Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 10, 2017

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THIS WEEK:

Out-of-time Appeals; Notification of Right to Appeal

Watkins v. State, A16A2228 (2/14/17)

Appellant was convicted of V.G.C.S.A. on Jan. 15, 2015. At trial, he was represented by retained counsel. On February 27, 2015, a new attorney entered an appearance on appellant's behalf and filed a motion for an out-of-time appeal. He was subsequently declared indigent and entitled to appointed counsel. The trial court denied the motion after a hearing.

Appellant argued that the trial court erred because (1) nothing in the record shows that either the trial court or his trial counsel informed him that he was entitled to appointed counsel if he could not afford one; and (2) retained counsel took no steps to preserve his right to appeal, even though counsel did not withdraw his representation during the 30-day-period following entry of appellant's sentence.

The Court stated the where a defendant retains trial counsel and then claims indigence on appeal, he bears the burden of making that fact known to the trial court or some responsible state official. If the trial court has no reason to believe that the defendant is indigent and cannot afford the services of retained counsel for the purpose of appeal, it is under no duty to inquire as to the defendant's indigence and may presume that his retained counsel will protect his appellate rights. Since appellant was represented by retained counsel at the time of sentencing, his attorney, not the trial court, had the duty to inform him of his right to counsel on appeal (including the right to appointed counsel for indigent defendants).

Thus, the Court stated, there is no mandatory obligation upon trial courts to inform every defendant represented by retained counsel that they have a right to appointed appellate counsel in the event of indigence. Nor are represented defendants automatically entitled to an out-of-time appeal if the trial court fails to inform them of their right to appointed counsel in the event of indigence. If trial counsel fulfills his or her duty to so inform the defendant, it is irrelevant whether the trial court provided the same information. On the other hand, if trial counsel fails to adequately advise a defendant about his appeal rights, no harm results if the trial court elected to provide the information.

Therefore, Court found, although the trial court did not advise appellant of his right to appeal, that did not entitle him to an out-of-time appeal. Instead, the Court stated it must look to whether trial counsel fulfilled his duty to adequately inform appellant of his appeal rights. But, the Court found, the record was silent as to whether appellant's trial counsel informed him of his right to appointed counsel if he could not afford one. In the absence of evidence showing that appellant's attorney advised him that he was entitled to

an appointed attorney if he was indigent, the trial court's finding that appellant was ultimately responsible for the failure to file a timely appeal was premature. Accordingly, the Court remanded the case for a determination as to whether appellant's retained trial counsel informed of him of this right and appellant nonetheless failed to take appropriate action to preserve his right to a direct appeal. If trial counsel did not advise appellant about his right to appointed counsel, the trial court was directed to grant appellant's motion for an out-of-time appeal. If appellant's attorney did so advise him, the trial court should conduct an additional inquiry into whether appellant thereafter slept on his right to appointed counsel and direct appeal.

DUI; Blood Testing

Jackson v. State, A16A1807 (2/15/17)

Appellant was charged with DUI (drugs), possession of marijuana (misdemeanor), and speeding. He argued in a motion to suppress that law enforcement was not authorized to request blood testing for drugs, but may request "blood testing for alcohol only." Specifically, his argument was based solely on the language of O.C.G.A. § 40-6-392(a)(2), which provides that "[w]hen a person shall undergo a chemical test at the request of a law enforcement officer, only a physician, registered nurse, laboratory technician, emergency medical technician, *or other qualified person may withdraw blood for the purpose of determining the alcoholic content therein*, provided that this limitation shall not apply to the taking of breath or urine specimens." (Emphasis supplied.) The trial court denied the motion and the Court granted interlocutory review.

The Court stated that the statute does *not* provide that the State may only draw blood for the purpose of determining the alcoholic content; instead, it states *who* may draw blood "for the purpose of determining the alcoholic content therein." O.C.G.A. § 40-6-392(a)(2). The fact that only qualified persons may withdraw blood to ascertain the presence of alcohol does not mean that law enforcement officers have no authority to obtain a blood draw for the purpose of detecting drugs. Moreover, the Court found, when O.C.G.A. § 40-6-392(a)(2) is viewed in context with other portions of O.C.G.A. § 40-6-392 and O.C.G.A. § 40-5-55(a), appellant's argument "strains credulity."

Thus, the Court found, appellant presented no evidence that the State-administered blood test for drugs did not comply with the statute. The statutory scheme expressly authorizes law enforcement officers to request a chemical analysis of a person's blood for the purpose of determining the presence of drugs, provided the chemical analysis complies with the requirements of O.C.G.A. § 49-6-392(a)(1)(A). Also, as this case did not involve a blood draw "for the purpose of determining the alcoholic content therein," O.C.G.A. § 40-6-392(a)(2) did not apply. And contrary to appellant's argument, the fact that the Legislature did not mandate particular procedures for a chemical analysis of blood to detect the presence of drugs does not render such chemical analysis inadmissible. "To hold otherwise would eviscerate the grounds for admissibility provided by O.C.G.A. § 40-6-392(a)(1)(A)." Accordingly, the Court concluded, the trial court did not err in denying appellant's motion to suppress.

DUI; Williams

State v. Brogan, A16A2152 (2/15/17)

Brogan was charged with DUI pursuant to O.C.G.A. § 40-6-391(a)(1) & (5), and other offenses. The trial court granted her motion to suppress, finding that she did not voluntarily consent to the warrantless taking of her blood. Without making specific findings of fact, the trial court found that the State had not "met its burden in proving voluntary consent to the arresting officer's request for a blood sample." The State appealed.

The Court noted that the material facts were not disputed and that a videotape of the encounter was a part of the record. The evidence, briefly stated, showed that when police arrived, Brogan was asleep behind the wheel of her vehicle, which was located in the middle of a busy intersection. She was so unsteady on her feet that the officer believed she could not safely perform field sobriety tests. Brogan appeared confused and lacking control over her physical movements, and she gave tentative and sometimes nonresponsive or incomprehensible answers to the officer's questions. The officer did not smell any alcohol on Brogan or in her car, and he told Brogan that he did not suspect she was impaired by alcohol. He asked Brogan if she had taken any drugs, and she responded that she had taken allergy medication. The officer told Brogan that he was worried about her and suggested she get medical attention. When Brogan replied that she wanted to go home, the officer told her that she could not drive herself home. At that point, Brogan turned away from the officer who, believing that Brogan was heading back to her car, handcuffed her and placed her in his patrol vehicle. He did not tell her that she was under arrest or explain why he had detained her. Once Brogan was in the patrol vehicle, the officer read her Georgia's informed consent notice. He then asked her if she consented to a blood test. The officer testified that Brogan bobbed her head, but he conceded that he "really c[ould]n't speak to how she articulated yes," and, the Court noted, a "no" answer could be heard on the video recording.

The Court found that when viewed in the light most favorable to the judgment, the evidence showed that Brogan was extremely intoxicated and confused during her encounter with the officer. These factors supported the trial court's conclusion that she did not voluntarily consent to the blood test. The evidence also showed that the interaction between the officer and Brogan was ambiguous. The officer did not tell Brogan she was under arrest; instead, he told her that he did not think she was under the influence of alcohol and he expressed concern about her medical condition and her need for medical attention. While Brogan's knowledge of her right to refuse consent to a search was not the sine qua non of an effective consent, it nevertheless was a factor that the trial court could take into account, and these circumstances could be construed to cast doubt on that knowledge.

Nevertheless, the State argued, the evidence supported a finding of voluntary consent. The Court, however, stated that if it were reviewing a denial of a motion to suppress, the State's argument "might be persuasive." But, the Court stated, it was reviewing a grant of a motion to suppress and the evidence did not demand a finding contrary to the trial court's decision. Therefore, it affirmed the trial court's order granting the motion.

Prior Difficulties; Rule 404 (b)

Person v. State, A16A1954 (2/16/17)

Appellant was convicted of aggravated assault and other offenses. The evidence showed that the victim was present when appellant and

appellant's girlfriend got into an argument on the street and appellant slapped the woman. The victim intervened by punching appellant in the face. Appellant then pulled out a handgun and chased the victim down the street. On the morning of trial, the State made a motion to allow the introduction of a prior difficulty in which the victim observed appellant physically attack the girlfriend, causing the victim to come to her defense. Over appellant's objection, the court allowed the victim to testify that two or three months before the incident in question, he observed appellant grabbing his girlfriend "like he's fixing to choke her." When the victim intervened in that altercation, appellant relented and left the scene.

Appellant argued that the trial court erred in admitting this evidence of the prior difficulty because the girlfriend was not the alleged victim of the aggravated assault offenses for which appellant stood charged and, thus, that the State was required to provide reasonable notice of its intention to introduce evidence of the prior difficulty pursuant to O.C.G.A. § 24-4-404(b). The Court disagreed.

The Court stated that although appellant was correct that the girlfriend was not the victim of the crimes for which appellant was accused, the prior difficulty that the trial court admitted into evidence did not involve *only* appellant and his girlfriend. The prior difficulty also involved the victim, who felt compelled to confront appellant during both altercations. Thus, the victim's acts of intervening in both of the physical altercations was admissible to show the circumstances surrounding the charged crimes and the state of feelings between appellant and his girlfriend that existed at the time of the crimes. Furthermore, evidence of the prior difficulty draws together the preceding and subsequent acts and gives color of cause and effect to the transaction, shedding light upon the motive of the parties. Without showing appellant's previous physical abuse of his girlfriend, the State would have been unable to adequately explain the victim's decision to intervene in the subsequent altercation between appellant and the girlfriend or to demonstrate the level of hostility that existed between the two at the time of the physical confrontation which resulted in the charges for which appellant was prosecuted. Based on the evidence of the victim's intervention in the two altercations, a jury would be authorized to conclude that appellant's actions toward the victim were motivated by his desire to retaliate against the victim for continuing to intervene in appellant's physical abuse of his girlfriend. Thus, the trial court was authorized to find that the prior difficulty was relevant to show motive, which is the reason that nudges the will and prods the mind to indulge the criminal intent.

Finally, the Court held, because the prior difficulty was offered to prove the circumstances immediately surrounding the charged crime and the motive, the State was not required to provide notice in advance of trial of its intent to introduce such evidence under O.C.G.A. § 24-4-404(b).

Batson Challenges

Clayton v. State, A16A2147, A16A2148 (2/17/17)

Appellants were jointly tried and convicted of armed robbery and attempted armed robbery. In 2014, the Court affirmed their convictions, *Minor v. State*, 328 Ga.App. 128 (2014), but remanded for a hearing to determine if the State violated *Batson v. Kentucky*, 476 U. S. 79 (106 S.Ct. 1712, 90 L.E.2d 69) (1986). when it peremptorily struck Juror No. 31 from the venire. The facts, briefly stated, showed that the prosecutor struck Juror No. 31 because he had "gold teeth" in his "entire mouth" and a theft conviction. The trial court found, after a hearing that the prosecutor gave a race-neutral reason for striking the juror.

The Court stated that a prospective juror's criminal history is an adequate race-neutral reason to exercise a preemptory strike. Therefore, the trial court correctly held that this ground was race neutral and not a basis for a successful *Batson* challenge.

However, an explanation is not racially neutral if it is based upon either a characteristic that is specific to a racial group or a stereotypical belief that is imputed to a particular race. Thus, the Court stated, "[a]lthough the State argued otherwise, we cannot ignore the fact that having a full mouth of gold teeth is a racial stereotype associated with African Americans." And, while nothing in the transcript revealed any willful racial animosity on the part of the prosecutor, the purpose of *Batson* step two is to uncover the actual thinking behind the proponent's decision to strike a prospective juror, including any unconscious bias or stereotypes. Articulating a racial stereotype is a facially invalid response to a *Batson* challenge even if it is rationalized in purportedly race-neutral terms. Therefore, citing *Lingo v. State*, 263 Ga. 664 (1993), the Court found that if racially-neutral and neutrally applied reasons are given for a strike, the simultaneous existence of any facially racially motivated explanation results in a *Batson* violation.

Accordingly, the Court concluded that the State's gold-teeth rationale was fatal to its argument that it struck Juror No. 31 for a race-neutral reason. Despite the great deference due to the trial court's determination under *Batson*, this race-based rationale demonstrated clear error in the trial court's finding that the State's reason for striking the juror was race neutral. Consequently, the Court reversed the trial court's denial of appellants' motions for new trial.

Search & Seizure; License Plate Checks

State v. Martinez-Arvealo, A16A1813 (2/17/17)

Martinez-Arvealo was charged with driving without a license. The trial court granted his motion to suppress and the State appealed. The Court affirmed.

The evidence, briefly stated, showed that an officer was running license plates while sitting in a church lot beside a four-way stop. The officer ran a license plate number in her cruiser's computer, and it returned as being registered to an unlicensed owner, Laura Martinez. Although there is a light at the four-way stop, the officer testified that at that time of night "you can't see the driver of a vehicle clearly." She followed the vehicle after it left the stop, and after the results of the license plate scan came back, she pulled the vehicle over. The officer approached the vehicle, which was occupied by a male driver, later learned to be Martinez-Arvealo, and he presented an international identification card but could not show that he was licensed to drive in the state.

The State argued that the trial court erred by granting the motion to suppress because an officer does not have a duty to corroborate the gender of the driver with the gender of the owner prior to effectuating a traffic stop

based on a report of a prior violation of the law connected to that owner. The State also cited in support of its argument *Hernandez-Lopez v. State*, 319 Ga.App. 662 (2013), and *Humphreys v. State*, 304 Ga.App. 365 (2010). The Court disagreed.

Initially, the Court noted that the trial court's order did not use the word "duty" in its order. Instead, the trial court's analysis was conducted under the reasonable articulable suspicion standard. And the Court distinguished the State's cases, noting that neither address a situation in which the officer had or easily could have had knowledge of the discrepancy between the gender of the unlicensed owner as shown in the license plate search and the observed driver of the vehicle.

Thus, the Court found, the trial court found that the officer lacked a *reasonable* articulable suspicion for making the stop because she completely failed to note the unlicensed owner's name and gender as listed in the license plate search report, and she made no attempt to observe the driver's gender prior to the stop, even though, as the court specifically noted in its order, there was a light at the intersection. Therefore, based on the evidence presented at the hearing on the motion to suppress, there was no clear error in the trial court's findings.

Moreover, the Court noted, it was clear from the language used in the order that the trial court found the officer's testimony questionable. And while the trial court could have accepted the officer's testimony that she was wholly unable to observe the driver's gender prior to the stop, and based on such credited testimony, the trial court could have determined that the officer had reasonable articulable suspicion to effectuate the stop, the trial court was not required to do so. Accordingly, the Court affirmed the grant of the motion to suppress.

Search & Seizure; Standing

Courtney v. State, A16A1668 (2/17/17)

Appellant was indicted for sexual exploitation of children by distributing child pornography from his computer pursuant to O.C.G.A. § 16-12-100(b)(1)(5). The evidence showed that a detective used an "administrative subpoena," issued by the district attorney's office and pursuant to O.C.G.A. § 16-9-108(a), to obtain identifying subscriber information. Appellant argued the that trial court erred in denying his motion to suppress because the detective's use of an administrative subpoena pursuant to O.C.G.A. § 16-9-108(a), rather than a search warrant or court order pursuant to O.C.G.A. § 16-9-109(b), was illegal because the latter statute provides the exclusive mechanism through which an IP may be compelled to disclose subscriber information.

The Court stated that before it could consider the merits of appellant's argument, it must consider whether he had standing to challenge the search. Citing *Ensley v. State*, 330 Ga.App. 258 (2014), the Court stated that an internet service customer has no reasonable expectation of privacy in subscriber information that he voluntarily conveys to an IP. Therefore, appellant lacked standing to challenge the search for his subscriber information.

Nevertheless, appellant contended, O.C.G.A. § 16-9-109(b) grants him a reasonable expectation of privacy in the information listed therein, including his name and address, because it defines the circumstances under which an IP may be compelled to disclose that information to a law enforcement agency. The Court disagreed. O.C.G.A. § 16-9-109(a) provides that law enforcement units and prosecutors may require IPs to disclose the contents of electronic communications if they obtain a search warrant from an appropriate court. O.C.G.A. § 16-9-109(b) sets forth the process by which a district attorney "*may* require [an IP] . . . to disclose [certain subscriber information]." (Emphasis supplied). Nothing in the Code section prohibits the IP from disclosing the information to the district attorney, law enforcement, the Attorney General, or for that matter, anyone else. Consequently, the Court held, O.C.G.A. § 16-9-109(b) does not grant appellant a reasonable expectation of privacy in subscriber information he voluntarily conveyed to the IP. Accordingly, the Court concluded, appellant did not have standing to challenge the search, and the trial court's denial of his motion to suppress was affirmed.

Disorderly Conduct; Fighting Words

Knowles v. State, A16A1607 (2/21/17)

Appellant was charged with disorderly conduct in violation of O.C.G.A. § 16-11-39(a)(3) and V.G.C.S.A. The evidence was stipulated by the parties. It showed that a vehicle was stopped for not having a tag light. While the driver was undergoing field sobriety tests, a third officer encountered appellant in the back seat of the stopped vehicle. Based on appellant's behavior of "fidgeting and looking around," the officer thought that he was acting nervous and suspicious, and therefore, requested that he exit the vehicle to be frisked for weapons. Once appellant exited the car, he began "yelling and cursing," and in an apparent attempt to explain his fidgety behavior, he told the officer "I'm just trying to give you my damn ID." But despite appellant's statements and rude behavior, the officer did not feel threatened, and ultimately, he determined that appellant was unarmed. The officer then ran a check on appellant's identification and discovered that he had no outstanding warrants or warnings. When the officer returned to give appellant back his identification, appellant said "fuck you," and at that point, the officer arrested him for disorderly conduct. Later, during a search of appellant incident to his arrest, the officer found a crack pipe and a substance that he suspected to be cocaine.

The trial court denied appellant's motion to suppress and the Court granted appellant's petition for interlocutory appeal. Appellant argued that the trial court erred in denying his motion to suppress evidence because the arresting officer lacked probable cause to arrest him for disorderly conduct. The Court agreed.

The Court noted that appellant was arrested for disorderly conduct based on appellant's use of "fighting words." To ensure no abridgment of constitutional rights, the application of O.C.G.A. § 16-11-39(a)(3)'s proscription on "fighting words" must necessarily be narrow and limited. In consideration of whether the words rise to the level of "fighting words" the circumstances surrounding the words can be crucial because only against the background of surrounding events can a judgment be made whether the words uttered had a direct tendency to cause acts of violence by others. And, the Court noted, the fighting words exception to constitutionally protected speech requires a narrower application in cases involving words addressed to police officers. This is so because a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to "fighting words." In fact, the Court noted, the freedom

of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.

Here, the Court found, the stipulated facts showed that appellant raised his voice and cursed at a police officer during a traffic stop. "While we in no way condone [appellant]'s use of disrespectful and vulgar language toward a police officer (indeed, we unequivocally condemn this behavior), the particular facts and circumstances of this case—including that the statements were directed to a trained police officer—do not support the trial court's finding that there was probable cause to believe that [appellant] uttered fighting words within the meaning of O.C.G.A. § 16-11-39(a)(3)." Accordingly, the Court reversed the trial court's denial of appellant's motion to suppress.