

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 26, 2016

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THIS WEEK:

- **Recidivist Sentencing; Foreign Convictions**
- **DUI; Williams**
- **Discovery; Bad Faith**
- **DUI; Actual Consent**
- **Juries; O.C.G.A. § 15-12-139**
- **Search & Seizure**
- **Crime Victims; Statute of Limitations**
- **Lie Detector Tests; Cross Examination**

Recidivist Sentencing; Foreign Convictions

State v. Anderson, A16A1242 (7/6/16)

Appellant was convicted of armed robbery. At sentencing, the State introduced certified copies of three prior convictions for purposes of recidivist sentencing under O.C.G.A. § 17-10-7(a) and (c). One of the prior convictions was for armed robbery in Michigan. The certified copies of the Michigan charging document and judgment of sentence reflected that appellant pled nolo contendere to armed robbery in Michigan Recorder's Court for stealing a car from a victim at gunpoint on August 19, 1991, and that appellant was given a sentence committing him to the Michigan Department of Corrections for a term of six to fifteen years. His sentence included a court recommendation that he be housed in a facility with youthful offenders. Based on these three convictions, the trial court sentenced appellant as a recidivist to life imprisonment without parole.

Appellant contended that the trial court erred in using his Michigan conviction in

sentencing him as a recidivist under O.C.G.A. § 17-10-7(a) and (c). The Court disagreed. As a general rule, prior offenses committed in other states by a defendant when he was a juvenile cannot be used as predicate convictions for recidivist punishment because in Georgia, a juvenile is not convicted of felonies, but adjudicated delinquent, based on delinquent acts, and the plain terms of the recidivist statute require that the defendant be convicted of prior crimes which if committed in this state would be felonies. However, if the defendant, despite his juvenile status, could have been convicted of a felony if the prior offense had been committed in Georgia, then the prior offense can be used as a predicate conviction for recidivist punishment under O.C.G.A. § 17-10-7(a) and (c).

Here, the Court found, the Michigan charging document alleged that appellant took a car from the presence of the victim by use of a handgun. These same allegations would have constituted the crime of armed robbery under Georgia law. Furthermore, the potential punishment for armed robbery in Georgia included imprisonment for life. Thus, if appellant had committed the same offense in Georgia as a juvenile in 1991, a superior court would have had concurrent jurisdiction over the matter and appellant could have been convicted of the felony offense of armed robbery. Therefore, the Court concluded, the State met its burden of proving that appellant's Michigan conviction was for conduct that would have been considered a felony under Georgia law. The trial court accordingly committed no error in using the Michigan conviction as a predicate offense for recidivist punishment under O.C.G.A. § 17-10-7(a) and (c).

DUI; Williams

State v. Jung, A16A0527 (7/7/16)

The State appealed after the trial court granted Jung's motion to suppress the results of his breath test. In its order granting the motion to suppress, the trial court first noted that the responding officer had articulable suspicion for the stop and probable cause to arrest Jung for driving under the influence. The trial court then stated that the primary question presented in this case is "whether or not the Defendant voluntarily consented to the state administered test." The trial court then addressed the various factors presented during the hearing, noting that the responding officer believed Jung appeared to understand him, that the responding officer did not raise his voice or use any weapons or other force, and that he read the statutory implied consent warnings to Jung. However, the trial court also found that Jung was "confused when he was stopped as well as during the walk and turn field sobriety evaluation and was unable to follow instructions." Thus, the trial court concluded that Jung "lacked the capacity to consent based upon his confusion and high level of intoxication" and that the State "was only able to show that Defendant acquiesced to the officer's request that he submit to a breath test but was unable to show actual consent."

The State argued that the trial court focused exclusively on Jung's "confusion and high level of intoxication" to determine whether his consent was voluntary and failed to give careful consideration of all the factors pertinent to assessing the totality of the circumstances. However, the Court found, the trial court clearly considered factors other than Jung's confusion and high level of intoxication. Moreover, there is no requirement that the trial court expressly address each relevant factor in its order, particularly when the State did not present evidence on each of the factors. Accordingly, the trial court did not fail to consider the totality of the circumstances as presented by the evidence and directed by *Williams*.

The State nonetheless argued that the trial court erred in giving too much weight to Jung's level of intoxication. However, citing its recent decision in *State v. Bowman* 337 Ga.App. 313 (2016) and the Supreme Court's decision in *Clay v. State*, 290 Ga. 822, 826 (1) (B) (2012), the Court found that a high level of intoxication may be

sufficient to support a trial court's finding that a consent is involuntary. And although the responding officer testified that Jung appeared to understand him, he also noted in his supplemental police report that Jung was confused and failed to follow his instructions on the HGN test and the one leg stand test. Furthermore, the trial court was authorized to accept or reject any portion of the responding officer's testimony. Accordingly, the Court concluded, the evidence supported the trial court's findings and did not demand a contrary conclusion.

Discovery; Bad Faith

Moceri v. State, A16A0063 (7/7/16)

Appellant was convicted of first degree vehicular homicide. The evidence showed that while attempting to elude a police officer, appellant crashed his vehicle into a utility pole, killing his passenger. He contended that the trial court erred by excluding evidence that the 1995 BMW M3 car he was driving had a possible mechanical malfunction which he contended caused or contributed to the fatal crash. The trial court entered a pre-trial order excluding the evidence based on findings that the defendant violated provisions of the Criminal Procedure Discovery Act (the Discovery Act or the Act) (O.C.G.A. § 17-16-1 et seq.) by failing to preserve the car for inspection by the State as ordered by the court; that the defendant's failure was in bad faith; and that the State was prejudiced. The Court affirmed.

It was undisputed that the defendant elected to have the Discovery Act apply to his case, and therefore the reciprocal discovery obligations in the Act applied to the prosecution and the defense. Where the prosecution or the defense fails to comply with discovery obligations in the Act, the trial court has broad discretion to fashion a remedy to ensure a fair trial. If the defendant fails to comply with a discovery obligation in the Act, the trial court "may order the defendant to permit the discovery or inspection, interview of the witness, grant a continuance, or, upon a showing of prejudice and bad faith, prohibit the defendant from introducing the evidence not disclosed or presenting the witness not disclosed, or may enter such other order as it deems just under the circumstances." O.C.G.A. § 17-16-6.

The Court set out in great detail the procedural facts upon which the trial court relied. Briefly stated, they showed that after the defendant's experts inspected the car in support of the mechanical malfunction claim, defense witnesses, the defendant's father (who owned the car at the time) and Sicheron (a mechanic who had worked with the defendant), took actions calculated to prevent the car from being available for inspection by the prosecution. At the same time, defense counsel not only acquiesced in the court's order that the defendant preserve the car for inspection, counsel induced the order by assuring the court that the defendant's father owned the car and that the car was being preserved for the purpose of inspection. But, the Court found, "These assurances were not true." Additionally, defense counsel took other actions designed to keep the trial court unaware of the true facts regarding the ownership and location of the car, ensure that the court had no opportunity to take additional steps to preserve the car for inspection by the State, and obtain a tactical advantage for the defendant.

The Court found that although there was evidence to support the trial court's conclusion that the actions by the defendant's father and Sicheron were taken in bad faith, there was no evidence sufficient to support the court's conclusion that these two witnesses acted as the defendant's agents. But even if the defendant's father and Sicheron acted without the defendant's knowledge, there was evidence to support the trial court's conclusion that defense counsel took actions in bad faith calculated to conceal or enable the actions taken in bad faith by the defendant's father and Sicheron. Therefore, counsel's bad faith contributed to the destruction of the critical engine parts in violation of the court's order. Appellant was responsible for actions taken in bad faith by his defense counsel. Accordingly, the Court found no clear error in the trial court's determination that the evidence was sufficient to show appellant acted in bad faith in violation of the court's order, and that the destruction of the evidence was not simply the result of mistake. The Court also found no clear error in the trial court's finding that the evidence was sufficient to show the State was prejudiced because, in the absence of the lost engine parts (already inspected by the defendant's experts), the State lost all

opportunity to inspect those parts to refute the defendant's mechanical malfunction defense arising from expert witnesses, fact witnesses, or evidence of the vehicle's recall. Under these circumstances, the Court concluded that the trial court did not abuse its discretion by excluding evidence and testimony about the possible mechanical malfunction.

In so holding, the Court rejected appellant's argument that his constitutional right to present a defense (grounded in the Sixth Amendment's Compulsory Process Clause and the Fifth Amendment's Due Process Clause) was violated by the trial court's exclusion of evidence pursuant to O.C.G.A. § 17-16-6. A defendant has no unqualified constitutional right to present evidence that violates a state's rules of evidence and procedure, and probative evidence may, in certain circumstances, be precluded when a criminal defendant fails to comply with a valid discovery rule. Here, the trial court's finding that the defendant's attorney took actions in bad faith was based on evidence that the attorney engaged in willful misconduct designed to obtain a tactical advantage for the defense by enabling destruction of evidence, in violation of the Discovery Act, to prevent the State from inspecting the evidence to rebut the mechanical malfunction defense. Accordingly, there was no constitutional bar to the trial court's order entered under O.C.G.A. § 17-16-6 excluding the defense evidence.

DUI; Actual Consent

State v. Williams, A16A0509 (7/7/16)

This was an appeal following remand in *Williams v. State*, 296 Ga. 817 (2015) ("Williams I"), in which the Supreme Court vacated the trial court's original order denying the motion to suppress, as well as the judgment of conviction, holding that the trial court "failed to address whether Williams gave *actual consent* to the procuring and testing of his blood, which would require the determination of the voluntariness of the consent under the totality of the circumstances." (Emphasis in original.) Following a hearing in the trial court on remand, the trial court found that articulable suspicion supported the traffic stop and that the officer had probable cause to arrest Williams. The trial court then identified the primary question before it as "whether or not the Defendant gave actual consent and

voluntary consent to the state administered test," tracking the Supreme Court's directive in *Williams I* to address the issue of actual consent and the voluntariness of the consent under the totality of the circumstances. The trial court found that Williams's communications with the officer during the field sobriety evaluations indicated that he was confused, noting Williams's failure to properly follow the officer's instructions on the HGN, walk and turn, and the one-leg stand evaluations. The trial court found that this evidence brought Williams's mental capacity into question and showed that Williams appeared "highly intoxicated." After citing the testimony regarding the reading of the implied consent notice while Williams was handcuffed and sitting in the back of the patrol car and the events at the hospital, during which Williams had to lean on the officer for support, the trial court concluded that "[t]he State was able to show that Williams acquiesced to the officer's request that he submit to the state administered blood and urine tests but was unable to show actual consent." Accordingly, the trial court ruled that the results of both the urine or blood tests would not be admissible at trial. The State appealed.

The State argued that the trial court erred in failing to consider all the factors pertinent to the totality of the circumstances analysis. But, the Court stated, it was not aware of any requirement that the trial court expressly address each of these factors in its order, particularly when the State in carrying its burden of proof failed to present evidence on these factors. To the contrary, the trial judge acknowledged that he was required to apply the totality of the circumstances test to the evidence at the hearing, and the trial court's order stated that the court's findings were based on Williams's motion, the parties' oral arguments, "evidence presented, all matters of record and the applicable and controlling law." Accordingly, the trial court did not fail to consider the totality of the circumstances as presented by the evidence and directed by *Williams I*.

Nevertheless, the State argued, the trial court erred in giving too much weight to Williams's intoxicated state in its consideration of the motion to suppress, citing the trial court's finding that Williams was "highly intoxicated." However, the Court stated, a defendant's level of intoxication may be an appropriate factor for consideration among the totality of the circumstances in

determining the voluntariness of consent. Here, the trial court found that the State failed to carry its burden. And because the Court must accept the trial court's factual findings unless clearly erroneous and must construe the evidentiary record in the light most favorable to the factual findings and judgment of the trial court, the Court could not say that the evidence demanded a finding contrary to the trial court's ruling. Accordingly, the trial court's grant of Williams's motion to suppress was affirmed.

Juries; O.C.G.A. § 15-12-139

State v. Desai, A16A0020 (7/12/16)

The State appealed from an order granting Desai a new trial. The record showed that, after the close of the evidence and the retiring of the jurors to deliberate, the trial judge realized that she may have forgotten to administer the petit jury oath. She conducted a brief investigation into the matter, after which she recalled the jurors and administered the oath. The jurors had been deliberating for approximately 38 minutes before they were properly sworn, and they reached a verdict within ten minutes of returning to the jury room. The trial court thereafter concluded that its failure to administer the jury oath prior to the commencement of deliberations rendered the trial a nullity and granted Desai a new trial.

The State argued that because the jurors took the oath before reaching a verdict and there was no evidence of harm, the trial court erred. The Court disagreed. The petit jury oath provided in O.C.G.A. § 15-12-139 is mandatory; consequently, the failure to administer this oath to the trial jury requires the setting aside of any conviction based upon the decision of such an unsworn body. Although its mandate that the trial court give the oath is absolute, the statute does not otherwise prescribe a specific time for the oath to be given. Nevertheless, citing *Adams v. State*, 286 Ga. 496, 497-498 (2) (2010), the Court stated that there is a clear distinction between (1) a jury which is never sworn or not sworn prior to deliberations, and (2) a jury that is belatedly sworn, but the oath is administered before jury deliberations. This distinction is reasonable—and even necessary—because the statutory oath is "jurisdictional in character,"

and is a prerequisite to establishing a “legally constituted” tribunal with lawful authority to pass on the issues being submitted.

Here, it was undisputed that the jury was not administered the petit oath prior to beginning deliberations and, in fact, was not sworn until it had almost rendered a verdict. Thus, the Court concluded, a belated oath of that nature rendered the jury “fatally infirm” and the trial a mere nullity. The trial court, therefore, did not err in granting Desai a new trial.

Search & Seizure

State v. Rucker, A16A0047 (7/12/16)

A trial court granted Charles Rucker’s motion to suppress a handgun recovered in a warrantless search of the camper where he lived while on probation. The evidence showed that a narcotics investigator received an anonymous tip that Rucker was involved in the sale of illegal narcotics from his residence. The investigator also learned that Rucker was on probation for possession of methamphetamine and had signed a waiver of rights as a condition of his probation. Rucker’s residence was a camper, about 15 ft. wide and parked on an open lot. The officers (a) knocked on the door of the camper; (b) entered the camper by the invitation of the woman who answered the door in Rucker’s absence, and (c) saw and seized the handgun at issue from the bedroom.

As a preliminary matter, the Court first found as clearly erroneous the trial court’s factual findings that the officers had “no information” about the woman who answered the door of Rucker’s camper or that the “only evidence in the record” supporting a conclusion that she had authority to give consent was testimony that she had clothing there and “may have been staying there.” Instead, the Court found that the woman’s presence alone in the camper was some evidence of her authority to give consent, and the woman told the officers shortly after they entered, but after they had seen the handgun at issue, that she was involved in a relationship with Rucker and had been sharing a bedroom with him in the camper. Even if the trial court was entitled to disbelieve the officers’ testimony as to what the woman told them on this subject, then, the court was not entitled to mischaracterize the record as not including such information.

Next, the Court addressed the trial court’s finding that the officers “did not articulate any reasonable or good-faith suspicion for the search,” and that the only basis for which was an “unverified” and “anonymous tip.” The Court noted that the evidence supporting the officers’ decision to investigate the anonymous tip included Rucker’s status as a probationer on drug charges and his execution of a valid waiver of his Fourth Amendment rights; the officers undertook an authorized knock-and-talk procedure that did not amount to a search; and there was no evidence in the record to justify a conclusion that they acted in bad faith or with the intent to harass Rucker when they did so. Therefore, the Court found, the trial court erred when it concluded that the officers had no reasonable good faith suspicion. On the contrary, the officers acted properly when they engaged in a knock-and-talk at the door of Rucker’s camper.

The trial court also found that there was no evidence that the woman who answered the door had the authority to allow the officers inside. The Court found this too to be clearly erroneous. As the trial court acknowledged, the woman’s claim that she was living there with Rucker was never disputed or disproved. Furthermore, even assuming that the trial court discounted all the testimony tending to establish that the woman had actual common authority to grant access to the living room of the camper, there was no evidence to support a conclusion that these officers acted in an objectively unreasonable way when they concluded that the woman who invited them inside its common area had common authority or other sufficient relationship with the property such that they could enter. The trial court therefore erred when it concluded that these officers made an illegal entry into the camper’s front room.

Finally, the Court found, it was also undisputed that the officers responded to the woman’s request to enter the camper only to the extent of entering its front room, an area where a visitor would normally be received. Because police were lawfully in the camper’s entry area pursuant to the woman’s invitation to enter that part of the camper, they were lawfully in a position to see the contraband in plain view in the bedroom. Accordingly, the Court reversed the grant of Rucker’s motion to suppress.

Crime Victims; Statute of Limitations

Harrison v. McAfee, A16A0648 (7/7/16)

On June 16, 2011, while patronizing the Shamrock Bar, a masked man burst in and shot John Harrison in the arm. More than two years later, Harrison filed a premises liability lawsuit against the bar’s alleged owners, which the trial court dismissed as time-barred by O.C.G.A. § 9-3-33, the two-year statute of limitations applicable to personal injury claims. In so holding, the trial court rejected Harrison’s claim that the statute of limitations was tolled by O.C.G.A. § 9-3-99. Harrison appealed the trial court’s ruling, explicitly urging the Court to overrule its precedent that restricts the application of O.C.G.A. § 9-3-99 to suits against alleged perpetrators.

O.C.G.A. § 9-3-99 provides as follows: “The running of the period of limitations with respect to any cause of action in tort that may be brought by the victim of an alleged crime which arises out of the facts and circumstances relating to the commission of such alleged crime committed in this state shall be tolled from the date of the commission of the alleged crime or the act giving rise to such action in tort until the prosecution of such crime or act has become final or otherwise terminated, provided that such time does not exceed six years, except as otherwise provided in Code Section 9-3-33.1.”

The en banc Court stated that although its prior precedent has held consistently that O.C.G.A. § 9-3-99 applies only to actions brought by crime victims against persons accused of such crimes, “we now hold that such an interpretation is contrary to the plain language of the statute.” Thus, the Court stated, “If we presume — as we must — that the General Assembly meant what it said and said what it meant, we must conclude that the tolling provision applies here. Harrison is the victim of an alleged crime committed in this state. He has filed a lawsuit containing a cause of action in tort. And his cause of action in tort arises out of the facts and circumstances relating to the commission of the alleged crime; but for the crime, there would be no cause of action. ‘[A]ny cause of action in tort’ that ‘arises out of the facts and circumstances relating to the commission of such alleged crime’ means precisely that; there is no qualifying or limiting language that narrows

the scope of the statute based on the identity of the civil defendant.”

Therefore, the Court concluded, based on the plain language of O.C.G.A. § 9-3-99, the statute applies regardless of whether the defendant in the case has been accused of committing the crime from which the cause of action arises. Accordingly, the Court overruled *Valades v. Uslu*, 301 Ga.App. 885, 888-89(1), (2009), *Columbia Cty. v. Branton*, 304 Ga.App. 149, 152-53(1) (2010), *Mays v. Target Corp.*, 322 Ga.App. 44 (2013), and *Orr v. River Edge Cmty. Serv. Bd.*, 331 Ga.App. 228, 230(1) (2015), to the extent that they improperly limit the statute’s application. The Court also disapproved dicta in *DeKalb Med. Ctr. v. Hawkins*, 288 Ga.App. 840, 847 (2) (c) n.6 (2007) that is inconsistent with the holding of this case.

Lie Detector Tests; Cross Examination

Parfenuk v. State, A16A0636 (7/13/16)

Appellant was convicted of two counts of child molestation and two counts of sexual battery. He contended that the trial court erred by allowing the State to cross-examine him regarding a lie detector test and to admit testimony regarding the results of the test. The Court agreed and reversed.

The general rule in Georgia is that the results of polygraph tests, including voice stress tests, whether favorable or unfavorable to an accused, are not admissible in evidence, as they are not considered reliable. The results of a polygraph examination are inadmissible with two exceptions, by a proper stipulation of the parties, or to explain an actor’s conduct or motive when such is relevant to the issues on trial. Here, the parties did not stipulate to admission of the test results. Rather, the State argued, the results were necessary to explain appellant’s conduct and that separate from the above exceptions to the general rule of inadmissibility, appellant opened the door to introduction of the test results by his own testimony at trial.

The Court held that the trial court erred by allowing the State to introduce the results of the voice stress tests. First, appellant’s statement that he agreed to take a test was not solicited by defense counsel and it appeared to be spontaneous and inadvertent. Further, he did not imply what the results of the test were,

as the State contended. Indeed, at trial the State argued that appellant had implied only that the State refused to allow him to take a test. Second, although appellant may have opened the door to some evidence regarding taking the test, the trial court allowed the State to introduce the *results* of the test, far exceeding any necessary rebuttal. But the results of the test, including that they showed the officer that appellant was being deceptive when he denied the material allegations of the charges against him, invaded the province of the jury. This evidence went to the core of the case, as appellant’s sole defense was that he denied touching the victim on the breasts and vaginal area, and therefore the Court could not say that the error was harmless. Accordingly, the trial court abused its discretion by allowing the voice stress test results into evidence and a new trial was granted.