



TRAFFIC/CRIMINAL CASE LAW UPDATE DECEMBER 31, 2009

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(The following is a list of case summaries alphabetical by subject matter. –Ed.)

ACCUSATION

Page v. State, A09A0196 (Ct. App 3/4/09)
The accusation charging Page with DUI *per se*, O.C.G.A. 40-6-391(a)(6), stated that she had “benzolecgonine, a controlled substance, in her blood system.” Actually that compound is a compound of cocaine; while the Court of Appeals says the accusation could have been drafted better, the accusation still sufficiently places the Defendant on notice of the crime charged.

King v. State, A08A2025 (Ct. App 3/2/09)
Here, the DUI *per se* accusation alleges that King “was in actual physical control of a moving vehicle on Piedmont Road with an alcohol concentration of 0.08 grams or more within three hours after being in actual physical control ended [sic], in violation of O.C.G.A. § 40-6-391.” The accusation should have read “before driving ended.” However, the accusation was not fatally flawed, because it put the Defendant on notice that he was charged with DUI under § 40-6-391.

ARTICULABLE SUSPICION/PROBABLE CAUSE FOR ARREST

State v. Goode, 298 Ga. App. 749 (2009)
Ms. Goode was arrested for DUI to the extent it was less safe for her to drive (O.C.G.A. § 40-6-391 (a) (1)). She filed a motion to

suppress on the ground that the arresting officer lacked probable cause to believe that she was an impaired driver. Following an evidentiary hearing, the trial court granted the motion. The State appealed, contending that the evidence demanded a finding that probable cause existed for Goode’s arrest. The Court of Appeals affirmed, “Here, the arresting officer provided other testimony supporting an inference that Goode was not an impaired driver, namely, her proper operation of her vehicle, her successful completion of the field sobriety tests, her coherent interaction with the officer, and her steadiness on her feet after exiting the vehicle. The officer also admitted that Goode’s glassy and watery eyes were not bloodshot and could have been caused by any number of alternative factors. Finally, when the trial court viewed the videotape of the traffic stop, the court had the opportunity to observe Goode’s speech, balance, and dexterity prior to her arrest. Given this record, we must conclude that there was evidence to support the trial court’s finding that Goode was not an impaired driver.”

State v. Burke, A09A0375 (Ct. App. 6/30/09)
The State appealed the grant of Burke’s motion to suppress evidence gathered following the stop of his vehicle and subsequent arrest for DUI – less safe (O.C.G.A. § 40-6-391 (a) (1)). The trial court ruled that there was insufficient evidence of impairment and no testimony to suggest that Burke was a less safe driver. The Court of Appeals reversed. The evidence showed that the arresting officer encountered Burke at 10:26 p.m., when he observed that the

license plate on Burke's vehicle had expired. The officer stopped Burke and asked to see his license and insurance. He noticed that Burke's eyes were bloodshot and watery, and he smelled a "very strong odor of alcoholic beverage" coming from inside the vehicle. The officer asked Burke to step to the rear of the vehicle. Burke complied, and the officer noticed that he was unsteady on his feet. He explained that Burke had to hold on to the door as he exited the vehicle and had to lean against the vehicle as he walked to the rear. The officer also noticed a "very strong odor of alcoholic beverage coming from his breath outside the vehicle." At the officer's request, Burke agreed to take an alco-sensor test, which registered positive for alcohol. The officer testified that he then arrested Burke, because he believed Burke was under the influence of alcohol to the extent he was less safe. Burke was transported to jail where he refused to provide breath samples for the Intoxilyzer 5000. No evidence was presented at the hearing that contradicted any of these facts. The trial court found insufficient evidence for probable cause, but the Court of Appeals held: "We have previously held that either the presence or odor of alcohol on a driver's breath, or a positive alco-sensor result, would not alone support an inference that the driver was impaired. Handley v. State, 294 Ga. App. 236, 238, 668 SE2d 855 (2008). But under the combination of circumstances here, the evidence, including the officer's observation that Burke was unsteady on his feet, had bloodshot and watery eyes, exuded a strong odor of alcohol, and tested positive on the alco-sensor test, was sufficient to support a finding of impairment."

State v. Felton, A08A1817 (Ct. App 3/26/09)
The trial court granted Felton's Motion to Suppress Marijuana found during search of vehicle, holding that the officer, who originally stopped Felton for not wearing a seat belt, impermissibly exceeded the scope of the stop;

even though Felton gave consent to search, the search was illegal. The Court of Appeals affirmed, holding: Although the State argues that the officer could continue the detention

a f t e r t h e conclusion of the traffic stop based on the consent, "[i]t is well settled that if the officer continues to detain the



subject after the conclusion of the traffic stop and interrogates him or seeks consent to search without reasonable suspicion of criminal activity, the officer has exceeded the scope of a permissible investigation of the initial traffic stop." Bennett v. State, 285 Ga. App. 796, 798, 648 SE2d 126 (2007) (punctuation and footnotes omitted). "It is the unsupported additional detention, not police questioning, which constitutes the Fourth Amendment violation." Evans v. State, 262 Ga. App. 712, 715 (1) (a), 586 SE2d 400 (2003).

State v. Rish, A08A1922 (Ct. App. 1/14/09)
The trial court granted Rish's motion to suppress on the issue of probable cause to arrest. Rish was stopped for weaving, admitted drinking 3 or 4 drinks, and agreed to an alcohol sensor. The Court of Appeals affirmed as to the granting of motion as to DUI – less safe, but reverses on the DUI *per se*, effectively holding that the results of an alco-sensor can be used to form probable cause for a DUI *per se* charge.

CHEMICAL TESTING

Holowiak v. State, A08A1872 (Ct. App. 1/8/09)
Holowiak appealed the trial court's order which failed to find the computer source code for the Intoxilyzer 5000 machine used to test his blood alcohol concentration was "necessary, material, and relevant, so that the appellant could procure

evidence... by means of subpoenaing an out of state witness.” The Court of Appeals affirmed, saying Holowiak failed to meet his prima facie burden of showing the State had possession, custody, or control of the source code.

DISCOVERY

State v. Smiley, A09A1827 (Ct. App. 12/22/09)
The Court of Appeals affirmed the trial court's granting of a motion to suppress for failure on part of State to comply with O.C.G.A. § 40-6-392 (a)(4), the misdemeanor discovery statute.



Stetz v. State, A09A1474(Ct. App. 10/28/2009)
Stetz had filed a discovery motion under O.C.G.A. § 40-6-392(a)(4) requesting the State to provide certain information relating to the breath test machine used in this case. The issue for the Court of Appeals was the scope of “full information” under this code section. The Court held that since the machine calculates the results, the only discoverable information from an intox test under § 40-6-392(a)(4) is the computer printout of the test result. NOTE: This decision only affects discovery requests pursuant to § 40-6-392(a)(4), not discoverable information sought by subpoena.

State v. Miller, A09A0086 (Ct. App. 6/29/09)
Miller was charged with robbery. When he was arrested, the police confiscated a cell phone, which Miller claimed contained information about two alibi witnesses. The State had filed a request to destroy the cell phone, alleging that “the items of property to be destroyed had been

unclaimed for more than ninety (90) days after their seizure, or following the final conviction in the case of property used as evidence, and such items [were] no longer needed in a criminal investigation or for evidentiary purposes.” The trial court issued an order allowing the cell phone to be destroyed. After learning of the destruction of the phone, Miller’s attorneys filed a Motion to Dismiss, which was granted. The trial court found “that because the police officer had seized the cell phone without any real justification, because the police department could have delivered the cell phone to Miller while he was being held in custody, because the police department had destroyed the cell phone in violation of O.C.G.A. § 17-5-54 and through representations in the application that were inaccurate, and because the police officer who seized the cell phone did not appear and testify at the hearing on Miller’s motion to dismiss, acts amounting to conscious wrongdoing by the State had been shown so as to justify dismissal of the two charged offenses. The Court of Appeals affirmed, holding that the trial court was authorized to find a denial of Miller’s right to due process under the federal constitution and to order dismissal of the criminal charges because of the State’s destruction of the cell phone.

EVIDENCE

Melendez-Diaz v. Massachusetts, 07-591 (U.S. Sup. Ct 6/25/09)

The U.S. Supreme Court had the following issue: whether a state forensic lab report prepared for use in a criminal prosecution is “testimonial” evidence subject to the demands of the “confrontation clause” set forth in the Sixth Amendment and in Crawford v. Washington, 541 US 36 (2004). Answering in the affirmative, the Court held that the Sixth Amendment requires the testimony of the lab technician.

IMPLIED CONSENT

State v. Carder, A09A2083 (Ct. App. 12/11/09)
Ms. Carder was involved in a fatal accident; although the officer had some contact with Carder on the scene, he did not read her the Implied Consent until after she had been taken to the hospital and he had further questioned her. Reversing the trial court's suppression of her refusal, the Court of Appeals held that the officer did not form probable cause to arrest until after he had observed Carder at the hospital exhibit glossy eyes, slurred speech and the odor of alcohol.

Thrasher v. State, A09A1406 (Ct. App. 9/22/09)
Thrasher filed an appeal alleging ineffective counsel, arguing that trial counsel should have filed a motion to suppress a blood test which came back positive for methamphetamines. Thrasher had been in an accident and had been arrested for leaving the scene, but not DUI. The Court of Appeals held: "The State's claim to the contrary notwithstanding, the record before this Court shows only that Thrasher was arrested for leaving the scene of the accident at or about 4:48 p.m. when Sergeant Tucker began questioning him. Thrasher was read his implied consent rights at 5:45 p.m., 57 minutes later. There is no indication that Thrasher was formally arrested for driving under the influence at either point in time. Inasmuch as the arresting officer must read a person's implied consent rights contemporaneously with an arrest for driving under the influence involving an accident (O.C.G.A. §§ 40-5-55 and 40-6-392(a)(4)), we must first determine whether Thrasher was under arrest for driving under the influence in the circumstances of this case, and if so when." The Court goes on to say that Thrasher was obviously under arrest at the time the officer actually placed him under arrest for leaving the scene and had probable cause to believe he was under the influence of meth; since there were no exigent circumstances, and

since the implied consent warning was not read until some 57 minutes later, the implied consent warning was not read at the appropriate time and hence the blood test should have been excluded. Accordingly, trial counsel indeed was ineffective.

State v. Rowell, A09A1390 (Ct. App. 7/16/2009)
Ms. Rowell was accused of driving under the influence of alcohol to the extent that it was less safe for her to drive and *per se* DUI. The trial court granted Rowell's motion to suppress the results of her state-administered breath test, ruling that the procedure used by the arresting officer to persuade her to rescind her refusal to take the test was not fair or reasonable. The State appealed. Because there was evidence to support the trial court's factual findings and the court did not commit an error of law, the Appeals Court affirmed the court's ruling. Notably, in its order, the trial court credited Rowell's testimony "that she was told that if she blew under .08 no charges . . . would be made and she would be allowed to go home to her son."



Epps v. State, A09A0832 (Ct. App. 6/29/09)
After a bench trial, Ms. Epps was convicted of driving under the influence of alcohol to the extent it was less safe for her to drive and DUI *per se*. On appeal, Epps challenged the denial of her motion to suppress, arguing that the State did not prove that it complied with the implied consent notice requirements. The Court of Appeals agreed with Epps and reversed. The record showed that Epps was involved in a one-vehicle accident wherein her vehicle made

contact with a utility pole. The officer testified that when he arrived at the scene and encountered Epps, he noticed a strong odor of alcohol emanating from Epps' person; that Epps' ankle was injured; that he allowed E.M.S.



to treat Epps; and that Epps was air lifted to Atlanta Medical Center. The officer drove to the hospital to meet Epps and recalled that as soon as he made contact with Epps, he read the implied consent warning to her, asked her if she would allow the testing of her blood, and informed her that she was under arrest for DUI. On appeal, Epps argued that the trial court erred by denying the motion to suppress for two reasons: (1) there was no evidence of what was read to her; and(2) even if the implied consent rights were read to her, they were read before she was arrested in violation of Georgia law. Because the State did not demonstrate that it met the implied consent notice requirements, the Court of Appeals reversed.

Williams v. State, A09A0836(Ct. App. 4/23/09)
Williams was charged with vehicular homicide, DUI and other various traffic offenses. He moved to suppress the State blood test. The officer asked Williams for a blood test, but failed to advise him of his implied consent rights; the blood test was positive for marijuana. The State responded to the motion by pointing to an amendment to the implied consent statute, O.C.G.A. § 40-5-67.1 (d.1), which provides that nothing in the implied consent statute shall be deemed to preclude the acquisition or admission of evidence of a violation of [the DUI laws] if obtained by voluntary consent or a search warrant as authorized by the Constitution or laws of this state or the United States. The State argued that the amendment, which took

effect in July 2006, should be applied retroactively. The Court of Appeals disagreed: “The implied consent statute grants drivers the right to refuse to take a state-administered test, with one of the consequences of exercising that right being that evidence of such refusal is admissible at trial. Unlike the amendment at issue in the cases relied upon by the State, the amendment here eliminates the need to give the notice where an individual “voluntarily” agrees to testing. This amendment not only changes the substance of the implied consent warning, it does away with the requirement that the warning be given at all where an officer manages to otherwise lawfully obtain consent to testing. This is not merely a procedural or evidentiary change, but one eliminating a defendant’s substantive right to refuse to submit to testing. Therefore, the trial court erred in applying the amendment retroactively and in denying Williams’ motion to suppress.”

Page v. State, A09A0196 (Ct. App. 3/4/09)
After arresting Ms. Page for DUI, the officer requested a blood test. Page said she would take a breath test; after much conversation, the officer allowed Page to call a lawyer; Page agreed to take a blood test and then was given a breath test. Basically, the Court of Appeals held that the officer did not mislead the defendant as to her Implied Consent rights, and therefore the blood test was admissible.

JURY CHARGES

Wells v. State, A08A2043 (Ct. App. 3/27/09)
Wells contended that, by communicating with the jury outside his and his lawyer's presence, the trial court violated his constitutional right to be present at all stages of the proceedings. After being informed that the jury had reached its verdict, but before bringing in the jury, the trial court summoned to the courtroom the prosecuting and defense attorneys (and apparently Wells) for the express purpose of

announcing on the record: “This Court received a communication from the jury that they had reached a unanimous decision on three counts and that they were 11 to 1 on the other three, please advise. I sent them a written instruction to continue to deliberate and try to reach a unanimous verdict. I then got another written communication from them that says, ‘May we have access to the defendant’s testimony, paren, transcript.’ I just discussed that off the record with both attorneys and how I was proposing to answer that to the jury, and before we could bring them in, the bailiffs have just now informed me that we have a verdict. So I don’t think there’s any need in answering this question. They seem to have resolved it themselves.” The Court of Appeals held that the trial court’s communication at issue in this case was not “relating to the comfort and convenience of the jury,” but was instructive to the jurors who sought guidance in light of their inability to reach unanimous decisions on several counts. When a jury is unable to reach a unanimous decision, an *Allen* charge might be appropriate; and any such charge given must not be coercive “so as to cause a juror to abandon an honest conviction for reasons other than those based upon the trial or the arguments of other jurors.” On the other hand, “[w]here the jury is hopelessly deadlocked, . . . a mistrial is necessary.” Given the necessary considerations and significant ramifications, instructions to the deliberating jury concerning its reported deadlocked status on several counts constituted a substantive communication at a critical stage in Wells’ criminal prosecution. In light of well established Georgia principles, such communication having occurred outside the presence of Wells and his attorney mandates reversal of Wells’ convictions.



SEARCH/SEIZURE

Johnson v. State, A09A1141 (Ct. App. 10/6/09) Johnson had been involved in a one-car accident, left the scene and went home. Johnson’s father had flagged down a State Trooper and advised that his son had been in an accident. The trooper went to Johnson’s house, Johnson’s father knocked on the door, and when Johnson came to the door, the trooper asked him to come out. Johnson immediately came out. Johnson alleged at a motions hearing that he was unlawfully seized from his house; the Court of Appeals disagreed. The Court listed the following reasons why this was not an unlawful seizure: 1. When a police officer enters private property only to knock on outer doors, the Fourth Amendment is not violated. 2. If a suspect complies with an officer’s request to step outside the home and is arrested, the detention does not occur inside the home for purposes of Fourth Amendment. 3. The officer did not force Johnson to cross the threshold, unlike other cases where officers were brandishing weapons.

Brogdon v. State, A09A1269 (Ct. App. 8/5/09) Reaffirms King v. State, 272 Ga. 788, 535 SE2d 492 (2000), stating the State can use subpoena powers to subpoena medical records.

Arizona v. Gant, 07-542 (U.S. Sup. Ct. 4/21/09) Respondent Gant was arrested for driving on a suspended license, handcuffed, and locked in a patrol car before officers searched his car and found cocaine in a jacket pocket. The Arizona trial court denied his motion to suppress the evidence, and he was convicted of drug offenses. Reversing, the Arizona Supreme Court distinguished New York v. Belton, 453 U. S. 454 (1981) which held that police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of a recent

occupant's lawful arrest on the ground that it concerned the scope of a search incident to arrest but did not answer the question whether officers may conduct such a search once the scene has been secured. Because Chimel v. California, 395 U. S. 752 (1969), requires that a search incident to arrest be justified by either the interest in officer safety or the interest in preserving evidence and the circumstances of Gant's arrest implicated neither of those interests, the Arizona Supreme Court found the search unreasonable. The U.S. Supreme Court held that police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest.

Bell v. State, A08A1785 (Ct. App. 1/21/09)

Bell was stopped for speeding; the officers detained Bell and his passenger because they were "nervous," and the passenger had "dry mouth." The officers had Bell and his passenger exit the car and wait until a K-9 unit could arrive; the officer saw a bat in the car, and proceeded to search the car without Bell's consent. Officer found meth; Court of Appeals found the search of Bell's vehicle for weapons was not justified under the circumstances and motion to suppress should have been granted.

SPEEDY TRIAL

Grizzard v. State, A09A2301 (Ct. App. 12/14/09)

Grizzard appealed the trial court's denial of his plea in bar, in which he argued that he was denied his constitutional right to a speedy trial. He pointed to the more than eight-year delay between his arrest and the calling of his case for trial. In light of the extraordinarily-long delay, the Court held that the trial court abused its discretion in weighing lightly the State's admitted negligence in bringing this matter to

trial and in discounting the actual prejudice that is presumed in delays exceeding five years.



*Mickey Roberts has been practicing law since 1980 and is a member of the State Bar of Georgia as well as the Gwinnett County Bar Association. A native of Gwinnett County, he graduated from Mercer University *cum laude*, attended Woodrow Wilson College of Law, and at the age of 23, established his law firm. He was the Judge for the City of Lilburn for 15 years before retiring in 1997. Mickey Roberts was also the Judge for the City of Suwanee for 14 years before retiring in December, 2000. He is a member of the National College for DUI Defense (NCDD), as well as Defense of Drinking Drivers (DODD), an exclusive invitation-only association of DUI Defense Attorneys. Mr. Roberts is also a regular speaker at DUI Defense Seminars, and the author of several DUI Defense articles.