Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 20, 2018

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THIS WEEK:

- Statements; Miranda
- Impeachment Evidence; Defendant Testimony
- Sentencing of Juveniles; OCGA § 49-4A-9 (e)
- DUI; Implied Consent
- Search & Seizure; Standing
- DUI; Venue

Statements; Miranda

State v. Abbott, S17A1583 (3/15/18)

The State appealed from an order suppressing video-recorded statements that Abbott gave to an investigator to be used in his prosecution for murder and other crimes. The evidence showed that a shooting occurred between two rival gangs at a house party. Abbott, who was a 17-year-old high school student, was identified as a suspect or person of interest. On the day after the shooting, four or five sheriff's vehicles converged on Abbott's mother's house. He was not present but appeared shortly after his mother telephoned him. Abbott was placed in the back of a patrol car and was not handcuffed, shackled, or questioned at that time. Instead, he was transported to the criminal investigation division of the sheriff's office and placed in an interrogation room with his left leg shackled to the floor. He was left alone in that condition for at least 32 minutes until Investigator Langford entered the room. Abbott was not told that he could leave at any time, and he was interrogated for 53 minutes before being informed of his *Miranda* rights. In the course of that pre-*Miranda* interrogation, Abbott admitted that he was present at the party, subsequently admitted that he possessed a pistol, and later admitted that he shot three times in the house and three times outside. Immediately after Abbott's admission of firing inside the house, Langford gave Abbott the *Miranda* warnings, had him sign a waiver form, resumed the interrogation for 34 minutes, and obtained further incriminating admissions. The possibility of self-defense was discussed extensively. After the conclusion of the interrogation, Abbott remained in the interrogation room for at least 56 more minutes, during which time deputies gave him some aid for his wounds and performed a DNA swab test. Based on its findings, the superior court concluded that Abbott was in custody no later than the time when he was placed in the interrogation room and shackled to the floor, because no reasonable person could believe that he was free to leave under Abbott's circumstances. Considering all of the circumstances, the superior court not only excluded Abbott's pre-*Miranda* statements, it also excluded all of his post-*Miranda* statements as having resulted from an "interrogate first, warn later" procedure that violated *Missouri v. Seibert*, 542 U. S. 600, 616-617 (124 SCt 2601, 159 LE2d 643) (2004), and *State v. Pye,* 282 Ga. 796, 803 (2007).

The State first contended that the trial court erred in suppressing Abbott's pre-*Miranda* statements. The Court disagreed. In general, resort to physical restraint is almost certain to result in a holding that an arrest had been made. The notable exceptions involve either a second-tier, investigatory stop or a first-tier encounter when the defendant has voluntarily consented to an interview and is handcuffed during transportation in a police car as a reasonable safety measure and the

handcuffs are removed before the evidence as to which the defendant seeks suppression is obtained. Here, the Court noted, Abbott was not detained pursuant to a limited investigatory stop, and he was left alone and shackled for more than half an hour, unable even to move around the closed interrogation room, much less leave the room or ask for the shackle to be removed so that he could leave. When an officer finally entered the room, he did not remove the shackle or ever give any indication that Abbott was free to leave or terminate the interview. Nor did the officer explain to Abbott why he was shackled. The Court found insignificant that Langford testified the shackling was a security measure and that Abbott appeared cooperative. The test is an objective one, and stressing the officers' motivation of self-protection does not speak to how their actions would reasonably be understood. Accordingly, the Court found, it could not be said that the court erred in its determination that a reasonable person in Abbott's situation would believe that he was in custody, and, to the extent that the court concluded that Abbott's pre-*Miranda* statements had to be suppressed, its judgment was upheld.

The State further contended that the court erred in finding that Investigator Langford had employed a two-step interrogation technique in violation of *Seibert*. The Court noted that the Supreme Court's decision in *Seibert* deals with what the Court referred to as a "two stage" or "question first" interrogation procedure, in which police first question a suspect without administering *Miranda* warnings, gain a statement from the suspect, then administer *Miranda* warnings, and have the suspect repeat that which the suspect has already related, often with little interruption in time.

The Court noted that in *Pye*, it followed the plurality opinion authored by Justice Souter in *Seibert*, which required an examination of the circumstances, rather than the intent of law enforcement, to determine whether the *Miranda* warnings were effective. And the *Pye* Court rejected the argument that the concurrence by Justice Kennedy constituted the narrowest ground of the Supreme Court's decision, which would require a finding of subjective intent on the part of police to employ a deliberate "two-step" strategy. But, the Court found, since *Pye*, a clear and strong majority of federal circuits and state courts have decided that Justice Kennedy's concurrence in *Seibert* must be applied instead of Justice Souter's plurality opinion. In its most recent decision, *Norwood v. State*, ___ Ga. _____, ___ (2), 2018 Ga. LEXIS 95 (A) (2018), the Court noted that it applied Justice Kennedy's concurrence in *Seibert*. However, in *Norwood*, the Court did not mention its contrary ruling in *Pye*. In light of this omission, the Court clarified *Norwood* by expressly overruling *Pye*, together with any Georgia case relying on *Pye*, to the extent that it applied the *Seibert* plurality instead of the Kennedy concurrence. See, e.g., *Andrews v. State*, ___ Ga. ___, ___ (2), 2018 Ga. LEXIS 43 (2018); *Fennell v. State*, 292 Ga. 834, 836 (3) (2013); *State v. Folsom*, 286 Ga. 105, 108-110 (2) (2009); *State v. Kendrick*, 309 Ga. App. 870, 873-877 (2) (2011).

The Court then found that through no fault of its own, the trial court applied a legal standard that it subsequently rejected in *Norwood*. Accordingly, the superior court's judgment suppressing Abbott's post-*Miranda* statements was vacated, and the case remanded so that the trial court may make further findings of fact and apply the correct legal standard, as clarified in this opinion.

Impeachment Evidence; Defendant Testimony

McKoy v. State, S17A1994 (3/15/18)

Appellant was convicted of malice murder. At trial, appellant testified on his own behalf. However, after direct examination, appellant refused to be cross-examined by the prosecutor. The trial court then struck his entire testimony.

Appellant contended that the trial court erred in ruling that his journals were admissible. He contended that the journals were illegally seized, and the State did not dispute it. Nevertheless, the Court noted, appellant conceded that evidence seized illegally may still be admissible for impeachment. Thus, the admissibility of appellant's journals turned on whether they actually impeached any of appellant's testimony. Relying on the analysis in *Luce v. United States*, 469 U. S. 38 (105 SCt 460, 83 LE2d 443) (1984), and *Warbington v. State*, 316 Ga. App. 614 (2012), the Court stated that it need not answer that question because the journals that the trial court held would be admissible were never actually admitted into evidence due to appellant's decision not to testify on cross-examination. Any error the court may have made in that ruling in limine was therefore not preserved for appellate review.

Appellant also contended that the trial court erred in striking his direct testimony when he refused to be cross-examined. The Court noted that "If an accused testifies, he or she shall be sworn as any other witness and, except as provided in Code Sections 24-6-608 and 24-6-609 [which were not pertinent in this case], may be examined and cross-examined as any other witness." OCGA § 24-5-506 (b). Thus, when a defendant voluntarily takes the stand in his own behalf and testifies as to his guilt or innocence as to a particular offense, his waiver of the right against self-incrimination is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.

Thus, the Court found, once appellant withdrew his consent to be cross-examined as a witness, he could no longer be treated as a witness at all. When a witness declines to answer on cross-examination certain pertinent questions relevant to a matter testified about by the witness on direct examination, all of the witness' testimony on the same subject matter should be stricken. Here, appellant refused to submit to any questions on cross-examination, so the trial court properly struck all of his direct testimony.

Appellant also argued that striking his testimony deprived him of his rights under the United States and Georgia Constitutions to defend himself and to due process. The Court found this to be simply not true. In fact, five other witnesses testified for the defense, and all of them supported his self-defense theory. And the procedure the trial court followed before striking appellant's testimony gave him due process. The court clearly informed appellant of the consequence if he refused to retake the stand, allowed appellant to consult his counsel, and then asked appellant to make an informed decision. Appellant elected not to retake the stand and thereby suffered the consequence of his testimony being excluded from the evidence he presented in his defense.

Sentencing of Juveniles; OCGA § 49-4A-9 (e)

State v. Hudson, S17G0738 (3/15/18)

When Hudson was 16, he entered a negotiated plea in the superior court, pleading guilty to armed robbery, aggravated assault, firearm possession, and obstruction charges. The State agreed to a sentence of ten years — five in prison and five on probation — for the armed robbery conviction, which otherwise would have required a minimum prison sentence of ten years with no option of probation or parole, see OCGA § 17-10-6.1 (b) (1), (e). The court also sentenced Hudson to concurrent prison terms of five years for aggravated assault and one year for obstruction and a consecutive prison term of five years for firearm possession. Hudson began serving his sentences at a youth detention facility under the supervision of the Department of Juvenile Justice. Six months later, as Hudson's 17th birthday approached, the superior court held a hearing with Hudson and the State to "determine if [Hudson], upon becoming 17 years of age, should be placed on probation, have his … sentence reduced, be transferred to the Department of Corrections for the remainder of the original sentence, or be subject to any other determination authorized by law." OCGA § 49-4A-9 (e). The court reduced Hudson's prison sentence for armed robbery to one year commuted to time served, with the remaining nine years to be served on probation. The court probated the remaining aggravated assault sentence, commuted the obstruction sentence to time served, and suspended the five year sentence for firearm possession. In accordance with these modifications, the court also entered an order to release Hudson from custody onto probation. The State appealed the resentencing and release orders. In *State v. T.M.H.* 339 Ga. App. 628 (2016), a divided Court of Appeals affirmed. The Supreme Court granted certiorari.

The State argued that OCGA § 49-4A-9 (e) does not apply to Hudson because OCGA § 17-10-14 (a) requires that he be transferred to the Department of Corrections to serve the remainder of his original sentence when he turns 17. The Court stated that which juvenile offenders come within the scope of § 49-4A-9 (e) and how that provision interacts with § 17-10-14 (a) are difficult questions requiring meticulous examination of not only those two provisions but the rest of each Code section and their broader statutory and legal contexts. The Court of Appeals decided those questions, but it did not need to, and the Court stated, it also did not need to decide them. Thus, because the Court of Appeals' holdings on those questions were unnecessary to decide this case, they are to be treated as dicta only.

The Court held that regardless of whether § 49-4A-9 (e) applies to Hudson, his sentence for armed robbery is controlled by OCGA § 17-10-6.1. Under that statute, the mandatory minimum ten-year prison sentence for armed robbery cannot be probated without the State's agreement. Accordingly, the superior court's reduction of Hudson's armed robbery prison sentence was improper. In contrast to § 49-4A-9 (e)'s discretionary language providing possibilities, § 17-10-6.1 (b) (1)'s language is unequivocally mandatory and allows for very limited exception. Indeed, § 17-10-6.1 (b) (1) recognizes only one exception — the exception "provided in subsection (e) of this Code section" that allows the parties and court to agree to a departure. The provision does not say, for example, "except as otherwise provided by law." And it does not appear that any provision elsewhere in Georgia's Code expressly purports to create an exception to § 17-10-6.1's requirements. In sum, reading OCGA § 17-10-6.1 as a limitation on the discretion granted to the superior courts by OCGA § 49-4A-9 (e) effectively harmonizes the two provisions by giving effect to both as they apply to offenders like Hudson. Assuming that § 49-4A-9 (e) applied to Hudson and thus, required the superior court to consider his sentences before his 17th birthday and determine if they should be modified, § 17-10-6.1 (b) (1) dictated that with respect to his armed robbery sentence, the court had only one choice from the list of § 49-4A-9 (e) options — "transfer[ ] to the Department of Corrections for the remainder of the original sentence." Therefore, the Court held, the Court of Appeals erred to the extent that it affirmed the superior court's reduction of Hudson's prison sentence for armed robbery, and the Court reversed that portion of the judgment, although the modification of Hudson's other sentences was properly affirmed.

DUI; Implied Consent

Stroud v. State, A17A1851 (3/2/18)

Stroud was charged with DUI and failure to maintain lane. He filed a motion in limine to suppress evidence of his refusal to submit to the State's administered test. The trial court granted the motion because the implied consent notice given by the arresting officer was not substantially accurate so as to allow Stroud to make an informed decision about whether to consent to the testing. The State appealed and the Court affirmed.

The parties stipulated that the arresting officer misread the implied consent notice by substituting the word "may" for the word "will" in the sentence concerning suspension of a license for refusing to submit to testing. Specifically, the officer told Stroud, that if he refused testing, his "Georgia driver's license or privilege to drive on the highways of this state *may* be suspended for a minimum period of one year." (Emphasis supplied.) The Court found that the officer's error in giving the implied consent notice misled Stroud as to a serious consequence of refusing to submit to testing. The notice provision that a Georgia driver's license "will be suspended" upon refusal of testing establishes a mandatory suspension for such refusal. Thus, the arresting officer's statement to Stroud that his license "may be suspended," instead of "will be suspended," altered the substance of the implied consent notice by changing the mandatory suspension into a mere permissive possibility. This misleading notice, which incorrectly informed Stroud that his license suspension upon refusal was not mandatory, impaired Stroud's ability to make an informed decision about whether to submit to testing. Therefore, since the refusal was based, at least in part, on misleading information concerning a penalty for refusal, Stroud was deprived of making an informed choice under the Implied Consent Statute. Accordingly, the Court held, the refusal was rendered inadmissible.

Search & Seizure; Standing

State v. Wright, A17A1780 (3/2/18)

Wright was charged with multiple counts of VGCSA. The trial court granted Wright's motion to suppress based on its ruling that the search of an apartment yielding contraband was not conducted pursuant to valid consent given by Wright. The State appealed.

The evidence showed that the police were conducting an early-morning "roundup" of suspects with outstanding arrest warrants. They were given a list of suspects with descriptions or photographs and the locations where they were believed to reside and where they had been observed during previous surveil-

lance. The officers knocked on the door of an apartment where police believed a suspect would be present. Wright soon came to the door and partially opened it, and the officers, who were in uniform with tactical gear, identified themselves and immediately recognized that Wright "obviously was not the subject [they] were looking for" based on his appearance. The officers asked Wright if he knew the suspect, and Wright said no; police then asked if they could come inside and look for the suspect, and Wright agreed. The officers walked through the apartment and noticed contraband in plain view while searching for the suspect. The officers then asked Wright for consent to further search the residence for additional contraband, and Wright signed a written consent form agreeing to the search after being advised of his constitutional right not to have the premises searched without a warrant. No additional contraband was discovered in a subsequent search.

The State contended that the trial court erred by concluding that Wright met his burden to demonstrate standing to challenge the search of the apartment. The Court agreed. The Court noted that the evidence of Wright's connection to the apartment was sparse. Although Wright was the sole occupant of the apartment in the early morning, the evidence from the suppression hearing did not address Wright's status relative to the apartment, i.e., whether he was the primary tenant, a co-tenant, an overnight visitor, merely present with the tenant's consent, or even an uninvited trespasser. The only evidence of anyone occupying the apartment prior to the police visit was testimony that this was the last known address of the suspect and that police had observed the unnamed suspect at the apartment during surveillance. Faced with this thin record, and in the absence of any evidence tying Wright to the apartment other than his early-morning presence along with his identification, a firearm, and narcotics in an upstairs bedroom, the trial court explicitly found that "the record does not establish what, if any, relationship [Wright] had with the house in question at the time of the search."

However, the Court found, the trial court erred by concluding that Wright had met his burden to demonstrate that he had standing to contest the search (the same search to which he consented). It was Wright's burden to demonstrate a legitimate expectation of privacy in the apartment, for example, by demonstrating that he was an overnight guest at the apartment. Once the trial court concluded that Wright had not demonstrated his status, the court erred by allowing him to challenge the search on Fourth Amendment grounds. In so finding, the Court stated that this case might be different if Wright was the owner/occupant of a residence objecting to a third party's consent to search it. Our case law is clear that a person in that position has a reasonable expectation of privacy and may object to consent given by another person without authority. But here, the record did not establish Wright's relationship to the apartment, and as a factual matter, Wright did not object to someone else's consent. Therefore, the trial court erred by concluding that Wright had standing to challenge the search he consented to in this case.

DUI; Venue

Smith v. State, A18A0800 (3/7/18)

Following a stipulated bench trial based on proffered evidence, the State Court of Fayette County found appellant guilty of DUI (less safe). He argued that the trial court erred in considering evidence that, during the ALS proceedings, he agreed with the arresting deputy to plead guilty to the criminal DUI charge in exchange for dismissal of the deputy's sworn report supporting administrative suspension of his driver's license. The agreement, which was reflected in a consent "Motion to Dismiss Sworn Report" signed by Smith's attorney and the deputy, stated: "The dismissal of the Sworn Report is based upon [appellant's] agreement to enter a guilty plea to the underlying charge of violating OCGA § 40-6-391 … [appellant] further agrees that if [he] fails to enter the plea as agreed, [appellant] waives [his] right to further contest the suspension under OCGA § 40-5-67.1, and agrees to the entry of an order vacating the Consent Order and an order suspending or disqualifying [his] driver's license, permit or privilege to operate a motor vehicle or commercial motor vehicle in this state."

The Court noted that appellant did not claim on appeal that the ALS agreement was fraudulent or signed without his authority. In fact, he conceded that his attorney was authorized to enter the agreement on his behalf. Instead, citing *Flading v. State*, 327 Ga. App. 346 (2014), he argued that evidence of the agreement should have been excluded because it did not contain language establishing that it would be admissible at his criminal trial if he failed to plead guilty. However, the Court found, *Flading* did not turn on this language. Rather, after determining that the defendant had authorized his attorney to enter the stipulation, the Court noted that it found his election to "plead guilty to DUI in exchange for the return of his driver's license … relevant to, though certainly not dispositive of, the charge that he was driving under the influence of alcohol." The *Flading* Court also concluded that any prejudice caused by admission of the agreement did not outweigh its probative value.

The Court found that the same principles apply here. Appellant did not dispute that he authorized his attorney to enter the agreement, and he raised no claim of fraud or mistake. The agreement was relevant to the underlying issue at trial — whether appellant drove under the influence of alcohol to the extent he was less safe. And nothing indicated that potential prejudice caused by the agreement outweighed its probative value. Accordingly, the trial court properly considered this evidence at the bench trial.

Appellant also contended that the State failed to present sufficient proof establishing venue in Fayette County. The Court agreed. The Court stated that it did not find — and the State had not cited — any evidence that appellant stipulated to venue in Fayette County. Moreover, the State proffered no facts that might otherwise support a venue finding. The evidence showed that appellant was stopped on "Highway 138" while driving home from work at the Hyatt House Hotel. But, nothing linked Highway 138 or the hotel to Fayette County. And although the arresting deputy worked for the Fayette County Sheriff's Department, his county of employment does not, in and of itself, constitute sufficient proof of venue to meet the beyond a reasonable doubt standard.

Thus, the Court held, because the State failed to prove venue, it must reverse appellant's conviction for DUI. The State, however, may retry him without violating the Double Jeopardy Clause because there was otherwise sufficient evidence at trial to support his conviction.