DPS Legal Review

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ADMISSIBILITY OF PRIOR CONVICTION EVIDENCE UNDER RULE 404(b)

On January 21, 2011, the defendant was stopped by a police officer for driving in excess of the posted speed limit. The officer noticed the defendant's eyes were red and watery and smelled an odor of an alcoholic beverage coming from the vehicle. Upon the officer's request, the defendant exited the vehicle. The officer asked the defendant whether he had been drinking. The defendant twice denied consuming any alcohol. The officer administered three field sobriety evaluations. After the defendant showed clues of impairment on all three evaluations he admitted that he had drunk two beers at a bar earlier in the evening. Based on his observations and the defendant's performance on the field tests, the officer arrested him. The officer read the implied consent warnings and the defendant consented to state-administered chemical testing of his breath. The testing registered blood alcohol levels of 0.147 and 0.139.

The defendant was charged with DUI per se, DUI less safe, and speeding. During his trial, the state filed a motion to introduce a prior conviction for DUI less safe for the purpose of showing knowledge and intent by the defendant. The trial court allowed the evidence to be introduced by the state.

The defendant appealed contending the trial court erred in admitting the evidence of his prior DUI conviction. The Court of Appeals reversed the defendant's DUI per se conviction holding that evidence of the defendant's prior conviction should not have been admitted at trial because it was not relevant to, or probative of, the commission of the charged crimes because they were general intent crimes and "no culpable mental state was required to commit the crime[s] in the first place." The State petitioned the Supreme Court of Georgia to review the Court of Appeals' decision.

HOLDING: The Court held that other acts evidence may be relevant under Rule 404(b), without regard to whether the charged crime requires specific or general intent, when it is offered for the permissible purpose of showing a criminal defendant's intent and knowledge. O.C.G.A. §24-4-404(b) provides in part that "evidence of other crimes, wrongs, or acts [may] be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The Court applied a three prong test that "in order to be admissible, the State must make a showing that: (1) evidence of […] other acts is relevant to an issue other than a defendant's character…; (2) the probative value of the other acts evidence is not substantially outweighed by its unfair prejudice…; and (3) there is sufficient proof so that the jury could find that the defendant committed the act in question." The Court reasoned that the other act evidence was allowable in this case as it was admitted for the purposes of establishing the defendant's intent and knowledge in the charged crimes of DUI per se and DUI less safe and such purposes are relevant under the rule.

The Court noted that this decision does not signify that evidence of other acts will be admissible in every criminal prosecution to prove intent and knowledge. State v. Jones, 2015 WL 3447824 (Ga.).

ADMISSIBILITY OF PRIOR CONVICTION EVIDENCE UNDER RULE 417 IN DUI PROSECUTION

In the early morning of June 24, 2012, a concierge at a condo complex heard a loud noise and saw on the security monitor that a car had struck an entry gate and was proceeding into the complex. The concierge called 911, searched for the car, and observed the defendant in the driver's seat with the engine running, windows down, and music playing loudly. Three police officers arrived at the scene and confirmed that the car was damaged in a way consistent with it having struck the entry gate. The officers observed that the defendant was still in the driver's seat, that he was not wearing a seatbelt, and that he was drinking from a bottle of wine. The officer detected a strong odor of alcohol and repeatedly asked the defendant to exit the car. The defendant did not comply with their requests and appeared oblivious that the officers were attempting to speak with him. The defendant eventually acknowledged the officers and exited the car. He refused to perform any field sobriety tests or an Alco-Sensor breath test. At the time of his arrest, the defendant refused to summit to a state-administered breath test required by O.C.G.A. §40-5-55(a). The defendant was charged with DUI less safe, among other offenses.

The state gave notice of its intent to present evidence at trial that the defendant had driven under the influence of alcohol on two prior occasions. On both occasions, the defendant had refused the state administered tests. The trial court determined that the evidence would be relevant to prove knowledge under

O.C.G.A. §24-4-417(a)(1). The defendant appealed. The Court of Appeals found that the evidence was not relevant to prove knowledge. The Supreme Court of Georgia reviewed the Court of Appeals' decision.

HOLDING: The Court held the evidence that the defendant had driven under the influence on two prior occasions was relevant to prove knowledge and would be admissible under Rule 417(a)(1). O.C.G.A. §24-4-417(a)(1) provides "[i]n a criminal proceeding involving a prosecution for a violation of Code Section 40-6-391, evidence of the commission of another violation of Code Section 40-6-391 on a different occasion by the same accused shall be admissible when … [t]he accused refused in the current case to take the state administered test required by Code Section 40-5-55 and such evidence is relevant to prove knowledge, plan, or absence of mistake or accident…"

The Court recognized that other acts evidence in such cases could be brought under Rule 417 or Rule 404(b) as in Jones (see previous case). The Court distinguished this case in that Rule 417(a)(1)'s limited applicability is for **DUI prosecutions** where a defendant has refused state administered testing and the evidence of DUI on other occasions is offered to prove one of four specific facts. In its reasoning, the Court discussed how evidence from prior occasions may strengthen the inference that the defendant may have driven under the influence of the same or similar intoxicant; had awareness that his ingestion of an intoxicant impaired his ability to drive safely; and that such awareness would offer an explanation of why he refused the test in his current case. Such inferences would be relevant to the elements of a DUI case that the State has the burden to prove. State v. Frost, 2015 WL 3658821 (Ga.).

ARREST WARRANT NOT NEEDED IF PROBABLE CAUSE EXISTS

On July 3, 2013, an officer stopped the defendant for speeding within the city limits. The officer asked the defendant for his driver's license but he was unable to produce it. The defendant gave his name and date of birth to the officer. The officer ran the defendant's information on GCIC and learned that he had an outstanding warrant for his arrest. The defendant told the officer that the warrant was for his twin brother. The officer contacted the probation office to verify the information and a probation officer advised that the defendant had a tattoo of a pit bull on his right shoulder. Upon seeing the confirmatory tattoo on the defendant's shoulder, the officer handcuffed him and told him to stand by the car. A police unit arrived with a rapid identification unit. Upon scanning the defendant's finger, the test confirmed an outstanding warrant for the name the defendant provided and produced a photograph of the defendant which matched his appearance. The defendant was arrested. A search incident to his arrest revealed contraband.

The defendant was charged with possession of a controlled substance, possession of less than an ounce of marijuana, and speeding. At trial, no evidence was presented to show that the defendant was arrested pursuant to a warrant. The defendant filed a motion to suppress the evidence arguing that his arrest was illegal because it was based on an invalid arrest warrant, allegedly issued for his twin brother, and the State's failure to produce any warrant during discovery or at the motion hearing. The trial court granted the motion. The State appealed.

HOLDING: The Court reversed the motion to suppress the evidence holding that the officers had probable cause to arrest the defendant. The U.S. Supreme Court has held that probable cause to arrest arises once an arresting officer learns of the existence of an arrest warrant and that "[w]hether or not the information about the warrant later prove[s] incorrect or invalid is immaterial." The Court relied on the holding in Harvey in which the U.S. Supreme Court held that probable cause based on the facts and circumstances known to the arresting officer are reliable enough to establish probable cause for arrest. In this case, the officers learned from GCIC about an outstanding arrest warrant for the defendant; verified with the probation office his identity based on a tattoo; and verified his identity through a fingerprint rapid identification device which provided a reliable basis for a determination of probable cause to arrest. State v. Lucas, 2015 WL 3605497 (Ga.App.).

INQUIRING MINDS

Query: Can a sworn Department of Public Safety employee complete a Department of Revenue form T-22B (certification of inspection by a duly constituted Georgia law enforcement officer)?

Answer: Yes. [T]he certification of a VIN shall be made by a duly constituted city, county, or state law enforcement officer if the vehicle was previously registered in a non-title state or county or for the purpose of submitting a title bond.

ALS REMINDERS

If an additional witness is needed for an ALS Hearing, the witness must be subpoenaed. The Court only provides notice to the arresting officer. If you need assistance in subpoenaing an additional witness, contact Dee or Monique.

Published with the approval of Colonel Mark W. McDonough. Legal Services: Melissa Rodgers, Director, Joan Crumpler, Deputy Director, Christina Calloway, Legal Officer, and Dee Brophy, ALS Attorney. Send questions/comments to ccalloway@gsp.net.