



CASE LAW UPDATE DECEMBER 1, 2010

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ADMINISTRATIVE HEARINGS

Neal v. Augusta-Richmond County Personnel Board, A10A0705 4/28/10

Administrative disciplinary hearings are neither fitted with all the trappings of criminal procedure, nor all the trappings of civil procedure; however, each party must be afforded a fair opportunity to present its case. A fair hearing includes the right to confront and cross-examine witnesses.

ARTICULABLE SUSPICION/PROBABLE CAUSE FOR ARREST

Groves v. St., A10A1499 11/15/2010

Groves was parked at the edge of an otherwise empty parking lot at a truck plaza. As Groves was leaving the lot, he was stopped, consented to a search, and oxycodone was found in the car. HELD: The stop was illegal because there was no articulable suspicion for the stop; NOTE: This is different than the situation where the officer approaches a parked vehicle; since in this case Groves had already begun to move the car and the officer actually "stopped" the car, there must be reasonable articulable suspicion to justify the stop.



Van Aucken v. St., A10A0462 7/6/2010

Van Aucken moved to appeal the trial court's denial of a motion to suppress a traffic stop for

violating the "move over" law. The officer testified that his vehicle was moving, and Van Aucken asserts that the move over law applies to stationary vehicles. The Appeals court affirms the trial court's ruling that the stop was valid based on the officer's good faith belief that a traffic violation had been committed.

St. v. Mohammed, A10A1188 5/27/10

The arresting police officer watched defendant following another car, although there were two lanes of travel in the same direction. The officer testified that he believed defendant was following too closely, in violation of O.C.G.A. § 40-6-49(a) and he conducted a traffic stop of the car. Based on evidence collected during the traffic stop, defendant was charged with driving under the influence of alcohol. The police officer testified that defendant was repeatedly tapping his brakes and appeared to be having trouble estimating the distance in between him and the vehicle in front of him and that the distance was less than advisable when following people on roadways generally. The trial court apparently found that the police officer was not credible and rejected much of his testimony. The trial court agreed that the lead car was not maintaining a constant speed and that defendant's repeated tapping of the brakes resulted from his attempt to maintain the speed limit. Therefore, the police officer did not have a valid cause for initiating the stop. The appellate court was required to accept the trial court's determinations on credibility.

St. v. Parke, A10A0089 5/18/10

Officer did not have reasonable suspicion to stop defendant driver for impeding traffic, where defendant was traveling above the posted minimum speed limit and only a few miles below the posted maximum speed limit when his vehicle was passed by two vehicles that were speeding. U.S.C.A. Const.Amend. 4; O.C.G.A. § 40-6-184(a).

Butler v. St., 303 Ga App 564 4/7/10

A police officer flagged down Butler after seeing her leave the scene of a domestic dispute. She was later arrested for DUI; in a very strange decision, the Appeal Court holds that this was a "first-tier" encounter and did not amount to a Terry stop! The court ignored



O.C.G.A. §40-6-395 (visual stop); Judge Mikell: "no application because she was free to leave after being stopped and consented to further detention!??"

St. v. Damato, A10A0274 1/29/10

The Appeals Court affirms trial court's granting of Damato's motion to suppress; Damato was involved in a one car accident; she claimed a deer had run out in front of her and she had lost control; had bloodshot eyes, admitted drinking earlier; and tested positive on the alco sensor; HOWEVER the trial court ruled that the admission of drinking and positive alco sensor are not sufficient for probable cause to arrest; the State failed to show the defendant's driving ability was impaired due to the consumption of alcohol, and evidence which only shows the presence of alcohol is insufficient as a matter of law to constitute PC to arrest for DUI.

St. v. Encinas, A09A2151 2/12/10

The trial court granted Encinas' Motion to Suppress on grounds of lack of probable cause

to arrest for DUI. Encinas was stopped for speeding 70/55. Other than bloodshot eyes and odor of alcohol, there were no physical manifestations of alcohol impairment; there was no evidence of Encinas driving erratically; the officer did not administer the HGN correctly. The Court of Appeals affirms the trial court's ruling.

CHEMICAL TESTING

Scoggins v. St., A10A1427 11/10/2010

Scoggins was charged in part with a DUI per se; the State did not admit the Intox slip because it was lost; instead the Intox operator used the Intox log sheet to introduce evidence of the breath test results. The Court of Appeals affirms the DUI per se conviction, but apparently because Scoggins did not object to the admission of the Intox log sheet.

St. v. Tan, 10A0A687 7/8/2010

Tan was arrested for DUI; when she was administered the breath test, she spit out the tube, and the test results indicated an "insufficient" sample; at trial, the Defendant's attorney moved for a suppression of Tan's "refusal" on the grounds that the State had not provided a scientific report 10 days prior to trial. The Court granted the Defense motion. HELD: Since no result was actually obtained on the Intox, there was no "scientific test result to provide, hence the Defendant's motion should not have been granted.

CONSTITUTIONAL

Garrett v. St., A10A1294 10/13/2010

Garrett was involved in an accident with serious injuries and later pled guilty to DUI in a Municipal Court; he was later indicted for Serious Injury, and filed a plea in bar alleging double jeopardy under Federal statutes. The Trial court denied his plea in bar, but the Appellate court reversed, holding that both

under Federal and State double jeopardy laws, he State was barred from prosecuting Garrett.

Padilla v. Kentucky, US Supreme Ct 08-861 3/31/10

The lawyer for an alien charged with crime has a constitutional obligation to tell the client that a guilty plea carries the risk of deportation.

Head v. St., A09A2039 3/18/10

Head was charged with O.C.G.A. §40-6-390(a)(2), and 40-6-390(a)(6); he was involved in an accident, arrested for DUI, and a subsequent blood test showed the presence of alprazolam and benzoylecgonine, a cocaine metabolite. The Court Of Appeals rejects Head's argument that 40-6-390(a)(6) is violative of equal protection in that it arbitrarily distinguishes between those who are legally entitled to use cocaine and those who are not.

DISCOVERY

Yeary v. St., A09A1786 2/10/10

Yeary appeals the trial court's decision to deny a pre trial motions seeking production of the source code on the Intox 5000 from CMI. The Court Of Appeals goes into detail about the Uniform Act to Secure Out of State Witnesses, then says that because Yeary's Motion only sought production of the source code, and not a witness, the trial court's decision was affirmed.

EVIDENCE

Fletcher v. St., A10A1374 11/24/2010

In a vehicular homicide case evidence of the victim's failure to wear a seat belt is inadmissible where the defendant's conduct was a substantial factor in victim's death.



Clark v. St., A10A1332 8/26/2010

Clark argued that the trial court erred in restricting his cross-examination of the arresting officer. The indictment against Clark initially included a charge for failure to maintain lane, and the officer testified at the suppression hearing that she first noticed Clark because of this failure. Before trial, however, the State entered a nolle prosequi as to the lane violation. It then moved in limine to preclude Clark from questioning the officer about the violation at trial. Clark objected, arguing that he was entitled to introduce evidence of the officer's "prior inconsistent statements" regarding the violation, particularly her failure to mention it at a previous administrative hearing. Concluding that the lane violation was irrelevant following the nolle prosequi, the trial court overruled Clark's objection and granted the motion in limine. HELD: Arguably, the lane violation was relevant to whether Clark was under the influence of alcohol to the extent he was less safe to drive. But the trial court directed a verdict of acquittal as to this charge when the State offered no proof of less safe driving. Exclusion of the lane violation evidence was not only harmless with respect to this charge, it likely inured to Clark's benefit.

Worsham v. St., A10A0530 7/6/10

Worsham was arrested for speeding; at trial the State Trooper was unable positively identify Worsham; still the Court finds that a defendant can be identified through direct evidence. Although the trooper could not positively identify Worsham in court, the State presented direct evidence of Worsham's guilt with the trooper's testimony that he had positively identified Worsham as the speeder when he stopped him by examining the photograph on his driver's license. See Hatcher v. St., 175 Ga. App. 768 (334 S.E.2d 709) (1985) ("The eyewitness' failure positively to identify appellant in court did not invalidate [his] earlier unequivocal identification.").

FIELD SOBRIETY

Parker v. St., A10A1605 11/23/10

Parker moved to suppress the HGN because the officer administered the lack of smooth pursuit portion too quickly; the other portions of the HGN were administered correctly and apparently the officer found 4 clues on those portions. The Court holds that since the HGN was "substantially" administered according to the officer's training, the trial court did not err in denying the Defendant's motion to suppress.

Duncan v. St., A10A 0651 6/28/10

A strange case where even though the officer admitting not administering the HGN correctly, based on the officer's testimony that he substantially complied with his training, the trial's court did not err in admitting the results of the HGN.

Bravo v. St., A10A0363 5/28/10

HGN: Whether the officer can testify as to a numerical BAC based on HGN should be determined on a case by case basis; whether Deputy Nash's method of estimating a specific numeric BAC based on an HGN test can "be verified with such certainty that it is competent evidence in a court of law.

Bramlett v. St., A10A0397 2/25/10

Bramlett moved to exclude testimony about field evaluations, alleging that he was compelled to perform the tests in violation of Georgia Constitution not to incriminate oneself. The Court Of Appeals rejects such argument, holding: In Montgomery v. State, and more recently in Clark v. State, we concluded that a DUI suspect had not been compelled to perform field sobriety tests in violation of his right against self-incrimination, where "he was not threatened with criminal sanctions for his failure to perform the tests; he was neither physically forced to do the tests, nor was there

a show of force tantamount to an actual use of force; and he did not refuse to perform the tests." In the case at bar, as in *Montgomery* and *Clark*, there was no evidence of any threats or force by the investigating officer. And under Georgia law, an investigating officer is not required to advise a suspect that his performance of field sobriety tests is voluntary. The evidence authorized the trial court to find that Bramlett voluntarily performed the field sobriety tests after being asked by Runion to do so.

HABEAS/SENTENCE MODIFICATION

Alford v. St., S10A0062 4/19/10

Alford was convicted of DUI and minor in possession of alcohol, after representing himself; he filed a habeas alleging his constitutional right to an attorney was violated. "We granted a certificate of probable cause to determine whether Alabama v. Shelton, 535 U.S. 654 (122 S.C. 1764, 152 L.Ed.2d 888) (2002) applies retroactively to Alford's convictions because Alford was unrepresented by counsel. We hold that it does."



Sentinel v. Harrelson, S09A1624-6 3/15/10

The Supreme Court affirms the trial court's ruling that Harrelson's Habeas should have been granted because when she entered a plea without an attorney, by simply signing a form waiver, she did not knowingly waive her rights.

IMPLIED CONSENT

In re R.M., A10A1353 8/2/2010

RM had argued that because the notice informs the under 21 person that his/her license will be suspended for a year for a blood alcohol result of .02 or more, and because the suspension is

actually 6 months for a BAC under .08, that the implied consent warning is misleading. The Court of Appeals holds that the under 21 paragraph of the Implied Consent notice is sufficient.

St. Metzger, 303 Ga. App. 17 3/22/2010
Implied consent is misread when cop designates "blood, breath or urine." Right to independent test is violated when cop tells Defendant his blood test would occur at the hospital.



JURY SELECTION/ CHARGES

MacBeth v. St., 304 Ga. App. 466 6/17/2010
MacBeth was charged with DUI; he challenged the jury list, alleging that African-Americans were underrepresented. The Trial Court ruled that it had no jurisdiction, but the Appeals Court reversed and remanded.

SEARCH/SEIZURE

Brogdon v. St., S09G2058 7/12/2010
The issue is whether the State can obtain "private papers" through a search warrant. O.C.G.A. §17-5-21(a)(5) exempts private papers from a search warrant. Since the medical records that were the subject of the search warrant in the case at bar were neither the personal property of appellant nor were they seized from his possession, they did not constitute the "private papers" that are exempt from coverage of a search warrant in Georgia under OCGA § 17-5-21(a)(5). Accordingly, Court of Appeals did not err when it affirmed the trial court's denial of appellant's motion to suppress.

Nesbitt, St., v. A10A610 7/8/2010

The Appeals Court affirms the granting of Nesbitt's motion to suppress drugs found after Nesbitt's car stopped; the officer testified that he followed Nesbitt suspecting him of being an impaired driver; Nesbitt turned into an apartment complex, parked halfway into a space, got out of his car and fled the scene. Holding that Nesbitt had not abandoned the car, the Court finds the search of Nesbitt's car illegal.

Humphreys v. St., A10A0763 6/8/10

Humphreys was stopped when the officer ran a tag check through GCIC. The information came back that the vehicle was registered to a male and the male's license was suspended. The officer testified that a male was driving the car, and based on information from GCIC and NCIC, he stopped the car. The Appeals Court reaffirms rule that if the officer confirms information provided by GCIC, the stop is valid.

State v. Curles, A10A0086 5/28/10

Police went to Curles home in response to a concerned citizen's call regarding a possible drunk driver. Curles mother allowed the police to enter the home. Curles was awakened by his mother and asked to come downstairs, where he was interviewed by the police; the trial court found that a reasonable person in Curles position would have believed he was in custody; the Appeals court disagreed and reversed the trial court's granting of the motion to suppress.

Grimes v. St., A10A0156 4/22/10

Grimes was approached in a convenience store parking lot, and subsequently arrested for driving on suspended license; the officer searched the vehicle and found meth; the trial court denied Grimes' motion to suppress, but this was before the Arizona v. Gant case. This case is remanded to trial court to determine

whether the search was an inventory search, in which case it would still be valid in spite of *Gant*.

St. v. Jones, A10A0857 4/1/10

Two policemen on bicycle patrol each approached the driver's and passenger's sides of a vehicle respectively, where a female was leaning into the driver's side window and a male (later identified as Jones) was sitting in the



passenger seat. Neither officer observed the violation of any laws. After speaking briefly with the female and determining that she was fine, the officer on the driver's side observed Jones remove a "Crown Royal" bag from the cup holder and hold it in his hand, while a pizza box lay in his lap. Jones began to exit the vehicle but was prevented from doing so by the presence of the second officer on the passenger's side. He replaced the bag in the cup holder. The first officer asked what was in the bag, but Jones did not reply. The officer repeated his question several times, but Jones again declined to answer, at one point attempting to place the pizza box over the bag. The officer leaned into the vehicle and opened the bag so he could see its contents, which appeared to be cocaine. The officer seized the bag and determined that it contained cocaine, the drug "ecstasy," and marijuana. There are three tiers of police-citizen encounters: (1) communication between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment, (2) brief 'seizures' that must be supported by reasonable suspicion, and (3) full-scale arrests that must be supported by probable cause. In the first level, police officers may approach citizens, ask for identification, and freely question the citizen without any basis or belief that the citizen is involved in criminal

activity, as long as the officers do not detain the citizen or create the impression that the citizen may not leave. The second tier occurs when the officer actually conducts a brief investigative Terry stop of the citizen. In this level, a police officer, even in the absence of probable cause, may stop persons and detain them briefly, when the officer has a particularized and objective basis for suspecting the persons are involved in criminal activity. During this first-tier encounter, Jones was free to "refuse to answer or ignore the request[s of the officer] and go on his way if he [chose], for this [did] not amount to any type of restraint and is not encompassed by the Fourth Amendment." (Punctuation omitted) Black v. State. Indeed, at this point, "a citizen's ability to walk away from or otherwise avoid a police officer is the touchstone of a first-tier encounter. Even running from police during a first-tier encounter is wholly permissible." (Citation and punctuation omitted.) *Id.* at 44(1), 635 S.E.2d 568. However, as expressly found by the trial court, once the second officer prevented Jones from exercising this right and exiting the vehicle, the encounter escalated to a second-tier encounter. See Thomas v. State. Yet Jones had done nothing to give rise to "a particularized and objective basis for suspecting [he was] involved in criminal activity." McClain, supra, 226 Ga. App. at 716(1), 487 S.E.2d 471. All he had done was obtain the bag from the cupholder and attempt to exit the vehicle, which he was certainly entitled to do in a first-tier encounter. His decision to exercise that right can hardly give rise to a reasonable suspicion of criminal activity; otherwise, a citizen could never exercise his right to avoid an officer without that officer then claiming that the exercise of that right gave the officer a reasonable suspicion of criminal activity. Such logic would automatically escalate every first-tier encounter (where a citizen exercised his right to walk away or ignore the officer) to a second-tier encounter. See Black, supra, 281 Ga.App. at

46(1), 635 S.E.2d 568 ("[s]uch conduct may not provide the basis for elevating the encounter to a second-tier Terry stop").

State v. Long, A09A2196 1/5/10

Following a traffic stop, an officer with the Kennesaw Police Department found marijuana inside a car driven by Jordan Taylor Long and in which Harrison Hunter Irvin was a passenger. After Long and Irvin were charged with possession of marijuana with the intent to distribute, they filed separate motions to suppress the evidence found in the search of the vehicle. The trial court granted the motions, finding that the police officer did not have legal authority either to initiate the traffic stop or to expand the traffic stop and subject Long and Irvin to a continued detention. The state appeals from the grant of the motions, but we find no trial court error and affirm.

SPEEDY TRIAL

Meder v. St., A10A986 8/27/2010

An interesting look at the 4 factors to determine whether defendant's constitutional right to a speedy trial has been violated.



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