Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING AUGUST 13, 2010

Legal Services Staff Attorneys

**Chuck Olson**
General Counsel

**Joe Burford**
Trial Services Director

**Laura Murphree**
Capital Litigation Director

**Fay McCormack**
Traffic Safety Coordinator

**Gary Bergman**
Staff Attorney

**Al Martinez**
Staff Attorney

**Clara Bucci**
Staff Attorney

## THIS WEEK:

- Double Jeopardy
- Search & Seizure
- DUI; Juveniles

## Double Jeopardy

*Nicely v. State, A10A1426*

Appellant was convicted of possession of cocaine. He contended that the trial court erred in denying his double jeopardy plea in bar to the cocaine possession prosecution. The record showed that appellant was arrested by a Georgia DNR officer who, while investigating illegal fishing, found appellant in possession of cocaine. A deputy sheriff assisted and issued appellant a traffic citation for suspended license. The traffic citation directed appellant to appear in the probate court, which hears misdemeanors in White County. A White County grand jury indicted appellant for possession of cocaine on October 2, 2006. On October 10, 2006, appellant appeared in the probate court and entered a plea of nolo contendere to the citation for driving with a suspended license. Thereafter, appellant filed a plea in bar, asserting that the cocaine possession charge be dismissed.

Under OCGA § 16-1-7 (b), if "several crimes [1] arising from the same conduct are [2] known to the proper prosecuting officer at the time of commencing the prosecution and are [3] within the jurisdiction of a single court, they must be prosecuted in a single prosecution." A second prosecution is barred under OCGA § 16-1-8 (b) (1) if it is for crimes which should have been brought in the first prosecution under OCGA § 16-1-7(b). In order for this procedural aspect of double jeopardy to prohibit a prosecution, all three prongs must be satisfied. The Court found that it was undisputed that the first and third prongs of OCGA § 16-1-7 (b) were satisfied: both the cocaine possession charge and the traffic citation arose from a single transaction; and, both charges were within the jurisdiction of, and could have been tried in, the superior court. The second prong was also satisfied: In White County, the district attorney functions as the prosecuting attorney for the State in both superior and probate courts. As a result, the district attorney was the proper prosecuting officer for both the felony cocaine possession charge and the misdemeanor traffic citation against appellant. Moreover, by virtue of having achieved the return of an indictment on the cocaine possession charge on October 2, 2006, the district attorney, as a matter of law, had actual knowledge of that charge, which is the charge that appellant claimed was subject to a plea in bar under OCGA §§ 16-1-7 and 16-1-8, on the date of the first prosecution, that is, appellant's nolo plea to the traffic citation in the probate court on October 10, 2006. Therefore, the charge of cocaine possession was a successive prosecution for already-prosecuted conduct, and the trial court erred in rejecting appellant's plea in bar pursuant to OCGA §§ 16-1-7 and 16-1-8. In so holding, the Court stated that the district attorney's actual knowledge of the cocaine possession charge was imputed to the assistant district attorney who acted in the district attorney's place in representing the State in the prosecution of the traffic citation in the probate court.

## Search & Seizure

*Anderson v. State, A10A0852*

Appellant was convicted of trafficking in cocaine, possession of marijuana with intent

to distribute, and giving false information to a law enforcement officer. He contended that the trial court erred in denying his motion to suppress because the arrest warrant was obtained without probable cause. The record showed that officers obtained an arrest warrant for appellant for providing false information to a law enforcement officer in violation of OCGA § 16-10-25, which provides that "[a] person who gives a false name, address, or date of birth to a law enforcement officer in the lawful discharge of his official duties with the intent of misleading the officer as to his identity or birthdate is guilty of a misdemeanor." After obtaining the warrant, the officers entered appellant's hotel room, arrested him and in the course of the arrest, discovered the controlled substances.

The Court held that the warrant was issued without probable cause. The evidence showed that during a traffic stop on February 24, 2007, appellant provided the affiant officer with a driver's license and stated that he lived at the address shown thereon. The officer subsequently determined that, approximately one month earlier, appellant had provided a different address in connection with a reported burglary in which he had been the victim. This discrepancy led the officer to believe that appellant had given him a false address at the February 24 traffic stop. The officer went to both addresses several times but did not see appellant or his car at either address. The officer also spoke with a maintenance worker at the address on appellant's driver's license, but the worker had not seen him or his car at that address. On March 9, 2007, the officer discovered that appellant had checked into a local hotel, using the address shown on his driver's license. Based on this information, the magistrate issued the arrest warrant for giving a false address.

The Court held that evidence showing that on various occasions a person gave different information to a law enforcement officer "does not support even an inference" that the person gave false information to an officer on the occasion at issue. Thus, the fact that appellant gave two different addresses for himself over a one-month period was not evidence that the address he provided to the officer during the traffic stop was false at that time. Moreover, evidence that appellant had not been seen by the officer or a maintenance worker at the address listed on his driver's license, or that he had checked into a local hotel two weeks after the traffic stop, did not provide probable cause that he gave the officer a false address during the traffic stop. While this evidence may have raised a suspicion or possibility that appellant did not live at the address shown on his license at the time of the stop, it did not demonstrate a probability that he did not live there, as was required to find probable cause that he had violated OCGA § 16-10-25. Therefore, because the evidence failed to set forth a substantial basis for concluding that probable cause existed to issue the arrest warrant for providing false information, the warrant was invalid, and thus all physical evidence found and statements made by appellant during the execution of that arrest warrant should have been suppressed.

## DUI; Juveniles

*In the Interest of R.M., A10A1288, A10A1353*

R. M., age 16, was charged with DUI in Juvenile Court. The trial court granted his motion to suppress the results of the breath test, finding that the implied consent notice for suspects under the age of 21 was misleading, and the State appealed. R. M. cross-appealed from the denial of his motion on grounds that the implied consent statute is inapplicable to juveniles.

The officer read R. M. the statutory notice for suspects under 21, found at OCGA § 40-5-67.1 (b) (1). This notice to underage suspects states that "[i]f you submit to testing and the results indicate an alcohol concentration of 0.02 grams or more, your Georgia driver's license or privilege to drive on the highways of this state *may be suspended for a minimum period of one year*." Relying upon OCGA § 40-5-57.1 (b) (2) (B) (i), the trial court determined that the notice was misleading because it "clearly overstates the penalty for a person whose alcohol concentration is less than .08 grams . . ., by doubling the actual penalty statutorily authorized." The Court disagreed. 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. Subsection (b) (2) (A) of OCGA § 40-5-57.1 provides that an underage driver whose license is suspended due to a DUI conviction "shall . . . be subject to the provisions of [OCGA §] 40-5-63," which, as noted above, provides for suspension for at least 12 months. Subsection (b) (2) (B) (i) of 40-5-57.1, relied upon by the trial court, does not provide for the *suspension* of the license of an under-21 driver, but instead deals with the underage driver's eligibility to apply for *reinstatement* of a suspended license. Thus, a first offender whose blood alcohol concentration tested out at less than 0.08 grams is not eligible to apply for reinstatement of his license until the end of six months. The driver's eligibility to apply for possible reinstatement before the end of the suspension period, however, does not change the fact that the license is suspended for at least 12 months. Therefore, the trial court erred in ruling that OCGA § 40-5-57.1 actually authorized a penalty of only six months' suspension.

R. M. contended that the implied consent statute cannot be applied to juveniles, because the notice must be given after arrest, and juveniles are not subject to arrest. Specifically, he argued that although a juvenile may be taken into "custody . . . [p]ursuant to the laws of arrest" under OCGA § 15-11-45 (a) (2), OCGA § 15-11-45 (b) provides that "[t]he taking of a child into custody is not an arrest, except for the purpose of determining its validity under the Constitution of this state or of the United States." The Court held that implied consent is triggered at the point that the suspect is not free to leave and a reasonable person in his position would not believe that the detention is temporary, regardless of whether a "formal arrest" has occurred. When the officer determined that R. M. was under the influence, he placed him under arrest, read him the implied consent notice and placed him in the back seat of his patrol car. The officer testified that at that time, R. M. was not free to leave. R. M.'s detention was therefore an "arrest" sufficient to trigger the implied consent law, notwithstanding the provisions of OCGA § 15-11-45 (b).