Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 30, 2017

THIS WEEK:

DUI; Independent Testing

Hynes v. State, A17A0633 (5/31/17)

Appellant was charged with two counts of DUI. The evidence showed that after appellant was arrested, he refused after the officer read him his implied consent rights. However, appellant requested that he be given an independent test. The officer then obtained and executed a search warrant for a blood test. The deputy testified that he did not permit appellant to obtain an independent test because "he refused implied consent."

In a case of first impression, appellant contended that the trial court erred in ruling that OCGA § 40-6-392 (a) (3) does not grant a driver the right to an independent test when the officer obtains a search warrant for a blood test. He argued that the trial court should have granted his motion to suppress the results of the blood test performed pursuant to a search warrant because OCGA § 40-6-392 (a) (3) merely requires that a test be administered at the direction of a law enforcement officer before the right to an independent test accrues and does not make an exception for chemical tests administered pursuant to search warrants. The Court disagreed.

The Court stated that under implied consent law, a DUI suspect has the option of accepting or refusing the state-administered test, after being advised of the attendant consequences for both choices. The law provides for penalties, including license revocation and admission into evidence the refusal to submit to state-administered testing, but also offers a DUI suspect an incentive "carrot" of additional testing after accepting the required state-administered chemical testing. Reading the statute in the manner suggested by appellant would vitiate the nature of independent testing as an incentive for accepting state-administered testing under implied consent, and effectively frustrate the intended effect of Georgia's implied consent law. When OCGA § 40-6-392 (a) (3) is read in the context of the entire statutory scheme for implied consent, it is clear that "the person tested" in subsection (a) (3) refers to a person tested pursuant to implied consent. Construing it any other way would render meaningless the language in the implied consent notice.

Furthermore, the Court found, OCGA § 40-6-392 (a) (3) provides, in pertinent part, that "[t]he person tested may have a physician or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of *a law enforcement officer*." (Emphasis supplied.) Here, appellant's blood was drawn pursuant to a search warrant. A search warrant is issued at the command or direction of a judicial officer, not at the direction of a law enforcement officer. Thus, the Court concluded, because appellant refused to submit to the chemical testing requested by the arresting officer pursuant to OCGA § 40-5-55, he was not entitled to an independent test, and the trial court properly denied his motion to suppress the

results of the blood test performed pursuant to a search warrant.

Forfeitures; Gambling Devices

Patel v. State of GA., A17A0067 (5/18/17)

The State of Georgia filed An in rem forfeiture complaint against the owners (Patel and Dharmasut, LLC) of a Citgo gas station based on alleged illegal commercial gambling on the premises using video gaming machines. The evidence showed that on May 25, 2015, a confidential informant placed $40 in a machine and redeemed the accumulated $20 credit with a store employee in exchange for two scratch-off lottery tickets. On June 1, 2015, the informant returned to the gas station, again placed $40 in a machine, and obtained a credit of $60. In exchange for the credit, a store employee gave the informant a $10 scratch-off lottery ticket and $40 in cash, and she put $10 in her own pocket. On June 4, 2015, police executed a search warrant for the gas station and seized $12,027.50 in cash from video gaming machines, the registers, a cash bag, a safe, drawers, boxes, Patel's wallet, and an ATM machine. After a hearing, the trial court granted the forfeiture.

The owners contended that the trial court erred by granting the forfeiture because the video gaming machines at issue were not "gambling devices" under Georgia law. The Court disagreed. The Court noted that the trial court found that by giving players cash and lottery tickets as rewards for winning games on the machines, the gas station employees effectively converted them into gambling devices. OCGA § 16-12-32 (b) (4) (2015) permits the State to seize via forfeiture "[a]ny property located in this state which was, directly or indirectly, used or intended for use in any manner to facilitate a violation of this article or of the laws of the United States relating to gambling and any proceeds." Thus, pretermitting whether the cash payouts from the employees converted the machines into "gambling devices" as defined by statute, these actions clearly violated the gambling laws of Georgia, which prohibit cash payouts for winning games on machines when the winnings are determined by chance even if they involve an element of skill. Accordingly, the Court held, the trial court did not err by finding in favor of the State and approving the forfeiture.

Double Jeopardy; Pretrial Intervention Programs

Palmer v. State, A17A0428, A17A0429 (5/18/17)

Appellants were convicted in Calhoun County of theft by taking and criminal trespass. Prior to trial, they filed pleas in bar which the court denied. The evidence showed that appellants entered a farm and stole a trailer of pecans in Calhoun County. They then drove the trailer to Irwin County where they unloaded the pecans for sale to a pecan company. Appellants were subsequently arrested in Irwin County and charged with two counts of theft by receiving stolen property. They were later arrested in Calhoun County and charged with theft by taking and criminal trespass.

Twenty-eight days after they were indicted in Calhoun County, they entered into a pretrial diversion program in Irwin County. It was undisputed that no indictment or accusation was ever filed in Irwin County, but the terms of the pretrial intervention agreement required two years of compliance with the program and payment of a $1,000 fine. Upon successful completion of the Irwin County program, the pending warrants against appellants would be dismissed. Both appellants paid the fine and began reporting to Irwin County authorities in compliance with the terms of the agreement. Thereafter, they filed their pleas in bar in Calhoun County based on double jeopardy.

The Court noted that OCGA § 16-1-7 provides, in relevant part, that "[w]hen the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if[ ] . . . [o]ne crime is included in the other; or . . . [t]he crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct." And OCGA § 16-1-8 provides, in relevant part, that "[a] prosecution is barred if the accused was formerly prosecuted for the same crime based upon the same material facts, if such former prosecution[ ] . . . [r]esulted in either a conviction or an acquittal; or . . . [w]as terminated improperly after the jury was impaneled and sworn or, in a trial before a court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts or after a plea of guilty was accepted by the court."

Thus, the Court found, after applying the undisputed facts to the plain language of the relevant statutes, it was clear that appellants' prosecution in Calhoun County was not barred by their decision to enter into a pretrial intervention program (a type of program expressly authorized by our General Assembly) *in lieu of prosecution* in Irwin County (a purpose which is recognized by the very statute that authorizes such programs). And, the Court noted, while there might arguably be some tension between the incentive to enter into and complete a pretrial diversion program (which the appellants had not yet done at the time of their pleas in bar) and the principles that are applicable to double jeopardy, the Court stated that it need not address or attempt to resolve any such tension at this time, because, under the relevant facts and law applicable to this case, appellants were not actually *prosecuted* in Irwin County, and thus, jeopardy did not attach. According, the trial court did not err in denying the pleas in bar.

Jury Instructions; Plain Error

State v. Crist, A17A0052 (5/18/17)

Crist was indicted for three counts of sexual battery and three counts of child molestation. The jury convicted him on all the sexual-battery counts and found him not guilty of the child-molestation counts. Crist filed a motion for new trial, arguing that although he did not object to the charge, the trial court committed plain error when it failed to fully instruct the jury on the elements of sexual battery, in that the charge given by the court omitted the element of lack of consent. Following a hearing, the trial court granted Crist's motion, finding that, when it read the written instructions at the conclusion of the trial, it had inadvertently omitted the page of the instructions defining the crime of sexual battery. The State appealed.

The State argued that the trial court erred in granting Crist's motion for new trial because the jury instructions, taken as a whole, properly instructed the jury on the elements of sexual battery, such that the omission of the instructions during the oral charge did not constitute plain error. Specifically, the State contended that Crist failed to show that

the omission of the oral instruction on the elements of sexual battery likely affected the outcome of the trial and the court impermissibly shifted the burden to the State to show no plain error. The Court agreed.

It is well established that the charge to the jury is to be taken as a whole and not out of context when making determinations as to its correctness. And for purposes of plain-error analysis, the "charge" includes not only instructions given orally to the jury, but necessarily must apply to any written instructions given to the jury. Thus, the Court found, even assuming that the trial court's failure to include the elements of sexual battery in its oral charge to the jury constituted an obvious error, Crist failed to show that this omission likely affected the outcome of the proceedings. Notably, the indictment, including the elements of the charge of sexual battery, was read to the jury; the jury was instructed that it had to find each element in the indictment beyond a reasonable doubt; and the indictment was sent into the jury room. Furthermore, the jury was told at the outset of the closing charge that it need not remember all of the court's instructions, which were 17 pages in length, and was given a complete set of written instructions, including the sexual-battery instruction, in the jury room. Although, the Court stated, "the better practice would have been to include all instructions in the oral charge following closing arguments", the trial court's written and oral instructions, as a whole, adequately informed the jury of the charges. Moreover, the elements of both child molestation and sexual battery were underlined on the written jury instructions that went out with the jury. Thus, while the trial court found that the notations on the written instructions were "unsubstantiated" evidence that the error did not affect the proceedings and declared that it would not "assume" that the jury read the instructions, its reasoning was misguided. The burden was on Crist, not the State, to show that the error likely affected the outcome of the trial. And here, the Court found no evidence that the jury misunderstood the instructions on sexual battery or any other topic. Rather, the record, including the acquittal of Crist on charges of child molestation, showed that the jury understood the law and the evidence before it. Accordingly, because the trial court's instructions, when considered as a whole, properly instructed the jury on the law and Crist failed to show that the omission of the oral instruction on sexual battery at the close of trial likely affected the outcome of the proceedings, the trial court erred in granting Crist's motion for a new trial. Thus, the Court reinstated his convictions for sexual battery.

Witness Harassment; Grand Juries

Dimauro v. State, A17A0180 (5/26/17)

Appellant, a former police officer, was convicted of aggravated assault, aggravated battery, and two counts of violating his oath of office relating to his excessive use of force o, the victim, a detainee. At trial, the State presented Rule 404 (b) evidence that appellant used excessive force against Davis while attempting to detain him. The State also presented testimony from a man who saw and videotaped Davis's beating and uploaded the video to YouTube.

Appellant contended that the trial court erred in admitting irrelevant evidence that *other* police officers threatened the man who videotaped the assault on Davis. The Court disagreed. The Court found that the evidence showed the witness testified that appellant was one of several police officers who harassed him. In fact, during direct examination, the witness testified that the three officers present in the video "threatened [him]" and told him they knew where he lived. Over defense objection, the witness then testified that, following his videotaping the assault and posting it on YouTube, he "had officers coming to [his] business harassing [him] for no reason[,]" resulting in the witness closing his business. On cross-examination, the witness clarified that appellant, specifically, pulled up in a vehicle later on the same day as the Davis incident and "hassled [him] about that video[.]" And, as a general matter, it is well settled in Georgia that evidence of a defendant's attempt to influence or intimidate a witness can serve as circumstantial evidence of guilt. Therefore, the Court held, while the evidence here went to the commission of other acts, rather than the charged offenses, it was nonetheless relevant. Accordingly, the trial court did not err in admitting the evidence.

Appellant also argued that the trial court erred in denying his motion to dismiss the indictment because his right to appear before the grand jury was improperly limited. Specifically, he argued that he was entitled to present evidence to the grand jury. The Court again disagreed. The record showed that when appellant appeared at the grand jury to testify, he attempted to present several exhibits as evidence, including the results of administrative proceedings against him, his awards and commendations, a photograph of Davis, and Davis's jail intake forms.

The Court noted that under former OCGA § 45-11-4 (g), a police officer charged with a crime occurring in the course of his duties is entitled to notice of grand jury proceedings and may request to appear and "make such sworn statement as he or she shall desire." But former OCGA § 45-4-11 (g) does not define "sworn statement." Thus, the Court stated, the question before it was whether the term "sworn statement" contemplates the introduction of evidence.

The Court found that the term "statement" means "[a] written or oral communication setting forth facts, arguments, demands, or the like"or "[a] verbal assertion or non-verbal conduct intended as an assertion." Thus, the Court found, under the plain language of the statute, appellant was permitted to communicate with or make a verbal account to the grand jury, including describing the exhibits to the jurors. But nothing in the language of the statutes permits him to present documentary evidence. Accordingly, the Court held, appellant's right to appear before the grand jury was not improperly limited, and thus, the trial court did not err in denying his motion to dismiss the indictment.