. The Court disagreed.

Two or more offenses may be joined in one charge, with each offense stated in a separate count, when the offenses (a) are of the same or similar character, even if not part of a single scheme or plan; or (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. Here, the evidence showed that appellant possessed drugs at the time she was arrested at her temporary residence, and also authorized a conclusion that appellant was a drug addict in need of money when she burned down her house for the purpose of collecting the proceeds of her State Farm insurance policy on the house. While motive is not an essential element in the proof of the crime of arson, the State is entitled to present evidence to establish that there was a motive. Thus, evidence of appellant's drug habit was admissible to prove her motive for burning down her own insured house, and the evidence and law of drug possession were neither complex nor confusing enough as to require severance. Therefore, the trial court did not abuse its discretion when it joined the drug possession charges to the arson charge for purposes of trial.

Appellant also argued that because no separate restitution hearing was held, and because no evidence was presented as to restitution at the sentencing hearing, the trial court's order granting State Farm restitution was erroneous. The Court noted that nothing in O.C.G.A. § 17-14-10 mandates a separate hearing on restitution. Subsection (a) of the statute provides that a trial court ordering restitution "shall consider" factors including the offender's "financial resources" (including earnings and obligations), as well as "the amount of damages" suffered by the victim, the "goal[s]" of restitution and rehabilitation, and "the period of time during which the restitution order will be in effect." O.C.G.A. § 17-14-7(b) provides that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the ordering authority by the preponderance of the evidence," with "[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense" resting on "the state." Also, a trial court is not required to make written findings when ordering an offender to make restitution.

Although appellant cited *Watts v. State*, 321 Ga. App. 289 (2013), for the proposition that a trial court errs when it fails to hold a separate restitution hearing, the Court found that because appellant did not assert or show that she asked for such a hearing, she waived any error in the decision of the trial court to decide the question of restitution as a part of the sentencing hearing, rather than in a separate and distinct hearing. Moreover, the trial court's restitution order of $212,000 was based on evidence introduced at trial showing the amount of payments made by State Farm to the mortgage holder as well as to appellant herself. Finally, the record showed that the trial court considered all the factors laid out in O.C.G.A. § 17-14-10(a) and that it based its restitution award on competent evidence proving the amount granted by a preponderance of that evidence.

Implied Consent; Coercion

Humphries v. State, A14A0626 (6/11/14)

Appellant was convicted of DUI (per se) and failing to maintain lane. The evidence showed that after stopping appellant, the officer asked her to blow into an alco-sensor. Appellant refused. The officer told her that

was her right, but that he was going to arrest her for DUI. When appellant asked further questions about the alco-sensor test, the officer said, "Ma'am, it's not optional, either you're submitting or you're not, which do you want to do?" She again said no. The officer read her the Implied Consent notice, and asked again if she would consent to testing, and when appellant replied that she would not, the officer said that was fine, and that he would get a search warrant to draw her blood. As they waited on a friend to pick up her car, appellant questioned the officer about the intake process, and the officer told her that "it's going to be a longer process [getting out of jail] because you refused . . . the State's test." But he also repeatedly told her again that it was her decision. Appellant was transported to jail, and after being re-read the notice at the jail, she agreed to take the state-administered breath test.

Appellant contended that the trial court erred in denying her motion to suppress the results of the breath test because the officer coerced her into taking it. Specifically, she contended that, although she later consented to the Intoxilyzer test, some of the officer's statements before she changed her mind rose to the level of coercion, specifically the statements that the test was not optional and that it would take longer to be processed out of jail if she did not submit to the test. The Court disagreed.

The Court stated that if a person has declined to submit to a state-administered test, officers are allowed to use "fair and reasonable" methods of persuasion to get them to rescind the refusal. If it is determined that the officer acted in a manner to coerce consent, then the evidence obtained must be suppressed. Here, the Court found, despite appellant's contentions, none of the officer's statements to appellant were deceptively misleading or inaccurate. Although he said it would take longer to be processed and released as a result of her refusal, this information was not misleading or deceptive information, as he explained to appellant that the process of acquiring a warrant would mean additional time before she could be processed out of custody. Further, regarding the officer's statement that he would obtain a warrant to retrieve appellant's blood, a statement that police would obtain a warrant if defendant refused to consent to search, being true, does not amount to such duress or coercion as would invalidate the subsequent search. Moreover, although appellant contended that by saying consent was "not optional," the officer was giving her no choice but to take the test, upon review of the video of the stop, the Court found that it appeared that the officer's statement was that she either had to submit or not submit and that to not do one or the other was not optional. Moreover, the officer repeatedly told appellant that the decision was up to her. Under these circumstances, the Court concluded, the trial court had a substantial basis for making its finding that the officer's statements did not render appellant incapable of making an informed decision about whether to submit to the breath test.

Expert Testimony; Psychological/Psychosexual Evaluations

Abney v. State, A14A0690 (6/11/14)

Appellant was convicted of two counts of obscene internet contact with a child. The evidence showed that appellant interacted in a regional internet chat room with a police officer whom appellant believed to be a 13-year-old girl. Appellant's defense at trial was that he thought he had been engaging in "fantasy role play" with another adult user and never intended to interact with an actual underage female.

Appellant retained a psychologist who conducted a psychological and psychosexual evaluation of him. After conducting the evaluation, the psychologist issued a report in which he opined that "Mr. Abney's test results and his self-report are not suggestive of any sexual deviance towards minors," that "Mr. Abney does not appear to pose a risk of sexually offending in the future," and that "there does not appear to be any need for any psychological interventions based upon [Mr. Abney's] sexual history and overall psychosexual (or psychological) functioning." The trial court would not allow the expert to testify, finding that even an expert may not opine about what is the ultimate issue for the jury.

Appellant argued that the trial court erred in excluding the testimony of his expert witness. Specifically, he contended that the psychologist's testimony about the evaluation should have been permitted because it would have supported his defense that he did not intend to have obscene Internet contact with an underage girl. The Court disagreed.

The Court stated that it well-established that an expert may not offer an opinion on an ultimate issue of fact—including the issue of the defendant's guilt—where the jury is capable of making that determination without expert assistance. And, the Court noted, it has repeatedly held that opinion testimony from an expert who administered psychological testing to the defendant regarding whether the defendant exhibited signs of sexual deviance or abnormality or met the profile of a child or adolescent sex abuser is not admissible in Georgia. The type of opinion testimony proffered by appellant goes to the credibility of the defendant and his capability of performing the acts of which he was accused, and such matters are not beyond the ken of the jurors and thus, do not necessitate expert testimony. Accordingly, the Court concluded, the trial court acted within its discretion in excluding the testimony of the psychologist retained by the defense.