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Georgia Court of Appeals Reversals

SEARCH & SEIZURE: No articulable suspicion to authorize stop of car; Nervousness not enough to justify detention; Consent not valid if produce of wrongful detention; Taint of bad stop not attenuated by probation condition. APPEAL: De novo review of trial court's order when facts disputed. Adkins v. State, Case No. A90A0342 (June 5, 2009).

The Court of Appeals reversed Adkins' methamphetamine possession conviction, finding that the trial court erred in denying her motion to suppress. Because the facts of the case were undisputed, the Court applies a de novo review to the trial court's application of the law to the facts. State v. Palmer, 285 Ga. 75 (2009).

The Court agreed with the trial court's findings that the initial stop was invalid, and the State did not take issue with it. Officers were responding to an anonymous call about a suspicious white car parked with its lights off in a neighborhood cul-de-sac. The caller said that two people were in the car. The officers found no car in the cul-de-sac, but a white Cadillac with one person in it was pulling away from the area, and they stopped it. Adkins produced her valid driver's license, and explained that she had been dropping her boyfriend off at his parent's house and that they had sat in the car with the lights off because his parents were asleep in the house; when he got out, she left. Adkins was shaking and would not maintain eye contact with the officer.

Checking her license, the officers discovered that Adkins was on active probation. Adkins said it was for possession of meth, and admitted that a condition of her probation was that she had to submit to a search and to provide a specimen. She consented to a search of her car, and the drugs were found in a change purse. She said the drugs belonged to her boyfriend, who denied it when the officers called him.

The Court said that the anonymous call was insufficient to create a reasonable suspicion of criminal activity. Further, there was no evidence that the neighborhood was a high-crime area, or that it was illegal to park there, or that Adkins was involved in any illegal activity. The Court rejects her extreme nervousness as supporting her detention – nervousness alone is not enough to justify a detention, and, besides, the officers' observation of her nervousness "arose directly from the illegal stop." Bell, 295 Ga. App. 607 (2009).

The Court found that the State could not meet its burden of showing that, under the totality of the circumstances, Adkins' consent was valid despite the wrongful detention. The Court finds that, considering the "temporal proximity" of the consent to the illegal stop, the lack of intervening circumstances, and the misconduct of exploiting the discovery that Adkins was on probation with a search condition, the taint of the unreasonable stop was not sufficiently attenuated. Brooks, Case No. SO8G1898 (April 28, 2009); State v. Lanes, 287 Ga. App. 311 (2007); Baker, 277 Ga. App. 520 (2006).

SEARCH & SEIZURE: Authority to search car incident to arrest is limited; Passenger has standing to indirectly challenge. Simmons v. State, Case No. A09A0279 (July 13, 2009).

The Court of Appeals vacated Simmons' cocaine trafficking conviction and remands the case for the trial court to reconsider its denial of Simmons' motion to suppress in light of Arizona v. Gant, No. 07-542 (April 21, 2009) which was decided after the briefs in Simmons' appeal were due.

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Simmons was a passenger in a car which pulled into the parking lot of a restaurant. An officer recognized the car from the previous day when he'd discovered that it was not insured and not registered. As the driver, Swicord, walked toward the restaurant, the officer arrested him. Simmons and another passenger were asked to get out of the car so that it could be searched. Marijuana was found. Simmons was arrested and was taken to jail alone in the back of a patrol car. After he took Simmons into the jail, the transporting officer searched the backseat of his patrol car and found a bag of cocaine wedged into it.

The Court first said that Simmons did not have standing to directly challenge the search of the car since he asserted no possessory interest in it or in the items in it. By arguing that he was illegally detained during the search of the car, however, he had indirectly challenged that search, which challenge the trial court denied based on the "totality and the exigency of the circumstances." State v. Menezes, 286 Ga. App. 280 (2007).

The Court then discussed its decision in the driver's appeal (Swicord, 293 Ga. App. 545 (2008) in which, relying on New York v. Belton, 453 U.S. 454 (1981), it had held that the officer having properly arrested Swicord, he was authorized to search the entire passenger compartment of the car and any closed containers in it. Belton allowed such a search "as a contemporaneous incident of an arrest of the vehicle's recent occupant."

Meanwhile, however, Gant was decided, and it limited Belton. Gant held that police may "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."

SEARCH & SEIZURE: No reasonable articulable suspicion for stop; Consent was product of illegal detention; Exceeded scope of consent. OBSTRUCTION: Not when trying to avoid an illegal detention. Walker v. State, Case No. A09A1539 (August 20, 2009).

The Court of Appeals reversed Walker's convictions for cocaine possession and obstruction, finding that the police had made a constitutionally improper stop of him.

Several officers were patrolling a street known for drug activity, but there had been no reports of such that day. Walker and three other guys were standing on the street, and when they saw the cops, they started to walk into a yard. One of the officers said, "Hey, hold on guys, come here." The men were told to sit on the pavement. Walker appeared very nervous; the officer could see his heart beating through his shirt. The officers patted the men down "for officer's safety because of what we were dealing with." The officer who frisked Walker said that the pat-down was based on his "experience with dealing with narcotics, and you know, the type of people that sell narcotics normally have weapons." Nothing was found during the pat-down.

The officer conducted a "field interview" of Walker, asking who he was and what he was doing there. He asked if he could search him. Walker said he'd already searched him. The officer said, no, I only patted you down for weapons. He explained that he wanted to look inside his pockets. Walker said ok.

After finding nothing in Walker's pockets, the officer pulled out the waist of Walker's pants, looked into his crotch area, and saw a cloth bag. The police then started to handcuff him, and he tried to pull away. The officers tackled him, and told him to put his hands behind his back. He didn't, and he stood up. The officers shot him with a taser gun. The bag was seized – it had cocaine in it.

After discussing the three tiers of police/citizen encounters, the Court finds that the second-tier, Terry-stop here was not authorized – the officers had no "particularized and objective basis for suspecting that Walker" was involved in criminal activity. There'd been no reports of drug activity, the men had not been seen flagging people down, and Walker had not fled, he'd only taken a couple of steps and had come back when the police called out. The men were simply on a public street during daylight hours. "Walker's . . . nervousness in the presence of . . . police . . . even in a known drug area, does not provide a basis for the suspicion required under Terry.

"At best, the officer's stated reasons raised a subjective, unparticularized suspicion or hunch . . . The detention here was unreasonable . . . [a]nd . . . Walker's attempt to avoid the illegal detention cannot support an obstruction charge."

The Court said that it is "required to scrutinize closely an alleged consent to search." Walker's consent was, first of all, the product of the illegal

detention, and so was not valid. Secondly, a consent search is limited by the permission – Walker had agreed to a search of his pockets, not to a look into his crotch. Terry v. Ohio, 392 U.S. 1 (1968); Foster, 285 Ga. App. 441 (2007); Black, 281 Ga. App. 40 (2006); Holmes, 252 Ga. App. 286 (2001); State v. Gibbons, 248 Ga. App. 859 (2001); Springsteen, 206 Ga. App. 150 (1992).

SEARCH & SEIZURE: No probable cause for stop; STIPULATION: Is an admission in judicio. Pritchard v. State, Case No. A09A1181 (September 2, 2009).

The Court of Appeals reversed Priscilla Pritchard's bench trial conviction for possession of methamphetamine.

An unidentified caller told the police that there were suspicious vehicles at a residence which the police had recently identified as a drug house. Deputy Morrison responded, and the person who'd called in the tip flagged him down and told him that a Toyota truck and a Toyota Camry had just pulled out of the driveway. Morrison saw them, and as he approached the Camry, driven by Pritchard, it pulled into a driveway. Morrison followed the truck and pulled it over because it was "loaded up with several items" and it did not have operational tail lights. He had another officer check out the Camry.

That officer spoke to Pritchard, and found out that she did not live at the residence where she'd pulled in. On the car's center console he saw a baggie which turned out to have meth in it. He asked her to "come back down.' Morrison testified that, at that point, Pritchard was not free to leave.

At trial, the parties stipulated that Morrison had stopped Pritchard's car, and that she was arrested after the other officer saw the baggie.

The Court found that the trial court erred in concluding that Morrison had probable cause for the traffic stop. The Court first notes that it could not accept the State's argument on appeal that because Pritchard had stopped on her own, that there had been no traffic stop; it was a mere first tier encounter when the officer approached her. The State's specific stipulation that "Morrison had stopped the vehicle that [Pritchard] was driving" was an admistion in judicio which was conclusive and binding on the parties. In the Interest of R.J.M., 295 Ga. App. 886 (2009).

There was nothing about the citizen's information or the observations by Morrison which justified an investigative stop. "[A]n officer does not have reasonable, articulable suspicion to stop an individual who is driving near or parking near a location where crimes have been committed." Hughes, 269 Ga. 258 (1998); State v. Hopper, 293 Ga. App. 220 (2008); State v. Mallard, 246 Ga. App. 357 (2000).

INDICTMENT: Failure to allege essential element of first-degree arson; CORPUS DELICTI: Not the same as same elements of the crime. Palmer v. State, Case No. A09A1142 (July 15, 2009), Shelnutt v. State, Case No. A07A2304 (February 7, 2008).

Elva Palmer and Katrina Shelnutt were jointly tried and convicted of first-degree arson, criminal damage to property, threatening a witness and intimidating a witness. The Court of Appeals reversed Shelnutt's first-degree arson conviction and her 15-year sentence in Shelnutt, 289 Ga. App. 528 (2008), and, referring to that case for the facts and adopting its rulings, now does the same for Palmer.

Palmer and Shelnutt were charged with having burned up a guy's car; the indictment alleged that they had committed first degree arson by unlawfully and knowingly damaging the car by means of fire and without his consent.

Under O.C.G.A. §§16-7-60 and 16-7-62, there are four ways of burning (or blowing up) a vehicle (and other things) such that it is arson in the first degree: without the owner's consent knowingly damaging by fire any vehicle designed for use as a dwelling, burning an insured vehicle, burning a vehicle with the intent to prejudice the rights of a spouse or co-owner, or burning a vehicle under such circumstances that it reasonably foreseeable that human life might be endangered.

Under O.C.G.A. §16-7-61, arson in the second degree is committed by burning (or blowing up) a vehicle (or other things) without the owner's consent. Second degree carries a fine of up to $25,000 and imprisonment of up to ten years; first degree is $50,000 and 20 years.

Although the proof at trial may have supported first-degree arson convictions, the indictment was defective as to first-degree arson in that it did not allege any of the four elements which would make it such. Smith v. Hardrick, 266 Ga. 54 (1995); McKay,

234 Ga. App. 556 (1998); Prater, 279 Ga. App. 527 (2006).

Finally, the Court noted that "Cases such as Hurst, 88 Ga. App. 798 . . . (1953) explain that in a case of arson the corpus delicti is the burning of the thing described in the indictment by the defendant by criminal means. The essential elements of a crime differ, however, from the corpus delicti. Under Georgia's statutory scheme, arson in the first, second, and third degree are legally distinct crimes with different elements and penalties, although the corpus delicti may be the same."

JURORS: Failure to excuse for cause. Garduno v. State, Case No. A09A0686 (July 13, 2009).

The Court of Appeals reverses Garduno's child molestation convictions, finding that it was a manifest abuse of discretion for the trial court to deny his motion to excuse a juror.

When the juror was asked why she hesitated when asked if she could be fair and impartial, she explained that she had worked for the Department of Family and Children Services for ten years investigating molestation cases and interviewing victims, and that she had been trained to always "believe the victim is telling the truth." She said she would be biased towards the victim in the case, and that Garduno would have to present evidence controverting the victim in order to sway her opinion.

Although she agreed, when pressed by the prosecutor, that kids aren't always truthful, and that she could render an impartial verdict, the Court says that "these types of talismanic questions and responses are not determinative." Any reasonable person wants to believe that they can set aside preconceptions and inclinations. Moreover, even after answering the prosecutor, the juror again revealed her bias by saying Garduno would have to present contrary evidence to overcome her bias.

"Under these circumstances, the prosecutor's questioning did not rehabilitate the juror, and the trial court manifestly abused its discretion in refusing to strike her for cause." Valentine, 265 Ga. App. 139 (2004); Park, 260 Ga. App. 879 (2003); Brown, 116 Ga. App. 577 (1967).

APPEAL: Issue preserved when motion in limine is made and denied; EVIDENCE: Improper to allow prior conviction. Hampton v. State, Case No. A09A0809 (September 9, 2009).

The Court of Appeals reversed Hampton's cocaine possession and trafficking convictions, finding that the trial court erred in admitting extraneous evidence of a crime unrelated to the one on trial.

During the traffic stop which led to his arrest, the officer asked Hampton if he was on probation. He said he was – for cocaine. The trial court denied Hampton's motion in limine to keep out that response.

The Court finds that Hampton's "probation for an unspecified prior offense involving cocaine had no bearing on his guilt or innocence of the offense charged, particularly in the absence of any motion by the State to introduce it as a similar transaction. Robinson, 192 Ga. App. 32 (1989).

The Court could not find that the error was harmless. Hampton had vigorously denied knowing anything about the drugs or money found in his car, and he'd made no other statement.

The Court rejected the State's argument that Hampton had waived the issue by not renewing his objection at the time the evidence was introduced; the denial of the motion in limine preserved the issue for appeal. Watson, 278 Ga. 763 (2004).

DISCOVERY: Improper exclusion of alibi witness for reciprocal discovery violation. Ware v. State, Case No. A09A0343 (June 5, 2009).

Ware had opted in for reciprocal discovery in his armed robbery case, and the State made a demand that he provide notice of intent to offer an alibi defense. (O.C.G.A. §§17-16-2; 17-16-5). During the weekend prior to trial, his counsel faxed notification to the State of his intention to call Ware's mom as an alibi witness. The State moved to exclude her on the ground that the notice was untimely.

Ware's attorney said that the mother did not have a constant address or phone. He'd simply not been able to reach her, and had just learned that she could corroborate that Ware was with her at the time of the robbery. The witness was present and available for the State to talk to.

The trial court granted the State's motion to exclude her, saying that it's ruling was "based on the [c]ourt's finding, not of bad faith, but that the

defense ha[d] failed to comply with the requirement for written notice of alibi."

The Court of Appeals reversed Ware's conviction, saying that by the plain terms of the discovery statute, the trial court is authorized to impose the most severe of the possible sanctions for a discovery violation (exclusion of a witness) only upon a showing of "prejudice and bad faith." The statute also provides that the trial court may order the defendant to permit an interview of the witness.

The Court could not say that the error was harmless since Ware's sole defense was misidentification by the victim. O.C.G.A. §17-16-6; Tubbs, 276 Ga. 751 (2003): Massey, 272 Ga. 50 (2000); State v. Jones, 283 Ga. App. 539 (2007); Brown, 268 Ga. App. 24 (2004).

INEFFECTIVE ASSISTANCE OF COUNSEL: Failure to object to expert opinion. Pointer v. State, Case No. A09A1146 (July 17, 2009).

The Court of Appeals reversed Pointer's child molestation and sexual battery convictions, finding that his trial counsel rendered ineffective assistance in failing to object to certain expert testimony.

Dr. Steven Knauts, a clinical psychologist, testified for the State as an expert in "sexual evaluation and treatment." He testified about what the child had told him that Pointer, her father, had done to her, and about showing her certain testing cards. The prosecutor asked what the child's response was to the cards, and, without objection, Knauts said that her responses were consistent with her reports that her father had molested her. The prosecutor then asked for Knauts's "overall impression," and he responded that "the results of the evaluation strongly suggest[] that [the child] had been sexually abused as alleged." The prosecutor asked, "...that sexual abuse was perpetrated . . . by her father. Is that correct?" Knauts said "correct." Defense counsel objected that the witness could say only that "someone" had abused the child. The trial court sustained the objection, saying the expert could say the child was sexually abused, but that it was for the jury to decide who the abuser was. No curative instruction was asked for.

It has been well-established that an expert may not give his "opinion as to the existence of *vel non* of a fact (in this case, whether the child had been abused sexually) unless the inference to be drawn...is beyond the ken of the jurors..."

It's ok for an expert to say that the results of the exam of the child were *consistent* with sexual abuse. But he may *not* say that it's his opinion that the child was sexually abused – that invades the province of the jury by "providing a direct answer to the ultimate issue..."

The "strongly suggests" language used by Knauts "falls somewhere between [those] two types of testimony" since he stopped "just short" of giving his opinion that the child was sexually abused. But, considered in context with the "as alleged" language, "the testimony amounts to [an improper] factual conclusion." Counsel was ineffective in not objecting to it.

The Court could not say that "but for the deficiency, there is [not] reasonable probability that the outcome of the trial would have been different." The evidence against Pointer was not overwhelming, and depended heavily on witness credibility. Harris, 261 Ga. 386 (1991); Allison, 256 Ga. 851 (1987); Osbourne, 291 Ga. App. 711 (2008); Mann, 252 Ga. App. 70 (2001).

INSUFFICIENT EVIDENCE: Possession of firearm during felony. Clyde v. State, Case No. A09A0096 (June 10, 2009).

Clyde was convicted of being in possession of a firearm during the commission of felony drug offenses. The drugs were found in his house, buried in a canister under a grill in his backyard, and in a wooded area behind his house on the other side of a fence. A sawed-off shotgun was found wrapped in plastic and buried under cinder blocks 30 feet from the house.

Under O.C.G.A. §16-11-106(b), a person commits a felony if, while in the commission of certain crimes, he has "on or within arm's reach...a firearm." No evidence was presented as to the distance between the shotgun and the drugs. "Clyde's conviction cannot be sustained unless there was evidence that he had immediate access to the weapon while possessing [the drugs]." Carswell, 251 Ga. App. 733 (2001).

INSUFFICIENT EVIDENCE: Drug Trafficking. Foster v. State, Case No. A09A1315 (October 13, 2009).

Foster was a passenger in a car which belonged to his brother, and which was being driven by Woods. During a traffic stop during which Foster

seemed more nervous than Woods, "the car took off," and the cops chased it into Alabama at speeds exceeding 100 mph. The car crashed, and Woods and Foster ran.

Two kilos of cocaine were in the trunk under some clothing. Woods pled guilty just before Foster's trial started.

A deputy testified that he did not know whose clothes were in the trunk. He agreed that he'd "messed up" by not fingerprinting anything. He said he "probably could not give a straight answer" as to what connected Foster to the cocaine. Another deputy also testified that he did not have any evidence connecting Foster to the cocaine.

The Court of Appeals said that the driver is presumed to have exclusive possession of contraband found in a car, and that such presumption can be rebutted by evidence that others had equal access to it. But "Foster did not own, drive, or otherwise 'possess' the car, so that presumption never even arose in the first place."

Further, since the evidence was circumstantial, it had to exclude all reasonable hypotheses other than Foster's guilt. It was not enough that Foster was present and nervous and fled: and "[t]he other factors argued by the State that Foster and Woods were in the same band, that Woods ditched the car in a neighborhood where Foster had family, and that they ran in the same general direction – are not even circumstantial evidence of a crime." Mitchell, 268 Ga. 592 (1997); Washington, 253 Ga. App. 611 (2002); Denham, 144 Ga. App. 373 (1997).

JURY INSTRUCTION: Failure to charge defense of coercion; Failure to charge as to sole defense even without request. Waller v. State, Case No. A09A0358 (July 31, 2009).

The Court of Appeals reversed Waller's armed robbery convictions, finding that the trial court erred in failing to instruct the jury as to Waller's defense of coercion.

JURY INSTRUCTION: Failure to give §24-4-6 circumstantial evidence charge. Butler v. State, Case No. A09A1104 (May 28, 2009).

The Court of Appeals reversed Butler's convictions for furnishing alcohol to a person under 21, holding that the trial court erred in failing to give Butler's requested charge on circumstantial evidence pursuant to O.C.G.A. §24-4-6, which provides that "to warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused."

JURY INSTRUCTION: Failure to charge essential element: Knowing victim was cop. Fedd v. State, Case No. A09A0641 (June 11, 2009).

The Court of Appeals reversed Fedd's conviction for aggravated assault on a police officer and remands for the trial court to re-sentence him on the lesser included offense of aggravated assault, finding that the trial court erred in failing to instruct the jury that an essential element of the crime is knowledge that the victim is an officer.

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