Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 11, 2017

THIS WEEK:

Accomplice Testimony; Giglio

Woods v. State, A17A0311 (6/16/17)

Appellant was convicted of voluntary manslaughter and simple assault. Appellant argued that the State failed to disclose that it had an agreement with his accomplice, Grant, to give him immunity or leniency in exchange for his trial testimony, arguing that such failure to disclose hampered his ability to impeach Grant during trial. The Court disagreed.

The record showed that prior to trial, the State gave Grant use and derivative use immunity, agreeing that any testimony or evidence he presented during appellant's trial (or related proceedings) would not be used against him during his own trial, except to the extent that such testimony or evidence was false or conflicted with his testimony at his own trial. The State filed a notice of its grant of immunity almost 18 months before appellant's trial. Thus, the Court found, appellant could not claim to have been ignorant of this grant of immunity.

Moreover, the Court found, appellant's assertion that the State must have agreed to give Grant leniency in his prosecution and sentencing in exchange for his testimony in appellant's trial was pure speculation. Not only was there no evidence of such an agreement in the record, the trial transcript affirmatively showed that no such agreement existed at the time of appellant's trial. Moreover, during the motion for new trial hearing, appellant's trial counsel admitted that, at the time of appellant's trial, the prosecutor informed him that the State did not have an agreement with Grant to give him leniency in exchange for his testimony.

Nevertheless, appellant argued, such an agreement had to be in place because of the fact that Grant received a lighter sentence than appellant believed was appropriate, given Grant's participation in the murder. However, the Court stated, the subsequent disposition of charges against the witness, standing alone, does not establish the existence of a deal. Given that the State consistently denied that a deal with Grant existed at the time of appellant's trial, the trial court accepted that representation as true, and appellant offered nothing but pure speculation to the contrary, the Court refused to hold that the trial court's finding that there was no deal with Grant was clearly erroneous.

Grand Juries; Video Recordings

Yancey v. State, A17A0264 (6/16/17)

A grand jury indicted appellant and others for second-degree burglary. The Court granted an interlocutory appeal after the trial court denied appellant's motion to quash the indictment. The record showed that appellant worked for a number of years under Sheriff Ladson O'Connor as an investigator primarily responsible for property crimes at the Sheriff's Department. On the night of June 15, 2015, Sheriff O'Connor died as a result of a wreck during a high-speed chase of Jim Lowery, whom appellant had been investigating. Low-

ery fled after the crash, and a manhunt quickly ensued involving numerous police officers from multiple jurisdictions. That same night, Sheriff O'Connor's individual office within the Sheriff's Department was opened, and a safe and possibly other items were removed by individuals who worked at the Department.

Appellant argued that the trial court erroneously denied his statutory right to notice and to appear before the grand jury pursuant to OCGA § 45-11-4 (c), (g) (2015) and OCGA § 17-7-52 (a) (2015). The Court agreed. The Court found that although appellant was not in the office during his regularly scheduled duty hours and normally did not have access to Sheriff O'Connor's office, there was substantial evidence that he entered the office in furtherance of the investigation of Lowery while he arguably was on call the night of O'Connor's death. Obviously, the circumstances of that night had most of the police forces of many of the surrounding counties responding to the command post outside of their normal assigned working hours, and there was some evidence that appellant provided assistance into the investigation at the command post. While it may be the case that he and the other indicted individuals committed burglary that night, the Court found that this was not the relevant inquiry when determining whether an individual is entitled to the protections of OCGA §§ 17-7-52 and 45-11-4. In so holding, the Court distinguished *Mize v. State*, 152 Ga. App. 190 (1979), because in *Mize*, there was no argument that the officer was transporting accomplices to the scene of the burgled building for any reason related to his duties as a police officer; thus, even though he may have been wearing his uniform and carrying his department issued weapon during duty hours, his actions could not be characterized as being in performance of his duties.

Appellant also contended that video footage of the Sheriff's office from the night in question should not have been admitted for the trial court to view in relation to his motion to quash. The Court disagreed. The evidence showed that Ricky Dykes drove his girlfriend, Kim Young (a dispatcher for the Department), to the Sheriff's Department on the night of O'Connor's death. He was familiar with the officers at the department and said many were around and some were in Sheriff O'Connor's office while he was there. Dykes testified that Young had an application on her phone that received a video feed from the department security cameras, and he used his phone to record the feed showing the individuals leaving O'Connor's office because Young did not know how to save the video feed. He provided a copy to the GBI, and he did not know if the original footage existed. The video showed the open back door to the Sheriff's office with various men and one woman coming out, one of whom was carrying a safe; some time later, other individuals left, one of whom had a sling around one arm and was carrying papers. None of the individuals appeared to be concealing their identities or their presence in the office.

The Court stated that pursuant to OCGA § 24-9-923 (c), "videotapes created by unmanned cameras 'shall be admissible in evidence when the court determines, based on competent evidence presented to the court,' that the video tends to reliably show the fact or facts for which it is offered." Here, the Court found, although it was not clear why Young did not testify about the surveillance system at the hearing on the motion to quash, Dykes testified as to the circumstances under which he created the video of the surveillance video. While the better practice to lay foundation may have been to have Young or another employee testify about the system, there was no abuse of discretion by the trial court in admitting the video because Dykes testified as to the circumstances and was personally at the Sheriff's Department when the video was captured. Additionally, the date and time were visible prior to Dykes choosing the portion of the video presented at the hearing. And, the Court held, the issues raised as to the State's failure to produce the original recording or from Young's failure to testify impacted the weight and not the admissibility of the video.

Statements; Right to Counsel

Bowman v. State, A17A0379 (6/19/17)

The Court granted appellant interlocutory review after the trial court denied appellant's motion to suppress his statements. The record showed that appellant was arrested pursuant to a warrant on a charge of armed robbery. At his first appearance hearing before the magistrate court, appellant did not request a court-appointed attorney but stated that he had hired an attorney. (In fact, appellant did not retain the attorney in this case; the attorney had represented appellant in other matters.) Subsequently, law enforcement officers interviewed appellant at the jail. At the start of that interview, an officer recited *Miranda* warnings to appellant and had him sign a waiver of rights form. Appellant appeared to understand what the officer was saying to him regarding his rights and was not reluctant to speak with the officer. He did not ask to speak with an attorney at any point during the interview, nor did he mention that he had hired an attorney.

Citing *Michigan v. Jackson*, 475 U.S. 625 (106 SCt 1404, 89 LE2d 631) (1986) and *O'Kelley v. State*, 278 Ga. 564 (2004), appellant argued that his *Miranda* waiver was ineffective because law enforcement officers initiated the interview after his right to counsel under the Sixth Amendment had attached. But, the Court stated, the United States Supreme Court overruled *Jackson* in *Montejo v. Louisiana*, 556 U.S. 778, 797 (IV) (129 SCt 2079, 173 LE2d 955) (2009). Following suit, our Supreme Court disapproved *O'Kelley* in *Stinski v. State*, 286 Ga. 839, 856 (61) n. 5 (2010).

So, the Court stated, as the law now stands under *Montejo*, even if it is assumed that appellant's Sixth Amendment right to counsel had attached at the first appearance hearing, this alone did not invalidate his waiver of that right during the police-initiated interview. Had appellant made a clear assertion of the right to counsel at the start of the police-initiated interview, then no interview should have taken place. Even if appellant subsequently agreed to waive his rights, that waiver would have been invalid had it followed an unequivocal election of the right. But it was undisputed that appellant did not assert his right to counsel at any point during the interview. And appellant did not argue that his Sixth Amendment waiver was not knowing and voluntary on any other ground. Moreover, the record supported the trial court's finding that appellant freely and voluntarily gave his statement in an interview after being informed of his right to an attorney. Accordingly, the trial court did not err in denying appellant's motion to suppress.

Subpoenas; Drug Detection Dogs

Harris v. State, A17A0172 (6/20/17)

Appellant was indicted for trafficking marijuana and possession of marijuana with

intent to distribute at Atlanta Hartsfield Jackson International Airport. The evidence showed that appellant was arrested after a drug detection dog named "PacMan" alerted on his baggage. He moved to suppress the evidence and in conjunction with his motion, subpoenaed certain information about the canine and the handler. The trial court denied the motion, accepting the State's contention that the dog's certification documents alone created an unrebuttable presumption of reliability, and that materials related to training were not relevant to demonstrate reliability. The Court granted appellant's petition for interlocutory review.

The Court noted that the material requested in appellant's subpoena were "[a]ll records and documents relating to drug/narcotic/explosive detection canine handler … and … [a]ll records and documents relating to drug/narcotic/explosive detection canine "PacMan." Appellant contended that the materials had demonstrative material relevance to an ultimate issue of his defense as presented in his motion to suppress, to wit: PacMan's reliability. Appellant further contended that per *Florida v. Harris*, 568 U.S. 237 (133 SCt 1050, 185 LE2d 61) (2013), he has a vested right to challenge the State's certification evidence of PacMan's's reliability because the reliability of the dog's alert is a "fact of consequence" to his motion to suppress and, moreover, that he is entitled to cross-examine the handler with the subpoenaed training documents that might either support or contradict the handler's opinion that PacMan's alert was reliable. Thus, he argued, because he has met the burden of establishing that the documents are relevant and material to his defense or fall within his broad right to a thorough and sifting cross-examination, the trial court erred in granting the motion to quash.

Citing *McKinney v. State*, 326 Ga. App. 753 (2014), the Court stated that within the context of establishing probable cause, certification can be sufficient to show that the dog's alert is reliable, this presumption is established when the reliability is uncontested. But if the defendant contests the reliability of the alert then the court should weigh the competing evidence. To do so, the defendant should be permitted to utilize subpoena power to obtain relevant materials. Thus, for the trial court to weigh competing evidence, the defendant must have access to it. The cases do not hold that appellant is precluded from challenging the reliability of the alert with materials related to training because reliability was presumptively established by demonstrating certification on the day of the alert.

However, having determined that certification on the day of the alert does not preclude a challenge to the reliability, the Court stated that it could not determine from the existing record whether the training materials were relevant to the issue of reliability. The subpoena requested all of the "records and documents relating to" the handler and PacMan. At the hearing on the motion to quash, the State simply argued that the materials were irrelevant because training materials were not related to reliability, and reliability was established per se by the certification. Other than the blanket assertion that training materials are irrelevant to demonstrate reliability based on its interpretation of *Florida v. Harris* and its progeny, the State offered no other basis for its objection. Moreover, even if the subpoena was overly broad, a trial court has discretion to modify it. Accordingly, because it was unclear whether appellant met his burden of establishing that the subpoenaed materials were relevant to challenge the reliability of the alert, and, if so, whether the State then met its burden of demonstrating that the subpoena was overly broad and unreasonably burdensome, the Court vacated the trial court's judgment and remanded the case to the trial court for further proceedings.

DUI; Williams

State v. Nicholson, A17A0470 (6/27/17)

Nicholson was charged with DUI. The trial court granted his motion to suppress the results of his state-administered chemical blood test and the State appealed. The Court reversed.

The State argued that the trial court erred in granting the motion to suppress because it incorrectly found that Nicholson's response was merely a "submission" and not a "factual consent." The Court noted that in *Williams v. State*, 296 Ga. 817 (2015). our Supreme Court rejected a per se rule automatically equating an affirmative response to the implied consent notice with actual consent to a search within the meaning of the Fourth Amendment. The courts are now charged instead with conducting a case-by-case analysis, considering the totality of the circumstances. Thus, the results of a warrantless blood test are subject to suppression unless the State establishes that the defendant freely and voluntarily consented to the test.

A consent to search will normally be held voluntary if the totality of the circumstances fails to show that the officers used fear, intimidation, threat of physical punishment, or lengthy detention to obtain the consent. Moreover, the defendant's affirmative response to the implied consent notice may itself be sufficient evidence of actual and voluntary consent, absent reason to believe the response was involuntary. The defendant's failure to express an objection to the test or change his or her mind also is evidence of actual consent."

And here, the Court found, the undisputed facts showed that Nicholson was neither injured nor threatened with harm during his interaction with the officer. Nicholson appeared to be acting and responding rationally and did not appear to be confused or extremely intoxicated. Throughout their encounter, the officer maintained a friendly demeanor and tone of voice and allowed Nicholson to ask questions. At one point, Nicholson asked if he could perform the walk and turn test on more even ground, and the officer readily agreed, moving his patrol vehicle so that the camera would be facing the area of the parking lot that Nicholson chose. Nor did Nicholson argue that youth, lack of education, or low intelligence somehow negated the voluntariness of his consent.

Nevertheless, Nicholson argued, because the implied consent notice uses the word "submit" versus "consent," a defendant's submission to a search (via a state-administered blood test) under Georgia's implied consent statute is not the same as a defendant "actually consenting" to a search under the Fourth Amendment. The Court noted that this argument was adopted by the trial court in its order granting the motion to suppress. However, the Court stated, it has previously considered and rejected this argument in *Kendrick v. State*, 335 Ga. App. 766, 769-71 (2016) and *State v. Oyeniyi*, 335 Ga. App. 575, 578 (2016). Therefore, the Court found, based upon is de novo review, under a totality of the circumstances, Nicholson freely and voluntarily consented to the blood test. Accordingly, the Court reverse the trial court's grant of Nicholson's motion to suppress.