Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 16, 2018

THIS WEEK:

Right to be Present; Critical Stages of Trial

Neale v. State, A17A1531 (2/5/18)

Appellant was convicted of three counts of child molestation. He argued that his right under the Georgia Constitution to be present at critical stages of his trial was violated in two ways: 1) the trial court communicated with potential jurors outside of his presence; and 2) he could not hear while attending pretrial hearings. The Court disagreed.

The record showed that the judge met in the jury assembly area with over 100 prospective jurors who appeared pursuant to the summons for jury service for multiple possible trials before this judge and another judge. The judge excused certain jurors because they were statutorily ineligible to serve or statutorily exempt. He also excused certain prospective jurors for discretionary reasons such as medical hardship. He also deferred other prospective jurors. Appellant's jury eventually was selected from the remaining prospective jurors.

The Court stated that the practice of the trial judge asking prospective jurors general qualifying questions outside the presence of the defendant is not condoned. All voir dire should take place in the courtroom in the presence of all parties. However, fundamentally, the entry of individuals summonsed for jury duty and the preliminary qualifying questions by the trial court judge to the venire was neither a trial nor a pre-trial procedure involving any specific defendant. The trial does not begin until the jury has been impaneled and sworn. And relying on *Payne v. State*, 290 Ga. App. 589, 593 (4) (660 SE2d 405) (2008) (emphasis in original), overruled in part on other grounds by *Reed v. State*, 291 Ga. 10, 14 (3) (727 SE2d 112) (2012), the right under the Georgia Constitution "to be present does not extend to any and all communications between the trial courts and *potential* jurors." Thus, the Court rejected appellant's constitutional challenge. In so holding, the Court also rejected appellant's argument that *Payne* was wrongly decided.

Next, appellant argued that that his

right to be present was violated because he could not hear the proceedings during three pretrial motions hearings. The Court noted that the State Constitution guarantees criminal defendants the right to be present, and to see and hear, all the proceedings which are had against him on the trial before the court. But here, the Court found, the record showed that appellant never informed the trial court of his inability to hear the pretrial proceedings or requested from the trial court any kind of relief to remedy that problem. Although at one pretrial hearing, counsel referenced appellant's hearing impairment, it was in the context of ensuring that appellant had a working headset to hear the trial testimony. Similarly, at another pretrial hearing, counsel mentioned that the "there was an issue with regards to the headphones and his use of headphones"; "[t]he bailiff … attempted to get the device that … [appellant] is now currently wearing"; "they were unable to find one that was in working order"; and "he is entitled to wear that." At no time did appellant or his attorney inform the trial court that he could not hear the pretrial proceedings. Thus, the Court concluded, appellant waived any right to hear those proceedings.

Search & Seizure; Hot Pursuit

State v. Charles, A17A1886 (2/6/18)

Charles was charged with three counts of DUI, misdemeanor possession of marijuana, and other misdemeanors. She filed a motion to suppress, arguing that the roadside stop was not authorized because it was outside of the officer's jurisdiction. The evidence showed the stop was made by Fayette County deputies after Charles' vehicle crossed into Clayton County. The trial court granted the motion and the State appealed.

The State argued that the trial court erred by ruling that the stop was not authorized under the "hot pursuit" doctrine. The Court agreed. Generally, a peace officer has the power to make traffic stops and to arrest only in the territory of the governmental unit in which he was appointed. An exception to this rule is recognized in instances in which "hot pursuit" of an offender takes an officer beyond his geographical limits in order to effectuate an arrest. The fact that an officer does not engage in a high speed chase in the pursuit of a driver does not necessarily mandate a finding that the stop and arrest beyond the officer's territorial limits were unauthorized under the "hot pursuit" doctrine. Nor is there any requirement that the officer activate emergency lights or a siren before leaving his jurisdictional territory. The critical elements characterizing "hot pursuit" are the continuity and immediacy of the pursuit, rather than merely the rate of speed at which pursuit is made. A pursuing officer may, and should, wait to stop and arrest a suspect at the first opportunity for doing so which is, under the circumstances, safe for all concerned - the suspect, the officers and other motorists.

Here, it was undisputed that the arresting deputies immediately began pursuit of Charles upon observing her broken tag light, which is a violation of OCGA § 40-8-7 (a), within their territorial jurisdiction, Fayette County. The deputy testified that the speed limit was 55 miles per hour, and they began the pursuit from a standstill; nevertheless, they conducted the pursuit with due regard for safety, taking into account the relatively trivial nature of the observed offense. Further, the evidence also was undisputed that the pursuit was continuous until they executed the traffic stop in Clayton County less than one mile from the point at which they observed the offense. Under these facts, the decision to look for safe, level ground to execute the traffic stop did not interrupt the immediacy or continuity of the pursuit, nor did it materially add to the duration of the pursuit — the deputies stopped Charles less than a mile after starting from a standstill on a highway with a 55-mile-per-hour speed limit. Therefore, the Court held, the trial court erred by concluding that the stop was not authorized under the "hot pursuit" doctrine.

Jury Deliberations; Continuing Witness Rule

Ross v. State, A17A1818 (2/8/18)

Appellant was convicted of burglary, six counts of aggravated assault, and seven counts of possession of a firearm during the commission of a crime. Appellant did not testify, but his one-hour statement was played in full to the jury during the trial. The court then allowed the jury to replay the statement during deliberations in the jury room and allowed the jury to stop (but not rewind) the video from time to time to discuss the significance of various aspects of the interrogation. Appellant contended that this violated the continuing witness rule. The Court agreed and reversed his convictions.

In Georgia the "continuing witness" objection is based on the notion that written testimony is heard by the jury when read from the witness stand just as oral testimony is heard when given from the witness stand. But, it is unfair and places undue emphasis on written testimony for the writing to go out with the jury to be read again during deliberations, while oral testimony is received but once. Thus, it is error to allow a jury to take written or recorded statements into the jury room during deliberations unless those statements are consistent with the defendant's theory of the case.

Here, the Court noted, appellant's defense was that he was not involved in the crimes. Evidence was presented that he was wearing a white undershirt and basketball shorts that night, not black clothing and a mask as described

by the victim, as well as evidence that investigators did not determine whether any hair or blood found at the scene matched appellant. During the taped interview, appellant insisted repeatedly that he was never at the scene of the crime and had no motivation to rob the victim. But in the course of the one-hour, video-recorded statement, appellant slowly began to admit that he had played a larger role such that, by the end of the interrogation, he essentially had admitted being a party to the crime. Therefore, the Court concluded, the video-recorded statement was not advantageous to the defense and thus, not consistent with appellant's defense.

Nevertheless, the State argued, any error was harmless for two reasons: the trial court created a reasonable procedure for the video replay; and because the evidence was overwhelming. But, the Court stated, it could find no support in the law for a trial court to define a procedure to be used in the jury room in order to control the harmful effects of a violation of the continuing witness rule. Further, although a jury may re-hear evidence in open court, the statement at issue was played in the jury room, and these jurors were allowed to stop and start the video, thereby allowing the jury to place great emphasis on the video. Also, because the victim was unable to identify the robbers, the strongest piece of evidence connecting appellant to the shooting was his recorded statement, and the jury entered a verdict shortly after re-watching the taped statement in the jury room. Accordingly, the Court held that the other evidence against appellant was not overwhelming and that a reversal was required.

Jury Instructions; Juror Misconduct

Deleon v. State, A17A1948 (2/9/18)

Appellant was convicted of armed robbery, kidnapping with bodily injury, and hijacking a motor vehicle. He contended that the trial court failed to fully explain "asportation" as contemplated by OCGA § 16-5-40 in its jury charge. Specifically, the charge failed to expressly state that "slight movement" shall be sufficient unless such slight movement occurred during the commission of another offense and was "merely incidental" thereto. Appellant also contended that the charge given the jury failed to recite those instances of movement specified by OCGA § 16-5-40 (b) (2) which shall not be considered "merely incidental" to another offense. Consequently, the jury lacked adequate guidelines for assessing whether the movement in this case was sufficient pursuant to OCGA § 16-5-40 (b).

The State conceded that appellant showed that the trial court erred by failing to instruct the jury on relevant parts of the kidnapping statute. However, the Court agreed with the State that there was no reversible error. The Court noted that appellant failed to object to the charge and in viewing the jury instructions as a whole, there was no plain error. Though the charge fell short of explaining relevant statutory language, the kidnapping charge given was not overtly wrong. Also, appellant testified and his version of the events paralleled that of the victim, except in two aspects: (1) the victim was stabbed by appellant in self-defense; and (2) the victim's traveling with appellant had been wholly voluntary. But the jury simply did not conclude that appellant acted in self-defense nor did the jury conclude that the victim had voluntarily accompanied him. Thus, the Court found, in light of the quantum of evidence showing movement of the victim, appellant failed to show that the cited omissions from the kidnapping charge affected his substantial rights.

Next, appellant contended that the trial court erred in its response to alleged juror misconduct. The record showed that after the final jury charge, the court recessed trial proceedings for lunch. During that break, courtroom bailiffs reported to the trial court that one of the jurors had been texting or otherwise using a communications device during closing arguments and during the final charge. When the jurors returned from lunch, the trial court convened a hearing with that juror. Upon the court's questioning, the juror explained that he had been using his cellphone only to take notes and that he had not been communicating with anyone. The juror offered to show the court his notes, but the court declined to inspect the juror's cellphone. The court asked defense counsel whether he wished to question the juror, and defense counsel said no. At defense counsel's request, however, the court summoned into the courtroom the remaining jurors, then instructed them all that jurors are allowed to take notes during trial proceedings; that whether such notes are taken by pen/paper or by an electronic device is immaterial; and that if/when such notes are taken by a juror, the notes do not place that juror in any superior position with respect to determining facts. Defense counsel asked the court to declare a mistrial, but that request was summarily denied. Deliberations then commenced.

Appellant argued that the trial court should have examined the contents of the cellphone and questioned the remaining jurors as to whether an improper communication had occurred. Appellant contended that the juror could have been using his cellphone to conduct independent research, which information that juror might have shared with other jurors.

However, the Court found, as soon as was practicable - and before the jury began deliberating, the trial court convened a hearing at which the juror stated that he had been using his device solely to take notes of the trial proceedings. And, a trial court is not mandated in every instance of alleged juror misconduct to question each juror individually. Thus, under

the circumstances, the trial court was authorized to find the juror's explanation credible. Furthermore, the Court noted, appellant's counsel conceded that the underlying claim of juror misconduct hinged on "pure speculation." Accordingly, the Court concluded that because the juror's conduct - as found by the trial court (of using his cellphone to take notes during the trial) - was not so prejudicial that the verdict must be deemed inherently lacking in due process, this contention supplied no basis to disturb the judgment.

Motions for Mistrial; Character Evidence

Cuyler v. State, A17A1804 (2/12/18)

Appellant was convicted of attempted armed robbery, aggravated assault, first-degree burglary, and related weapons charges. The evidence showed that appellant and his co-defendant, Brown, kicked in the victim's apartment door, shot the victim, and attempted to rob him. Appellant argued that the trial court erred by failing to grant a mistrial during the victim's testimony. Specifically, appellant argue that two statements by the victim improperly commented on his character, but he conceded that the State did not intentionally solicit either statement.

First, in response to the question of whether the victim could identify appellant in the courtroom and describe his clothing, the victim said appellant "is the guy that's on defense with … the orange and blue shirt, the different colored shirt on with the low haircut now. He used to have … like a Fro, an Afro and stuff before. I guess he went through the system—been in the system for doing his chain[-]gang time or whatever." Defense counsel objected, but did not ask for a mistrial and the trial court was not required sua sponte to declare a mistrial in the absence of a manifest necessity. And here, the Court found, the testimony did not necessitate a mistrial.

Second, in response to whether the victim was familiar with a particular car, he stated, "Yeah, I seen the car. I used the car all the time. Like I say, they stayed—we all stayed in the same neighborhoods and stuff like that together, and pretty much the same car that other crimes were committed in, you know. Like I said [appellant] is my homeboy's best friend. Everything [appellant] used to tell my homeboy about the things that [Brown] and [appellant] used to do together, like other robberies and stuff like that … ." Appellant immediately objected, but did not move for a mistrial. The court overruled the objection and in the jury's presence, instructed that the testimony should be disregarded.

At the close of the State's case, appellant moved for a mistrial regarding the chain gang comment, which the court denied. Appellant also did not want the court to give another instruction because such an instruction at that time would place undue emphasis on the comment. Thus, the Court found, the trial court did not abuse its discretion in denying the motion for a mistrial because in each of the two instances, the victim merely provided brief, isolated, and unsolicited testimony that may have negatively impacted appellant's character.

Fair Market Value; Evidence of Repairs

Wynn v. State, A17A1389 (2/13/18)

Appellant was convicted of ten counts of second-degree damage to property. The evidence showed that appellant stole copper pipes from inside ten air-conditioning units outside of a vacant medical center. Appellant argued that the State failed to prove that the fair market value of the damage to the property exceeded $500, which is an essential element of second-degree damage to property. The Court agreed.

At trial, the owner of the damaged air-conditioning units testified that he received an estimate that the repairs to his property would cost between $39,000 and $42,000. He further testified that, because the air-conditioning units were "fairly old," the replacement of those units might require him to replace the inside units too. The owner also testified that, while the repairs were covered by an insurance policy, his insurance company had paid him only about 70 percent of the estimated repair costs. The owner had not, however, actually repaired the units by the time of trial because there were no tenants in the building, and he did not want to risk having the units vandalized again.

The Court noted that the only relevant evidence the State presented in its effort to prove the value of the damage to the property was the testimony of the property owner. But the owner provided no testimony as to the original price of the ten air-conditioning units, their exact ages, or the condition of each individual unit at the time when they were vandalized. And even if he had testified as to the cost of the damage, there was no evidence, through his testimony or otherwise, of the condition of the damaged property both before and after the crime.

Here, to prove the fair market value of the damage to property, the owner testified only to an estimated range for the repair costs that he had been given by an undisclosed source. And although evidence of the cost to repair an item may suffice, the owner testified that no repairs had actually been performed, and an estimate of repair costs alone is inadmissible hearsay that is insufficient to prove the fair market value of damage to property. Nevertheless, the State argued, the owner's testimony that his insurance company paid him 70 percent of those costs was strong circumstantial evidence that the repair costs would be at least $27,300 (i.e., 70 percent of $39,000, which is the low end of the

estimate that the owner claimed to have received for the repair costs). But the Court found, the State presented no legal authority to support its apparent position that hearsay, which is otherwise inadmissible, may be considered when it is supported by other admissible circumstantial evidence, and the Court found none.

Additionally, the State presented no evidence of the exact amount that the victim's insurance paid in connection with the damage to his property, any terms or conditions of his policy, or the basis upon which this undisclosed insurance company determined the amount it paid for the property damage. Thus, it was impossible to know whether the amount that the insurance company paid the victim, which was not confirmed by any documentary evidence, was in any way related to the fair-market value of the damage to the air-conditioning units. And, the Court added, perhaps most importantly, each of the ten counts in appellant's indictment alleged property damage of at least $500 to a *single* air-conditioning unit identified specifically by its serial number. Thus, proof of the value of the damage to support *each conviction* corresponding to each of those counts must be established by evidence that the damage to each of the ten units individually exceeded $500, not by the total cost of repairs to or value of all ten air-conditioning units combined.

Furthermore, the determination of the amount of damages must be based upon fair market value, which must be determined exactly. Yet the State presented no evidence as to the amount of property damage described in each indicted offense, much less evidence sufficient for the jury to determine the exact fair market value of such damage. Given these particular circumstances, the Court concluded that the State failed to present sufficient evidence to establish an essential element of each of appellant's convictions. As a result, his ten convictions for criminal damage to property in the second degree were vacated.

Consequently, the Court remanded with direction that a conviction for the offense of criminal trespass to property be imposed in place of each vacated conviction for second-degree criminal damage to property. The Court found that this result will not violate appellant's due-process right to be notified of the charges against him since a defendant is on notice of all lesser crimes which are included in the crime charged as a matter of law.

State's Right to Appeal; Tender of Evidence

State v. Battle, A17A1753 (2/14/18)

The State appealed after the trial court ruled that certain other acts evidence was inadmissible as either intrinsic evidence or extrinsic evidence under O.C.G.A. §§ 24-4-404(b). The record, briefly stated, showed that pursuant to Rule 404 (b), the State filed a notice three months in advance of trial informing the defense of the general nature of evidence the State intended to introduce at trial showing "other crimes, wrongs or acts" committed by Battle five days before the indicted offenses. At a pre-trial hearing, the trial court informed the prosecutor that the court did not have a "404 (b)" motion and asked if one had been filed. The prosecutor informed the court that, although the court's calendar referred to a "404 (b) motion," there was no such motion and that the state's position was that the other crimes, wrongs, or acts evidence was admissible because "it's intrinsic evidence in the case so that is not subject to a 404 (b) analysis." Without any written motion filed, or any prior notice given to the defense, the trial court allowed the prosecutor to proceed on an oral motion for the admissibility of intrinsic evidence. The prosecutor then made a proffer in support of the State's oral intrinsic evidence motion by stating "in her place" the evidence that the State expected to introduce at the trial.

After hearing the proffer, the court ruled the other acts evidence inadmissible as intrinsic evidence and told the prosecutor that to the extent the State might seek at trial to show that the other acts were admissible as extrinsic evidence, the State would be required to file a pre-trial notice pursuant to Rule 404 (b). The prosecutor then provided the trial court with a copy of a pre-trial notice pursuant to OCGA § 24-4-404 (b) which was filed about three months prior to the hearing. The trial court therefore allowed the prosecutor to argue why the "in her place" proffered evidence was admissible under Rule 404 (b). The court found the proffer not to be evidence, but instead merely a self-serving declaration of what the State expected the other acts evidence to be, which was insufficient for Rule 404 (b) analysis. Consequently, the court refused to admit the evidence under Rule 404 (b).

The Court initially addressed the State's right to bring a direct appeal pursuant to OCGA § 5-7-1 (a) (5). The Court found that the State's right to appeal under OCGA § 5-7-1 (a) (5) is from an "order, decision, or judgment excluding any other evidence to be used by the state at trial *on any motion filed by the state or defendant* at least 30 days prior to trial and ruled on prior to the impaneling of a jury or the defendant being put in jeopardy, whichever occurs first …" (emphasis supplied). Here, the Court found, the State did not file a motion, but rather a notice that it would seek at trial to introduce other crimes, wrongs, or acts independent of or extrinsic to the charged offenses. Nevertheless, the record showed that a pre-trial hearing was scheduled, and that, at some point during the hearing, the trial court considered the State's notice as a motion filed by the State at least 30 days prior to trial seeking a pre-trial ruling on the admissibility of

evidence under Rule 404 (b). Thus, the Court found, although the trial court was not required to treat the notice as a motion filed under OCGA § 5-7-1 (a) (5), under these circumstances. the State complied with the provisions of the statute requiring that any appeal be taken from an order on a motion filed by the State or the defendant.

However, the Court ruled, to the extent the State appealed pursuant to OCGA § 5-7-1 (a) (5) from the court's ruling excluding intrinsic evidence, the appeal must be dismissed. The State's pre-trial notice, considered by the trial court as a motion seeking admission of other acts evidence, was brought pursuant to OCGA § 24-4-404 (b) and related only to other crimes, wrongs, or acts independent of or extrinsic to the charged offenses. The State filed no pre-trial motion seeking admission of other acts evidence on the basis that they were intrinsic to or inextricably intertwined with the charged offenses. Because no pre-trial motion was filed raising this evidentiary issue, the State was not authorized under OCGA § 5-7-1 (a) (5) to file a direct appeal from the trial court's ruling in response to the state's oral argument on the issue.

Next, the Court addressed whether the trial court erred in denying the State's motion to admit the evidence under Rule 404 (b). The trial court found the proffer insufficient on the basis that it was merely a "self-serving declaration" of testimonial evidence the State expected to produce at trial. But, the Court stated, the prosecutor's "in her place" proffer of expected evidence was not merely a self-serving declaration. Attorneys are officers of the court and a statement to the court in their place is prima facie true and needs no further verification unless the same is required by the court or the opposite party. Nothing in the record showed that the trial court required any further verification. Accordingly, in the absence of a timely objection when the evidentiary proffer was made to the trial court, the prosecutor's "in her place" proffer during the hearing is to be treated on appeal as the equivalent of evidence. Conversely, a timely objection when the proffer is made insisting that the State prove the admissibility of other acts under Rule 404 (b) with traditional evidence, would establish that the statements-in-place by the prosecutor were not a proper substitute for traditional evidence at the hearing and would require further verification.

Accordingly, the Court concluded that the trial court erred by finding that the prosecutor's "in her place" proffer provided insufficient proof that Battle committed the other acts solely on the basis that the proffer was a self-serving declaration. However, the Court found, under the circumstances, the trial court's ruling on the Rule 404 (b) motion must be vacated and the case remanded for reconsideration. First, the trial court's erroneous conclusion that the proffer was a self-serving declaration, and thus insufficient to show Battle committed the other act, precluded the court from reaching the remaining merits of the Rule 404 (b) motion. Second, the procedure followed by the State in presenting the Rule 404 (b) motion at the hearing had the effect of depriving defense counsel of a fair opportunity to make a timely objection to the prosecutor's use of the "in her place" proffer. When the hearing commenced, the prosecutor represented to the court that the State's only contention was that the other acts evidence was admissible as evidence "intrinsic" to the charged offenses, and that there was no motion and no issue with respect to admissibility of other acts "extrinsic" evidence pursuant to Rule 404 (b). With the hearing in this posture, the prosecutor made a proffer by stating "in her place" the evidence the State expected to show in support of its motion for admission of the intrinsic evidence. Defense counsel made no objection to the prosecutor's proffer made for this purpose. Only after the State made the proffer and gave supporting argument did the prosecutor finally inform the trial court that the State also intended to use the proffer to support an additional motion for the admission of the other acts pursuant to Rule 404 (b) as "extrinsic" to the charged offenses. The trial court sanctioned this unusual procedure by allowing the State to proceed with argument in support of the 404 (b) motion. Since the proffer had already been made, the procedure had the effect of depriving defense counsel of an opportunity to timely object to this use of the proffer when it was made. On remand, the Court directed the trial court trial court to (1) give defense counsel an opportunity to object to the prosecutor's proffer in support of the Rule 404 (b) motion and to require verification by use of traditional evidence at the hearing; and (2) to reconsider the merits of the Rule 404 (b) motion.

Search & Seizure; Traffic Stops

Harris v. State, A17A1785 (2/14/18)

Appellant was convicted of DUI. He contended that the trial court erred in denying his motion to suppress. The Court agreed and reversed his conviction.

The evidence showed that an officer was stopped in his vehicle behind appellant's vehicle at a traffic light at the intersection of two roads, and another vehicle was in front of appellant's at the light. Appellant's right turn signal was engaged. After waiting for several minutes, appellant turned right into an adjacent gas station, drove through the gas station parking lot, and exited on the other side of the gas station to avoid the traffic light. The officer conducted a traffic stop because the officer believed that appellant violated OCGA § 40-6-20 governing disregard or disobedience of an official traffic control device.

Appellant argued that the trial court

erred in denying his motion to suppress because taking a detour through the gas station parking lot to avoid the traffic signal did not violate OCGA § 40-6-20 and the officer's incorrect understanding of the law did not give rise to the reasonable articulable suspicion required for a traffic stop. The State conceded that appellant did not violate OCGA § 40-6-20 or any other Georgia statute by taking a detour through the parking lot, but argued that because the officer had a good faith basis to believe that appellant violated the law, the traffic stop was based on reasonable articulable suspicion and was valid.

The Court noted that in *Heien v. North Carolina*, ___ U. S. ___ (135 SCt 530, 190 LE2d 475) (2014), the Supreme Court examined the question of whether a mistake of law can give rise to the reasonable suspicion required under the Fourth Amendment to uphold a search and seizure. The Supreme Court held that the Fourth Amendment tolerates only reasonable mistakes, and those mistakes - whether of fact or of law - must be objectively reasonable. Courts do not examine the subjective understanding of the particular officer involved. And here, the Court found, it was clear, based on the plain language of OCGA § 40-6-20 (a) and (e), that appellant did not violate the statute because he did not "disregard" or "disobey" the traffic light's instruction to stop at the intersection. Moreover, this was not a case where the law in question is genuinely ambiguous. Therefore, the Court found, the officer's mistake of law was not objectively reasonable and there was no reasonable articulable suspicion to support the traffic stop.

Furthermore, the Court stated, there is no good-faith exception to the exclusionary rule in Georgia. Thus, the Court concluded, because the officer lacked the reasonable articulable suspicion required to initiate the traffic stop, the stop violated the Fourth Amendment, and the evidence obtained as a result of the stop should have been suppressed. Consequently, the Court reversed the denial of appellant's motion to suppress and his conviction.

Recusal Motions; Judicial Code of Conduct

Seruda v. State, A17A1454 (2/15/18)

After a bench trial, appellant was convicted of numerous offenses, including child molestation and aggravated sodomy. The record showed that appellant was indicted in 2010. That same year, the trial court judge campaigned for election to state court, but he was appointed by the Governor to the superior court bench. Appellant moved to recuse the trial judge, alleging, relevantly, that the judge had a "close relationship" with the district attorney. At the hearing, the trial court denied appellant's request for an evidentiary hearing and appellant's request to refer the recusal motion to another judge. Instead, the trial court judge ruled that his impartiality could not reasonably be questioned and thus, he denied the motion. Later, in another recusal motion hearing in an unrelated case, it was learned that the trial court's treasurer for his ultimately abandoned state court campaign was the district attorney.

Appellant contended that the trial court erred in denying his motion to recuse. The Court agreed. As an initial matter, the Court questioned whether the averment of a "close relationship" between the judge and the DA would have required assignment to another judge, because the claim lacks objective facts regarding the relationship. Nonetheless, even where the facts in an affidavit do not warrant recusal if assumed true, a judge still maintains an ethical duty to recuse himself when he is independently aware of grounds to do so.

The Court noted that when deciding whether the assumed state of facts in the affidavit would authorize an order requiring recusal, the assigned judge is to be guided by Rule 2.11 of the Georgia Code of Judicial Conduct. Judges must disqualify themselves in any proceedings in which their impartiality might reasonably be questioned. Moreover, even where a judge does not think that there exists any basis for disqualification, he or she should disclose on the record, or in open court, information that the court believes the parties or their lawyers might consider relevant to the question of disqualification.

The Court found that the treasurer of a judge's campaign may have financial reporting obligations even *after* the conclusion of the election. Thus, one could reasonably infer that the district attorney played a significant role in managing the financial activities of the judge's campaign, and may have had obligations in this role even after the judge was appointed to the superior court in October 2010. And, despite the judge's own knowledge regarding the DA's involvement in his recent campaign, the record did not evince that he made any corresponding disclosure to the parties.

Accordingly, the Court concluded that this case was one in which the trial judge's impartiality might reasonably be questioned. Furthermore, even if the trial court were not inclined to recuse itself, at a minimum, the motion should have been referred to another judge. Consequently, the Court vacated appellant's convictions and the trial court's order denying the motion to recuse and remanded the case to be referred for the assignment of a judge other than the trial court judge to decide the recusal motion.

Search & Seizure; Search Warrant Affidavits

Briscoe v. State, A17A1883 (2/20/18)

Appellant was convicted of possession of cocaine with intent to distribute. Appellant contended that the

trial court erred in denying his motion to suppress based on the sufficiency of the affidavit supporting the search warrant executed at his residence. The record showed that a detective made the following assertions in the affidavit: The detective met with a confidential informant (CI) whose veracity was unknown to the detective. The CI told the detective that a black man who goes by the name of "Briscoe" and who has short dreadlocks was distributing cocaine from his white Ford Explorer. The CI gave the detective appellant's phone number, which the detective traced to appellant at a particular address. At the detective's request, the CI arranged to purchase cocaine from appellant.

The detective had another law enforcement officer conduct surveillance of appellant's apartment before the scheduled controlled buy. That officer told the detective that a black male with short dreadlocks entered the apartment about ten minutes before the controlled buy, exited the apartment, and got into a white Ford Explorer. The surveillance officer followed the white Ford Explorer to the location of the buy, where the detective was waiting and watching. The detective saw the Explorer pull up. The detective saw that the driver was a black male with short dreadlocks. The CI purchased cocaine and identified the seller as appellant. The detective watched the entire transaction and monitored the conversation between appellant and the CI via a transmitter worn by the CI.

Appellant first argued that the detective who obtained the search warrant did not sufficiently corroborate the CI's description of appellant's physical appearance. Specifically, the detective testified that he did not see that the person selling to the CI had dreadlocks and in fact, appellant did not have dreadlocks. The Court noted that where false information is included in the affidavit supporting a search warrant, or where material information is omitted, the rule is that the false statements be deleted, the omitted truthful material be included, and the affidavit be reexamined to determine whether probable cause exists to issue a warrant. Here, deleting the detective's false statement that he had seen a black male with short dreadlocks in the Ford Explorer, the affidavit nonetheless provided probable cause to issue the warrant because the controlled buy conducted under the observation of the officer, alone, would have been sufficient to establish probable cause.

Next, appellant contended that the trial court should have granted his motion to suppress because there was not a sufficient nexus between the information known to the detective and appellant's apartment. The Court disagreed. The evidence of appellant's drug activity included appellant's actions of briefly going to his residence immediately before traveling to the location of the controlled buy. And, significantly, the evidence did not reflect that appellant made any additional stops or had contact with any other individual after leaving his residence and arriving at the controlled buy. Therefore, the evidence of appellant's actions and the circumstances presented authorized a finding that appellant may have stored the drug contraband at his residence and retrieved the drugs from that location before delivering them to the CI at the controlled buy.

Finally, appellant argued that the trial court should have granted the motion to suppress because the controlled buy could not support the issuance of the warrant as it occurred as many as 11 days before. The Court again disagreed. The search warrant affidavit stated that the informant knew that appellant was "distributing illegal drugs," which indicated an ongoing course of conduct. When the affidavit indicates the existence of an ongoing scheme to sell drugs, the passage of time becomes less significant than would be the case with a single, isolated transaction. Thus, given the totality of the circumstances, including the fact that the activity alleged was the ongoing sale of drugs, there was sufficient evidence to create a reasonable belief that drugs might still be in appellant's residence.