Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JULY 4, 2008

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## THIS WEEK:



## *Cocaine Possession with Intent to Distribute, Abandonment, Confrontation Right, Hearsay Exception*

Williams v. State, A08A0277

Appellant appeals his convictions for possession of cocaine with the intent to distribute, abandonment of a controlled substance in a public place and other offenses. Appellant argues that the trial court erred by admitted the bystanders' statements based upon the excited utterance exception to the hearsay rule and that this admission violated the Confrontation Clause of the Sixth Amendment, citing Crawford v. Washington. The Georgia Court of Appeals finds no error and affirms Appellant's convictions.

Georgia law states that "in order to qualify as an excited utterance, an event precipitating the statement must have been sufficiently startling to render inoperative the declarant's normal reflective thought processes, and the declarant's statement must have been the result of a spontaneous reaction, and not the result of reflective thought." Walthour v. State, 269 Ga. 396, 397(2) (1998). Additionally, there must be evidence that the declarant spoke from personal knowledge. Dolensek v. State, 274 Ga. 678, 679 (2) (1998). Here, the statements were made while a police officer was chasing a suspect (a sufficiently startling event) and by people in a crowd that the Appellant had just run past. The elements of an excited utterance are met. The trial court did not abuse its discretion by admitting the statements under the excited utterance exception.

Regarding the Appellant's contention that the admission of the bystander's statements violated the Confrontation Clause of the Sixth Amendment, Georgia law states that the confrontation clause "bars the admission of testimonial statements of a witness who did not appear at trial unless he or she was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Keys v. State, 289 Ga.App. 317, 319(1)(a) (2008). The Georgia Supreme Court has concluded that testimonial statements generally include statements made by witnesses to government officers investigating a crime. Hester v. State, 283 Ga. 367, 370(4) (2008). However, the Georgia Supreme Court also noted that other jurisdictions have found a statement to be non-testimonial where, as here, law enforcement involvement in the production of the statements was either limited or nonexistent and there was no indication of a purpose to collect information for a potential criminal prosecution. Id at 371. Here, the bystanders' statements were not testimonial because the police did not elicit the statements and the purpose of the bystanders' shouts was to avert a crime in progress, not establish or prove past

events for a later criminal prosecution. The Sixth Amendment was not violated.

## Confrontation Right, Hearsay Exception

Kilgore v. State, A08A0386

Appellant was convicted of battery, aggravated assault, criminal damage to property in the second degree, and simple battery. Appellant argues the trial court erred by allowing the introduction of excerpts of the victim's testimony from a previous hearing because the introduction violated his constitutional right to confrontation as defined in Crawford v. Washington. In Crawford, the Supreme Court declined to provide a comprehensive definition of "testimonial", but stated that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." The Georgia Court of Appeals agrees with Appellant that the portions of the transcript at issue in the instant case are testimonial; however, that does not necessarily mean that Crawford renders the statements inadmissible. The Supreme Court wrote in Crawford that "where testimonial evidence is at issue, the Sixth Amendment demands unavailability and a prior opportunity for cross-examination."

However, in Hardeman v. State, 277 Ga. App.180 (2006), the victim testified at the defendant's probation revocation hearing but refused to testify at trial. The Hardeman Court held that "where a witness is present in the courtroom but refuses to testify, the witness is inaccessible within the meaning of OCGA § 24-3-10." OCGA § 24-3-10 provides that "[t]he testimony of a witness since deceased, disqualified, or inaccessible for any cause which was given under oath on a former trial upon substantially the same issue between substantially the same parties may be proved by anyone who heard it and who professes to remember the substance of the entire testimony as to the particular matter about which he testifies." The victim's refusal to testify about the incidents rendered her unavailable or inaccessible under OCGA § 24-3-10. Therefore, where "an inaccessible witness' prior testimony satisfies the requirements of OCGA § 24-3-10, the testimony does not violate the accused right to confrontation."

Here, the victim made it clear she would not testify. The victim's sworn testimony at Appellant's probation revocation hearing concerned substantially the same issue and the same parties. Also, the victim was subject to cross-examination by Appellant's trial counsel at the probation revocation hearing. The trial court's admission of the victim/witness' prior testimony did not violate the Appellant's right to confrontation.

## Juvenile Statement Admissibility

In the Interest of E. J., A08A0627

The Juvenile Courts of Evans and Tattnall Counties adjudicated Appellant, a 14-year-old female, delinquent for acts which, if committed by an adult, would constitute the crimes of burglary, theft-by-taking-vehicle (3 counts), and obstruction of an officer. Appellant challenges the admission into evidence of statements made by Appellant to officers in both Evans and Tattnall County cases.

The admissibility of statements by juveniles depends upon whether, under the totality of the circumstances, there was a knowing and intelligent waiver of constitutional rights. Riley v. State, 237 Ga. 124, 128 (1976). The burden is on the state to demonstrate that the juvenile understood and waived those rights. The analysis involves the application of a nine-part test whose factors include: the age of the accused; their education; their knowledge as to the substance of the charge and nature of their rights to consult with an attorney; whether they were held incommunicado or allowed to consult with relatives or an attorney; whether they were interrogated before or after formal charges had been filed; whether or not they refused to voluntarily give statements on prior occasions; and whether they repudiated an extrajudicial statement at a later date. Henry v. State, 264 Ga. 861, 862 (1995).

Here, two interviews occurred on two consecutive days. In the first interview, an officer from Evans County visited Appellant at the Regional Youth Detention Center. He brought a translator to ensure Appellant understood him and brought along the Appellant's mother. Appellant was read her Miranda rights. Appellant did not ask to speak with an attorney or indicate any hesitation about giving her statement. The translator dictated the statement regarding one of the thefts, which was read back to Appellant, who proceeded to sign the statement. The next day a deputy sheriff from Tattnall County went to the RYDC to speak with Appellant. Appellant was accompanied by a RYDC employee. Appellant signed the juvenile Miranda waiver form after it was read to her by the sheriff. Appellant expressed no difficulty in communicating with the sheriff. Appellant was 14 years old at the time of both interviews. At time of interview no formal charges had been filed and there is no evidence she was prevented from contacting a relative. There is nothing to suggest that any improper means of interrogation were used in either interview and both interviews appear brief. The trial court applied the appropriate test, and the evidence supported its factual findings regarding both statements. Therefore, there is no error in the admission of the two statements.

## Juveniles, Venue, Double Jeopardy

In the Interest of M.S., A08A0550

The Juvenile Court adjudicated 16-year-old Appellant delinquent after finding that he made terroristic threats and trespassed on school property. Appellant challenges the sufficiency of the evidence supporting both venue and the terroristic threats allegation. Appellant does not challenge the juvenile court's finding towards trespass.

The State conceded that it offered no proof of venue, requiring reversal. However, despite its failure to establish venue, the State may retry Appellant without violating the Double Jeopardy Clause if there was otherwise sufficient evidence at trial to support the finding for the crimes charged. Melton v. State, 282 Ga.App. 685, 689(2) (2006). OCGA § 16-11-37(a) states that a person commits the offense of a terroristic threat when he or she threatens to commit any crime of violence with the purpose of terrorizing another. Here, the attendance officer was the only alleged victim of the threat. However, the attendance officer testified that she had know the Appellant for a long time, that the Appellant was angry at a student, not the attendance officer, and that she was not threatened nor felt threatened. The evidence does not support a finding that he made a terroristic threat against the attendance officer as alleged in the delinquency petition. On remand, the State may not retry Appellant on the allegation of terroristic threats.

## Right of Defendant to be Present, Waiver of Objection

Hernandez v. State, A08A0721

Appellant was convicted of criminal gang activity, armed robbery, and aggravated assault upon a peace officer. Appellant argues that his right to be present was violated when the trial court conducted a hearing during his trial outside his presence. A defendant has a right to be present at all critical stages of the proceedings against him. A critical stage in a criminal prosecution is one in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or one in which the outcome of the case is substantially affected in some other way. This right belongs to the defendant, and he is free to relinquish it if he so chooses. Waiver results "if the defendant personally waives it in court; if counsel waives it at the defendant's express direction; if counsel waives it in open court while the defendant is present; or if counsel waives it and the defendant subsequently acquiesces in the waiver." Hampton v. State, 282 Ga. 490, 491-492(2)(a)(2007).

Here, a discussion did occur between the trial court and the attorneys before Appellant was brought in. The matter discussed was a bailiff's report that several juror's had expressed security concerns after noticing certain trial spectators staring at them during lunch and that these jurors were requesting escorts to their cars at the end of each court day. However, Appellant was fully informed of the context of this discussion and Appellant waived the issue. The trial transcript shows that Appellant's attorney was aware that Appellant was not in the courtroom during the portion of the hearing and did not object to the matters being considered outside his client's presence. The judge detailed to Appellant what transpired during his absence and how he planned to deal with the matter. Also, Appellant heard again the prior testimony of the bailiff and agreed with the plan stated by the trial court. Hence the issue was waived and the trial court's decision affirmed.

## Juveniles, Search and Seizure, Statements

In the Interest of T.A.G., A08A0445

The State appeals the partial grant of T.A.G.'s motion to suppress statements. T.A.G. was implicated in the robbery of two students that occurred in the boy's restroom during a basketball game. T.A.G. moved to suppress statements he made to two administrators that questioned him in relation to that incident. The juvenile court denied the first motion to suppress the statement that T.A.G. made to the first assistant principal without police involvement. Regarding the second interview, the juvenile court found that the second assistant principal was acting as an agent of the police at the time, that the law enforcement officer was involved in the interview, and that T.A.G. was in custody. The juvenile court further found that the police were trying to "usurp Miranda by having the school officials do all the interrogating while they stand by and don't ask a question, but then take all the statements that were obtained by the school officials and make that part of the police investigation" and thus excluded the second statement. The State challenges these findings.

In State v. Young, 234 Ga. 488 (1975) the Georgia Supreme Court explained: with reference to searches by private persons, there is no Fourth Amendment prohibition and therefore no occasion for applying the exclusionary rule. Law enforcement officers are, of course, bound by the full panoply of Fourth Amendment rights and are subject to the application of the exclusionary rule. But there is an intermediate group of persons that includes government agents and consequently public school officials, which are plainly state officers whose action is state action bringing the Fourth Amendment into play; but they are not state law enforcement officials, with respect to whom the exclusionary rule applies.

The juvenile court correctly concluded that the officer was involved in the interview. The officer was armed and invited into the interview room after T.A.G. had already confessed to one robbery but was maintaining his innocence about another. T.A.G. had been there for five hours before the second interview even began. Also, the officer advised the assistant principal what type of criminal charges might be brought against him. T.A.G. then confessed to the second robbery. Under these circumstances, the juvenile court was authorized to find that the officer was more than merely present, and, in fact, participated in the interview process.

The juvenile court also correctly concluded that T.A.G. was in custody at the time the second statement was given. Once T.A.G. confessed and he was then taken into a room with an armed police officer and questioned by another administrator, any reasonable person in T.A.G.'s position would be led to believe he was not free to leave the office, that the detention would not be temporary, and that he was in custody. The trial court properly suppressed T.A.G.'s pre-Miranda statement to the second assistant principal.

## Search and Seizure

Cuaresma v. State, A08A0403

Appellants challenge the trial court's decision to deny a motion to suppress evidence. The trial court had concluded that the Appellants voluntarily consented to the search. Appellants first contend that the trial court erred in finding that there was a valid basis for the initial traffic stop. However, since the police officer testified the driver of the truck made an illegal lane change, the trial court's finding in this case was not clearly erroneous. Also, the fact that the traffic stop was clearly pretextual does not change this result. If an officer witnesses a traffic violation, the ensuing stop is never pretextual, regardless of the officer's subjective intentions, and the officer has probable cause to make the stop. Noble v. State, 283 Ga.App. 81, 83(1) (2006).

Next, Appellants contend that the detention exceeded permissible limits and that they did not give valid consent to search the truck. When the State relies on consent, it has the burden of showing that the consent was voluntary and not the result of express or implied duress or coercion. Officers may request consent to search as long as they do not convey a message that compliance with their request is required. A consent to search will normally be held voluntary if the totality of the circumstances fails to show that the officers used fear, intimidation, threat of physical punishment, or lengthy detention to obtain the consent. Here, the officers admitted they were not interested in the traffic violation. They only wanted to search the vehicle. The evidence shows they badgered the consent from the Appellants. The consent in this case was coerced and thus invalid. Consequently, the trial court erred in denying the motion to suppress and the judgment is reversed.