

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 7, 2008

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THIS WEEK:

- **Implied Consent**
- **Statements of Defendant- Miranda**
- **Interrogation - Right to Remain Silent**

Implied Consent

Synder v. State, S07G1093

Appellant was involved in a collision while driving. When the officer arrived on the scene, he smelled alcohol on appellant and in the car. The officer performed an alco-sensor test and received a positive result. The officer determined that appellant caused the accident by running a stop sign. Although alert and with no visible injuries, appellant was taken to a nearby hospital for evaluation. An officer at the hospital read appellant his implied consent warning at the request of the on scene officer. Appellant consented to having blood drawn, and he was not under arrest. Ten days later, the passenger in appellant's car died. This appeal raises the question of whether the State's use of test results on bodily substances that are requested and collected for testing after the traffic accident, but before a person dies as a result of the accident is authorized under OCGA § 40-5-55. Appellant claims that he must be under arrest before implied consent is read. The Court has already decided this issue adversely to appellant in Hough v. State, 279 Ga. 711 (2005). Appellant also claims that OCGA § 40-5-55 requires that the serious injury or fatality required under the statute must have been suffered by the driver whose bodily substances are sought for chemical testing. The Court found that the language

of the statute is much broader than appellant claims and that this claim is inconsistent with prior cases.

Appellant further argues that the serious injury must have been known prior to the request by a law enforcement officer that a driver submit to chemical testing and the reading of the implied consent warning. The Supreme Court held that § 40-5-55, "does not contain an express statement of a temporal connection between the traffic accident and the resulting serious injury or fatality." But, § 40-5-55 must be read in conjunction with § 40-5-67.1, since these two statutes deal with the same subject-matter. When construed together, §40-5-67.1(a) provides the temporal connection not found in §40-5-55(a). Therefore, the Court held that "an officer's request for testing is legally viable under the second contingency only if, at the time of the request, the driver has been involved in a traffic accident that has resulted in serious injuries or fatalities of which law enforcement is aware." In this case, because the driver was not under arrest and there was no evidence that a serious injury or fatality had resulted from the accident at the time of the request; the request for testing was invalid and should have been suppressed.

Statements of Defendant-Miranda

Vergara v. State, S07A1234

Appellant and his co-defendant were indicted for murder and related crimes. The State gave notice of its intent to seek the death penalty. On March 26, 2002, GBI agents Blackwell, Evans and Spindola went to appellant's residence in connection with their investigation of the victims' deaths. During a

videotaped interview, appellant acknowledged being present at the murders, implicated Soto as the perpetrator, and handed the officers a notebook containing Soto's telephone number. On March 27, 2002, appellant made his "first appearance" before the Magistrate Court, where he was formally charged with two counts of murder and where he made a request for counsel, who was appointed on that date. The following day, Agent Spindola interviewed appellant again. As a result of that interview, police obtained a quantity of cocaine from appellant's residence. The Court granted interim review to determine whether the trial court erred in failing to suppress appellant's March 28, 2002 custodial statement and all evidence obtained as a result thereof. Where a defendant asserts his right to counsel at his initial appearance, his Sixth Amendment right to counsel attaches. O'Kelley v. State, 278 Ga. 564, 568 (2) (604 SE2d 509) (2004). In order for appellant's subsequent statement on March 28 to be admissible, appellant must have initiated further contact with the police. Michigan v. Jackson, 475 U.S. 625 (106 S. Ct. 1404, 89 LE2d 631) (1986). The translated transcript of the audiotaped interview, to which the State and appellant stipulated, supports the trial court's finding that appellant had requested to speak with Spindola, as appellant responded affirmatively to the investigator's statement that he was there because he was told that appellant wanted to talk to him. However, the "initiation" inquiry is only the first step of a two-step analysis. Even where the accused initiated the conversation, it must then be determined, under the totality of the circumstances, whether he made a valid waiver of the rights to counsel and to remain silent.

The evidence shows that Spindola neither reread nor reminded appellant of his Miranda rights. While Spindola did tell appellant that he did not have to speak with him, neither the investigator nor appellant mentioned an attorney or whether appellant intended to speak without one. Before appellant said anything regarding when or why he had summoned Spindola, the investigator reprimanded appellant for not being truthful during the March 26 interview. Spindola immediately inquired about the current location of the cocaine. Based upon the totality of the circumstances, the Court could not conclude that appellant wished to waive his previously-invoked right to counsel

and resume answering questions about the case. Therefore, the trial court erred in ruling appellant's March 28 statement admissible.

Neither this Court nor the Supreme Court of the United States has addressed the scope of relief to be afforded a defendant who has suffered a constitutional violation in this precise context. However, the fruit of the poisonous tree doctrine has been applied in other Sixth Amendment right to counsel cases. In taking this approach, courts have recognized that because the Sixth Amendment right to counsel is fundamental to our adversarial system of justice, once that right has attached and been asserted, the State must honor it, at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel. Maine v. Moulton, 474 U.S. 159, 170-171 (II) (B) (106 S. Ct. 477, 88 LE2d 481) (1985).

Accordingly, under the fruits doctrine as explained by the Supreme Court and adopted by the Georgia Supreme Court, the Court need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. The more apt question is whether the evidence has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 487-488 (III) (83 S. Ct. 407, 9 LE2d 441) (1963). The Court concluded that the fruits doctrine provides the proper remedy here, as it appropriately balances "the fundamental importance of the right to counsel in criminal cases" with "the necessity for preserving society's interest in the administration of criminal justice." United States v. Morrison, 449 U.S. 361, 364 (101 S. Ct. 665, 66 LE2d 564) (1981).

A review of the evidence shows that, during the March 28 interview, appellant indicated that the cocaine might be at his home, and Spindola told him that he would arrange for them to go there together to retrieve it. Directly after the interview, Spindola and another officer escorted appellant to his residence. Spindola himself testified that the discovery of the cocaine was a direct result of his interview with appellant, and the State offered no evidence to establish that the cocaine had become so attenuated from the

primary illegality as to dissipate the taint. Nor had the State offered any evidence establishing that there was "a genuinely independent source for the discovery of the cocaine," or that it inevitably would have been discovered by lawful means. Therefore, the cocaine seized as a result of appellant's March 28 statement must also be suppressed.

Interrogation - Right to Remain Silent

Perez v State, S07A1755

Appellant was arrested in 2005 for a 1996 murder. Because appellant spoke limited English, the interview was in Spanish. During the interview, appellant made ambiguous statements that seemed to deal with stopping the interrogation. The Court took this appeal to determine whether a clarification of the defendant's statements is a requirement or merely a better practice. The Court held that the bright line rule from Davis v. United States, 512 U.S. 452 (1994), dealing with the right to counsel, should be applied in situations dealing with the right to remain silent. Therefore, the request to remain silent must be clear and unambiguous. The Court then looked to the facts of the case at bar. They found that appellant was not clear in the statements and that he continued to speak with the officer after his ambiguous statement. Therefore, the statement was properly entered into evidence.