

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 2, 2017

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THIS WEEK:

- **Mistrials; Manifest Necessity**
- **DUI; Prior Bad Acts**
- **Double Jeopardy; Actual Knowledge**
- **Prior Bad Acts; Rule 417**
- **Search & Seizure; Consent to Search**

Mistrials; Manifest Necessity

Laguerre v. State, S17A0646 (5/1/17)

Appellant and his co-defendant, Baker, were jointly indicted and the jury selection began on Dec. 9. The court informed the jury panel at the outset of trial that the attorneys' estimated that the trial would last seven to nine days. However, voir dire lasted nearly three days and the first State witness was called on Dec 11 in the late afternoon. The State's case took longer than estimated and the prosecutor advised the court the State's case may not be completed before Dec. 19. Counsel for Baker stated that she expected to call seven witnesses and needed at least a week. After one jury was excused and two others asked to leave because of the trial length, the trial court asked the case manager to poll the jury to determine scheduling conflicts for the holidays. On the morning of December 17, the trial court reported that on each day during both the week of December 22 and the following week, three to five jurors had conflicts, and that the first time that a complete jury could be back together would be Thursday, January 8. During an hour-long recess, the trial court and the attorneys went into chambers where they determined that they had only two options: either the court should declare a mistrial or order a continuance for nearly three weeks

from December 19 to January 8. The State and Baker acquiesced to the mistrial; appellant did not and objected. The trial court granted the mistrial. Appellant thereafter filed a plea in bar which the trial court denied.

Appellant contended that the trial court abused its discretion in denying his plea of former jeopardy because the circumstances did not demonstrate the "manifest necessity" that was constitutionally required to authorize a mistrial over his objection. The Court disagreed.

Here, the Court found, the trial court did not act abruptly or hastily. Prior to the day that the mistrial was declared, the court was already concerned about the length of the trial and the continuing availability of the jurors. The trial court knew that the jurors had been selected on the basis of a reasonable expectation of discharge within seven to nine days and thus prior to the holidays. And they listed their scheduling conflicts for the court. It became apparent, during trial, that the trial would last through the holidays and would conflict with numerous jurors' travel plans. But, they had not been forewarned of the potential need to take sufficient notes or otherwise prepare to recollect the evidence a month later. Moreover, there was a reasonable likelihood that the upset jurors would attribute responsibility for the delay to one of the parties, not unlike the two prospective jurors who, as the trial court noted in its order denying the plea of former jeopardy, had been excused for cause for forming a bias against appellant's counsel resulting from the length of jury selection. The Court stated that the attitude of disgruntled and distracted jurors, together with the likelihood for them to place blame, surely does not inure to the benefit of a criminal defendant.

Therefore, the Court found, under the circumstances, the trial judge acted in order to assure a fair trial, not only for appellant but for his co-defendant and the prosecution as well. He was present and in a far better position than the Court are to evaluate the complaining jurors' attitudes. The record reflected that the trial court duly weighed the respective rights of all the parties before electing to declare a mistrial and that prior to announcing the mistrial, it carefully considered the only proposed lesser alternative of a continuance. Whether or not the court's discretion in regard to the conduct of the trial may have permitted it to require interruption of the case and return of the jury in about three weeks, there was nothing shown regarding the circumstances of this case that would have compelled such a solution. Thus, the Court concluded, the trial court's decision to grant a mistrial was authorized, even if the mistrial was not strictly necessary, because under the totality of the attendant circumstances, reasonable judges could differ as to the type of disposition required to protect the fair trial rights of the parties. Accordingly, the trial court did not abuse its discretion by granting a mistrial over appellant's objection and subsequently denying his plea of former jeopardy.

DUI; Prior Bad Acts

Gibbs v. State, A17A0422 (5/4/17)

Appellant was convicted of DUI (less safe). The evidence showed that appellant refused to take the State's requested blood test. He argued that the trial court erred in admitting evidence of his prior DUI conviction. The Court disagreed.

The Court noted that under Rule 417, evidence that the accused committed another DUI on a different occasion "shall" be admissible when "[t]he accused refused in the current case to take the state administered test required . . . and such evidence is relevant to prove knowledge, plan, or absence of mistake or accident." Citing *State v. Frost*, 297 Ga. 296, 299 (2015), the Court held that the evidence was admissible under Rule 417.

Nevertheless, appellant contended, the evidence should have been deemed inadmissible as unduly prejudicial under Rule 403. The Court noted that in *Frost*, the Supreme Court explicitly declined to address whether evidence otherwise admissible under

Rule 417 may be excluded as too prejudicial under Rule 403. Also, in *Kim v. State*, 337 Ga.App. 155 (2016), decided after *Frost*, the Court presumed, without deciding that Rule 403 applied to evidence admissible under Rule 417. Thus, the issue remains an open question. However, like *Kim*, the Court found that it too would assume, without deciding that Rule 403 applies to Rule 417. And here, the Court noted, in its order denying appellant's motion for new trial, the trial court ruled that appellant's prior DUI was "properly introduced by the State to show knowledge or awareness on [appellant's] part," was not offered solely for its prejudicial effect, and was not merely of "scant or cumulative" probative value. Thus, the court concluded that even if counsel had lodged a Rule 403 objection to the evidence, such objection "would not have borne fruit."

The Court agreed with the trial court that the prior DUI was highly probative of the reasons for appellant's refusal of the portable breath and state-administered blood tests because it tended to show his knowledge of the effects of alcohol consumption on his driving and of law enforcement's use of testing to determine impairment. Accordingly, the trial court did not err in admitting the evidence.

Double Jeopardy; Actual Knowledge

Millsaps v. State, A17A0592 (5/8/17)

After pleading guilty in municipal court to reckless driving, resisting an officer, and speeding, appellant appealed from the denial of his motion to dismiss on double jeopardy grounds an accusation brought in superior court alleging separate charges of fleeing or attempting to elude an officer, misdemeanor obstruction of an officer, reckless driving, and speeding. The record showed that on May 22, 2014, appellant allegedly led police on a high-speed chase at speeds exceeding 100 miles per hour: fleeing and attempting to elude, reckless driving, and speeding. These offenses allegedly occurred in unincorporated Bartow County and he was issued citations by the Sheriff's Office. On May 23, 2014, the Emerson City Police Department issued traffic citations to appellant for related offenses committed within the city limits: reckless driving, resisting an officer, and speeding. In March 2015, appellant appeared in the Emerson Municipal

Court and pleaded guilty to the Emerson citations for reckless driving and resisting an officer, and the speeding offense merged with the reckless driving offense. In June 2015, the State filed an accusation in the Superior Court of Bartow County alleging separate occurrences of fleeing or attempting to elude an officer, obstruction, reckless driving, and speeding. Appellant then moved to dismiss the accusation on double jeopardy grounds, and, following a hearing, the superior court denied the motion.

Appellant argued that the trial court erred by concluding that his prosecution was not barred by O.C.G.A. § 16-1-7(b). The Court noted that under that Code section, when several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the first prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution. Appellant argued that the prosecutor was expected, "as an expert in the law," to know of the several crimes arising from the facts and evidence actually known to her. Thus, he argued, the municipal court prosecutor had actual knowledge of all of the facts supporting the subsequent charges in superior court, so the trial court erred by concluding that the municipal court prosecutor did not know of the crimes arising from the same transaction for which he was punished in municipal court.

However, the Court found, the evidence in the record was limited to the actual citations issued by the Emerson Police Department and the testimony of the municipal court prosecuting attorney. Those citations made no mention of conduct occurring outside of Emerson, and the prosecutor explained that the only way cases come to him is by way of a citation issued by the city. Any state warrants or reports associated with this case did not and would not have gone to him. Therefore, even though each of the offenses at issue in this case arose from the same transaction, there was no evidence that the municipal prosecutor was aware of the factual basis for the offenses occurring outside of Emerson. Accordingly, the Court concluded, the trial court correctly denied appellant's motion because there was no evidence that the municipal court prosecutor had actual knowledge of the criminal conduct taking place outside of the city limits, however related that conduct was to the Emerson charges.

Prior Bad Acts; Rule 417

State v. McPherson, A17A0364 (5/9/17)

The State appealed after the trial court excluded evidence of prior bad acts in this child molestation case. The record showed that McPherson, a child psychologist, was indicted for molesting four boys and one girl, all of whom were his patients. The State filed a notice of intent to introduce evidence of acts of child molestation McPherson allegedly committed between 1979 and 1981, involving a boy under the age of 12. These events occurred prior to McPherson becoming a child psychologist. The prosecutor argued that the prior bad acts were similar to the crimes at issue, because McPherson was supervising the children at the time the conduct took place, he offered the children gifts to gain their affection and to “groom” them, and his conduct toward the boy was almost exactly like his conduct toward the children in the instant case. She argued, therefore, that evidence of McPherson’s prior conduct demonstrated his sexual or lustful disposition toward children in that age range and, as a result, was admissible. The trial court granted the motion to exclude, but did not provide a reason for its decision or the basis for its finding that the evidence was inadmissible.

The State contended that the trial court abused its discretion in excluding the evidence of prior acts of child molestation allegedly committed by McPherson, arguing that O.C.G.A. § 24-4-414(a) specifically states that such evidence “shall be admissible.” The Court agreed. Further, the Court found no basis in the record to support the “extraordinary remedy” of excluding this evidence as unduly prejudicial under O.C.G.A. § 24-4-403, particularly given the strong statutory presumption of admissibility and in light of the close similarities between the crimes at issue. There was no showing that the evidence would confuse the issues, mislead the jury, waste time, or be cumulative of other evidence, or that the probative value of the evidence would otherwise be “substantially outweighed” by its prejudicial impact. In fact, the Court noted, the prejudicial impact of evidence of prior bad acts in child molestation cases is generally considered to be outweighed by its probative value in demonstrating an accused’s disposition toward committing a molestation. Also, when the defendant’s intent in committing certain acts is a strongly contested issue at trial, as will

be the case here, evidence that he committed prior similar acts tends to demonstrate his intent and, thus, has more probative value, which further justifies its admission.

Moreover, the Court found, the fact that the prior acts were committed about 35 years earlier does not automatically require their exclusion. Thus, there was no showing that the potential witness’ memory about the alleged incidents is either impaired or patently unreliable. And, citing *Harris v. State*, ___ Ga.App. ___, ___ (1) (b) (Case No. A16A2041, decided 3/16/17), the Court stated that it found evidence of prior acts of child molestation were properly admitted even though they occurred 44 years earlier. Consequently, the Court concluded, because the prior acts of child molestation are admissible under O.C.G.A. § 24-4-414(a), the exclusion of the prior acts evidence by the trial court was an abuse of its discretion.

Search & Seizure; Consent to Search

Batten v. State, A17A0317 (5/5/17)

Appellant was convicted of trafficking in methamphetamine and operating a vehicle containing a secret compartment. He contended that the trial court erred in denying his motion to suppress. Specifically, he contended that he did not consent to a search of his vehicle, but merely acquiesced to the authority of the police. The Court disagreed.

The Court stated that the voluntariness of consent is determined by the totality of the circumstances; no single factor controls. The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect. The appropriate inquiry is whether a reasonable person would feel free to decline the officers’ request to search or otherwise terminate the encounter. Mere acquiescence to the authority asserted by a police officer cannot substitute for free consent.

Here, the Court found, even though there were several police officers present during the stop holding flashlights (as it was dark), the videotape of the traffic stop corroborated the officers’ testimony regarding the consensual nature of the search yielding the methamphetamine sought to be suppressed.

Appellant was not in handcuffs prior to the search, and there was no evidence that he was being threatened in any way, that he was misled, or that he was subject to a lengthy detention before giving his consent to search. Moreover, the mere fact that four officers were present and holding flashlights when appellant was asked for permission to search his vehicle did not mean that his consent was merely an acquiescence to their authority. Rather, the officers testified that appellant was asked whether he would consent, and he did so. Therefore, the Court affirmed the finding by the trial court that the search was consensual.