Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 4, 2015

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State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

- **DUI; Source Code**
- **Bench Conferences; Right of Defendant to be Present at Trial**
- **Voice Recordings; O.C.G.A. § 16-11-66(b)**

DUI; Source Code

Holowiak v. State, A15A0547 (7/15/15)

Appellant was convicted of DUI (less safe) and DUI (per se). This was the fourth appearance of this case in the Court of Appeals. The pertinent facts, briefly stated, are that appellant sought a certificate of materiality to subpoena the source code from CMI, Inc., a Kentucky corporation that manufactures the Intoxilyzer 5000. The trial court denied the motion, determining that the evidence he sought by obtaining a material witness certificate was not material.

The Court affirmed. The Uniform Act to Secure the Attendance of Witnesses from Without the State, formerly codified in Georgia in O.C.G.A. §§ 24-10-90 through 24-10-97 (now O.C.G.A. §§ 24-13-90 through 24-13-97), provides a two-step process by which a witness living in a state other than Georgia can be compelled to attend and testify at a criminal proceeding in Georgia and to bring documents with them. The first step is obtaining a material witness certificate in the Georgia trial court. In ruling on a motion for a material witness certificate, the trial court must consider whether the sought-after out-of-state witness meets the definition of "material witness." A material witness is a witness who can testify about matters having some logical connection with the consequential facts, especially if few others, if any, know about these matters.

In *Cronkite v. State*, 293 Ga. 476 (2013), the Supreme Court held that a defendant who wished to obtain the Intoxilyzer 5000 source code was required to show that the witness' testimony regarding the source code bore a logical connection to *facts* supporting the existence of an error in his breath test results. In applying *Cronkite* here, the Court stated that it was incumbent upon appellant to show that the out-of-state witness' testimony regarding the Intoxilyzer source code, or the source code itself, bore a logical connection to facts supporting the existence of an error in his breath test results. But, the Court found, in his brief, appellant did not detail or discuss any evidence he presented to satisfy this burden. Rather, he distinguished *Cronkite* in a single sentence, stating: "[*Cronkite*] has no bearing on the instant case because [unlike the defendant in *Cronkite*, he] presented a large amount of evidence to support how the specific facts of his case could render a false reading." In support of this assertion, he summarily cited to ten volumes of transcripts from his first jury trial, thereby violating Court of Appeals Rule 25 (c) (2) (i), which requires that "[e]ach enumerated error shall be supported in the brief by specific reference to the record or transcript." It is a sound rule of appellate practice that the burden is always on the appellant in asserting error to show it affirmatively by the record. It is not an appellate court's responsibility to cull the record on behalf of the appellant to find alleged errors. Therefore, the Court concluded, appellant failed to satisfy his burden of showing error in the trial court's determination that appellant did not establish the materiality of the

testimony or evidence he sought by requesting a material witness certificate.

Bench Conferences; Right of Defendant to be Present at Trial

Gillespie v. State, A15A0146, A15A0149 (7/16/15)

Appellants Gillespie and Collins were convicted of armed robbery and aggravated assault. Both argued that their constitutional rights were violated because they was not present at bench conferences during jury selection at which several potential jurors were discussed and excused, and one potential juror was questioned and discussed. The Court stated that the constitutional right to be present does not extend to situations where the defendant's presence would be useless — for example, during bench conferences dealing with logistical or procedural matters or questions of law about which a defendant presumably has no knowledge. However, unequivocally, a defendant is entitled to be present during discussions that involve whether to replace prospective jurors. Although counsel may waive a defendant's presence, in order for the waiver of counsel to be binding on the defendant, it must be made in his presence or by his express authority, or be subsequently acquiesced in by him. In this context, a defendant's presence means that he can "see and hear" the proceedings. Any denial of the right to be present under the Georgia Constitution is not subject to harmless error review on appeal and is presumed prejudicial.

The Court addressed each appellant's assertions separately. As to Collins, the State argued that he waived his right to be present. The Court stated that the burden to prove waiver was on the State. Here, Collins's trial counsel testified that he did not believe he told Collins — or had ever told any client — of a right to be present. Collins's trial counsel stated that he did not recall telling Collins what took place during the bench conferences. Such statements did not suffice as evidence to satisfy the State's burden. Rather, they showed nothing more than counsel's inability to recall what happened, which amounts to an absence of evidence. No action or statement by Collins himself showed a waiver of his rights. Given that the trial court did not immediately excuse the juror (apparently because it did not want to influence other jurors who might attempt to evade service by also claiming hardship), Collins could not have acquiesced in a decision he did not even know was taking place.

Moreover, the Court found, contrary to the trial court's determination, the record clearly showed that at least one of the bench conferences at issue did not consist of merely legal argument of which Collins would have had no knowledge. Juror Solomon testified at voir dire that if required to serve, he would suffer financial hardship, his lights would be cut off, and he would be very distracted. The trial court made the *discretionary* decision to excuse him from service for hardship reasons. In this instance, the Court stated that it could not say that Collins would have been unable to offer his counsel a meaningful opinion as to whether Juror Solomon should be excused. Nor did counsel's failure to recall whether Collins's opinion would have been useful alter this determination. Collins's conviction was therefore reversed, and remanded for a new trial.

The Court then addressed the same issue regarding Gillespie. Unlike Collins' trial counsel, Gillespie's counsel testified that he was "very aware" that his clients have a right to participate in bench conferences, and while he did not recall discussing that right with Gillespie or asking that Gillespie be given headphones so he could listen, Gillespie's counsel testified that he "typically would tell my client that they have a right to come up[.]" He also did not recall telling Gillespie what happened during bench conferences, but testified that "if I didn't I would be extremely surprised because, I mean, obviously … I would tell him just as a matter of course what's going on." Gillespie testified that he was never told of his rights and that if his lawyer told him he could be present at the bench conferences, he would have been. The trial court found that "even had trial counsel not informed the Defendant, the Court finds and concludes that there is no evidence that, had the Defendant participated, he would have had any knowledge, thoughts, or input that could have assisted his counsel or his case."

The Court stated that because the trial court's order appeared to describe only what Gillespie failed to show, it was unable to discern with certainty whether the trial court was casting the burden of proving waiver on Gillespie or on the State. While Gillespie bears the burden of showing that he was denied the right to be present at bench conferences, the State bears the burden of showing that Gillespie waived that right. Because the trial court's order was unclear, the Court vacated Gillespie's conviction and remanded the case for the trial judge to reconsider whether the State met its burden to show waiver.

Voice Recordings; O.C.G.A. § 16-11-66(b)

London v. State, A15A0751 (7/16/15)

Appellant was convicted of child molestation and aggravated child molestation. He contended that the trial court erred in denying his motion to suppress a recording of a telephone conversation between him and the child. The Court agreed and reversed.

The evidence showed that after going to the police with her allegations, the detective asked her to call appellant "[t]o get him to admit what he did." When appellant answered the phone, the police conducted what the detective referred to as a "reverse phone call"; the police recorded the conversation with a video device and reduced the recording to a DVD format. Essentially, the victim transmitted the conversation over her speakerphone device and it was subsequently recorded and played for the jury.

The Court stated that O.C.G.A. § 16-11-62(4) prohibits any person from intentionally and secretly intercepting a telephone call by use of any device, instrument or apparatus. However, a party to the conversation is not prohibited from recording it. O.C.G.A. § 16-11-66(a) provides another exception to O.C.G.A. § 16-11-62 that allows such an interception where one of the parties to the communication has given prior consent. O.C.G.A. § 16-11-66(b) requires that consent for the recording or divulging of the conversations of a child under the age of 18 years conducted by telephone or electronic communication shall be given only by order of a judge of a superior court upon written application. More specifically, O.C.G.A. § 16-11-66(b) provides that the telephone conversations of a child under 18 years of age may be recorded and divulged if, upon written application by a private citizen, law enforcement agency, or prosecutor's office, a judge of a superior court and the child consent to such taping.

The State relied on *Malone v. State*, 246 Ga.App. 882 (2000) to support the trial court's ruling. But, the Court found, *Malone* is distinguishable. Unlike in *Malone*, here there

was undeniably third party interception of the conversation by law enforcement. The idea to record the conversation originated with the police; the victim went to the police station twice at the behest of the police to make the reverse phone call, and police recorded the conversation on their equipment. Moreover, there was no evidence that the police had informed the victim of their intent to record the conversation, let alone evidence that they had obtained her consent to record it. In either event, the Court stated, the police would still have been required to obtain consent for the recording by a court order pursuant to O.C.G.A. § 16-11-66(b). Notably, the judge would have been authorized to issue such an order only upon finding probable cause that a crime had been committed, determining that the child's participation in the recording would not be harmful to the child, and finding that the child understood that the conversation was to be recorded and that the child agreed to participate.

Furthermore, the Court found, the DVD recording contained incriminating statements by appellant, and its admission into evidence was not harmless. Appellant took the stand and denied having committed the indicted offenses, and there was no evidence that he had given police any confession or other incriminating statement(s). Nor was there any physical evidence connecting him to the crimes. A sample of carpet from the victim's bedroom was tested for the presence of seminal fluid and the results were negative; a sexual assault examination that was performed on the victim revealed no evidence of injury or of penetration; and the nurse who had conducted the examination made no "assault-related findings." Moreover, during deliberations, the jury asked to view the DVD of the telephone conversation with the transcript. Therefore, the Court concluded, the admission of the DVD was not harmless beyond a reasonable doubt.