



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, May 1, 2017

10:00 A.M. Session

SPENCER V. THE STATE (S16G1751)

A woman is appealing her conviction in **Henry County** for Driving Under the Influence, arguing the police officer used “pseudo-science” in improperly claiming he could determine a person’s numeric blood alcohol level using field evaluations.

FACTS: In the early morning hours of Jan. 31, 2015, Henry County Police Officer Wesley McNure stopped Mellecia Spencer for driving a car with a non-working headlight. Upon approaching the vehicle, the officer smelled alcohol, saw that Spencer was wearing a paper bracelet from a bar with the word “Budweiser” on it, observed a plastic cup with liquid in the car’s center console, and noticed that Spencer’s speech was slurred. She stated she had recently had surgery and she appeared unsteady when she got out of her vehicle. Initially, Spencer denied having been drinking, but later admitted she’d had a margarita. McNure, who had spent two years on a DUI task force and conducted about 1,000 DUI investigations, had Spencer perform field sobriety tests, one of which included the HGN test – or Horizontal Gaze Nystagmus test – which evaluates eye movements. McNure later testified that when administering the HGN test, he looks for certain clues because studies show that a certain number of clues can be indicative of certain blood alcohol levels. He stated that the HGN test is a scientific test validated by studies. Anyone who conducts the study looks for six clues – three in each eye – that have to do

with the involuntary jerking of the eyes. McNure testified that the earlier the jerking begins, the higher the level of alcohol intoxication. On Spencer, McNure observed four of six clues, including sustained involuntary jerking at maximum deviation in each eye. At trial, McNure testified: “Based on my training and experience, four out of six clues generally indicates a blood alcohol level equal to or greater than 0.08.” Georgia’s DUI laws make it illegal for drivers 21 years old and older to drive with a blood alcohol concentration of 0.08 percent or higher. After his investigation, McNure placed Spencer under arrest for “DUI less safe.” He then read her the implied consent notice and asked her whether she would like to take a state-administered breath test. The notice informs people that if they refuse to take the test, their license will be suspended for a year and their refusal may be used against them at trial. Spencer declined to take the test. The jury convicted her of DUI less safe and possessing an open container of alcohol in her vehicle. She appealed to the Georgia Court of Appeals, arguing that the trial court erred by allowing the arresting officer to testify that Spencer’s performance on the HGN test proved a specific numeric blood-alcohol content level. The Court of Appeals acknowledged that such testimony should be excluded, but upheld the lower court’s decision, finding that “the officer did not give such testimony, and instead properly testified that generally an HGN test showing four out of six clues indicates impairment.” Spencer then sought to appeal to the Georgia Supreme Court, which agreed to review the case to determine whether the Court of Appeals erred in allowing admission of the officer’s testimony correlating HGN results with a range of blood alcohol content without reference to whether such correlations have reached a state of verifiable certainty in the scientific community.

ARGUMENTS: Spencer’s attorney argues the trial court erred in allowing the State to use the HGN test to give a numerical figure for her blood alcohol level “since this evaluation has not reached a level of verifiable certainty for this purpose in the scientific community.” Left to stand, the Court of Appeals ruling “would gut” the standard for admitting the admission in a criminal case as announced in the Georgia Supreme Court’s 1982 decision in *Harper v. State*. That standard requires that a procedure must have reached a state of “verifiable certainty in the scientific community.” “Allowing pseudo-science to avoid the *Harper* standard will lead to the innocent being convicted – as may have happened here,” Spencer’s attorney argues. In its opinion, the Court of Appeals stated that, “it is true that an ‘arresting officer’s testimony identifying a specific numeric blood alcohol content based solely on [a] defendant’s HGN result should [be] excluded,’” citing the 2015 decision by the Court of Appeals in *Scott v. State*. Here, the officer “did specify a numeric blood alcohol content based solely on an HGN test.” In its 2010 decision in *Bravo v. State*, “the Court of Appeals found that the HGN is *not* generally accepted in the scientific community as a method of establishing a numeric level for a person’s blood alcohol,” the attorney argues. Finally, “to demonstrate the great danger in allowing the pseudo-science of using an HGN to predict actual blood alcohol results, one need only look to *Travis v. State*.” In that case, a well-trained State Patrol Trooper administered the HGN to the defendant and observed six out of six clues on the HGN test. Yet when the defendant took the state administered breath test, her result was only 0.037 – “less than half what the officer in this case claimed as a ‘scientific’ result based on only four clues.” Given that Spencer had not committed an actual less safe driving act (stopped for equipment violation), and that her physical condition brought into question the validity of any field tests, “the error in allowing the jury to believe that the HGN can scientifically establish a defendant’s blood alcohol level isn’t

harmless,” the attorney argues. Indeed, it may well have been “the single most important piece of evidence leading to the defendant’s conviction.” Spencer should be granted a new trial.

The Court of Appeals and the trial court did not err in allowing in Officer McNure’s testimony, the Solicitor-General, representing the State, argues in briefs. “Appellant’s [i.e. Spencer’s] entire argument that the Court of Appeals erred is centered around the *incorrect fact* that Officer McNure testified he determined *Appellant* had a *specific* blood alcohol content based on the HGN test,” the State argues. The *Bravo* decision specifically states that, “An arresting officer’s testimony identifying a specific numeric blood alcohol content based solely on a defendant’s HGN results should be excluded.” But “*That was not Officer McNure’s testimony,*” the State contends. He did not testify that Spencer had a specific blood alcohol content or even had one that fell in the range of 0.08 or higher. “On the contrary, he testified her HGN results ‘generally correlate,’ ‘generally indicate,’ a blood alcohol content equal to or greater than 0.08.” The HGN test indicates impairment by measuring blood alcohol content levels above and below 0.08 percent, and research shows that levels at or above 0.08 indicate impairment. Georgia law allows courts to take judicial notice that the HGN test is admissible scientific evidence under the standard set out in *Harper v. State*. In 1996, the Georgia Court of Appeals ruled in *Hawkins v. State*, that “we hold that the HGN test is an accepted, common procedure that has reached a state of verifiable certainty in the scientific community and is admissible as a basis upon which an officer can determine that a driver was impaired by alcohol.” The Court of Appeals did not err in finding McNure’s testimony correlating the HGN results with a range of blood alcohol content was properly admitted, the State contends.

Attorney for Appellant (Spencer): Thomas Thomas

Attorneys for Appellee (State): John Pipkin, III, William Kennedy, III

UNDISCLOSED LLC V. THE STATE (S17A1061)

In this high-profile open records case, the makers of a podcast series are asking the state Supreme Court to reverse a **Floyd County** judge’s ruling and allow them not only to *inspect* the audio recordings they requested but also to *copy* them.

FACTS: In 2001, Joseph “Joey” Watkins was convicted in Rome, GA of murder, stalking and other crimes for his role in shooting and killing Isaac Dawkins on Jan. 11, 2000 near Georgia Highlands College. Watkins was sentenced to life plus five years in prison. In 2003, the Supreme Court of Georgia upheld Watkins’ conviction and sentence.

Undisclosed LLC is a Delaware corporation that produces the podcast, “Undisclosed.” Since its debut in 2015, the company claims it has been listened to more than 120 million times. Season One of Undisclosed focused on the case of Adnan Syed, picking up where the hit podcast, “Serial” that ran on National Public Radio, left off. Season Two of Undisclosed, which debuted in July 2016, focused on Watkins’ case. Undisclosed filed an open records request asking to copy the court’s audio recordings of two pretrial hearings and of Watkins’ 2001 trial. In response, Floyd County Superior Court Judge William Sparks ordered Undisclosed to file a motion requesting access to the recordings, which its lawyers did. Georgia’s Uniform Superior Court Rule 21 states that “court records are public and are to be available for public inspection.” On Oct. 28, 2016 the judge granted Undisclosed the right to listen and inspect the tapes but denied its request to copy them. The judge cited the Georgia Supreme Court’s 1992 ruling in *Green v. Drinnon* which stated that an “official court reporter’s tape of a judge’s remarks in open

court is a court record” and that “the tape or [its transcript] must be made available for public inspection.” But the judge wrote that nothing in *Green* entitled Undisclosed to the court reporters’ back-up recordings. Undisclosed now appeals to the state Supreme Court, which is interested in hearing whether a motion filed by Undisclosed, which was not a party in Watkins’ criminal case, was the proper procedural way to get access to the recordings. And the high court is interested in hearing arguments about whether the right to inspect includes the right to copy.

ARGUMENTS: Attorneys for Undisclosed argue they followed the proper procedure in requesting copies of the court records. “For the last 30 years, this Court has consistently recognized a non-party’s right to file a motion pursuant to Rule 21 to obtain access to court records,” they argue in briefs. “Indeed in three cases that have come before this Court, news organizations have successfully pursued a non-party motion pursuant to Rule 21 to obtain access to court records.” A Rule 21 motion is a “fairer and more judicially efficient vehicle for redress than a separate civil action brought against members of the judicial branch,” they contend. A motion is far more efficient than a separate lawsuit against a judge or court clerk. And contrary to the State’s argument, Rule 21 confirms that the rule’s procedure for requesting the sealing of case files applies in *both* civil and criminal cases. Because they followed the correct procedure, this Court should consider the merits of the case. “The heart of this case concerns the trial court’s ruling that the public has no right to copy court records under Uniform Superior Court Rule 21.” Rule 21 “incorporates the common-law right to copy court records,” the attorneys argue. “The recordings requested by Undisclosed are subject to the same robust right of access and copying that would apply to a printed court record.” Undisclosed is a podcast that relies on audio recordings to inform the public about the criminal justice system. “A cold transcript cannot accurately depict the context and nuance of the trial, and is therefore an inadequate tool to further Undisclosed’s interest in fostering public discourse about how the criminal justice system functions.” The records sought are public records, and neither Watkins nor the District Attorney – representing the State – opposed Undisclosed’s request to copy the audio recordings, thus waiving any objection to the copying. “The trial court’s blanket prohibition on copying – which would equally apply to *any* court record – is an affront to the fundamental purpose of open records, which this Court has long recognized: ‘Public access protects litigants both present and future, because justice faces its gravest threat when courts dispense it secretly,’” the attorneys argue, citing the Georgia Supreme Court’s 1988 decision in *Atlanta Journal and Atlanta Constitution v. Long et al.* “As many courts around the country have held, a right to inspect documents without a corresponding right to copy those documents is hollow and essentially meaningless. The real value of open court records lies in the public’s ability to copy and disseminate those records to share in public discussion, to use in other proceedings, to petition for redress, or to otherwise ensure transparency and accountability in their public institutions. A prohibition on copying a court record impermissibly chills the public’s ability to scrutinize and oversee the judicial branch and discover the truth about our State’s administration of justice,” the attorneys for Undisclosed contend.

The State, represented by the District Attorney, argues that by filing a Rule 21 motion in a now-closed criminal case, in which it was not a party, Undisclosed, which it calls an “entertainment company,” did not use the proper vehicle for obtaining access to the trial recordings. Georgia Code § 9-11-24 recognizes the right of interested non-parties to intervene in civil proceedings in Georgia courts. However, “There is no comparable provision giving non-

parties the right to intervene in criminal proceedings in this state,” the District Attorney argues for the State. The Supreme Court cases cited by Undisclosed are all civil rather than criminal cases and were all active proceedings at the time of the sought-after intervention, unlike the Watkins case, which has long been closed. “Even if Undisclosed somehow can assert its right generally to intervene as a party in a criminal case, Georgia Code § 17-10-1 specifically limits the authority the trial court exercises in a criminal case once it is closed,” the State argues. The trial court granted Undisclosed the relief to which Georgia law entitles it – the right to inspect the records. “Rule 21 of the Uniform Rules of Superior Court and its subparts are clear and unambiguous.” The word “inspect” means “to view closely in critical appraisal;” the word “copy” means “duplicate.” The words clearly have different meanings. “The courts of this state, being fully cognizant of the various statutes enacted by the General Assembly and the interpretations given to those statutes, could have provided for the separate right of the public to inspect and copy court records,” the State argues. “Georgia law requires public access to court records. Here, Undisclosed has been provided with access to the transcripts of the trial of this case as well as the right to listen to the court reporter tapes. Furthermore, Undisclosed is not a party to this action and has failed to advance any legal reasoning why its request to copy the tapes should be granted.”

Attorneys for Appellant (Undisclosed): Michael Caplan, Sarah Brewerton-Palmer

Attorneys for Appellee (State): Leigh Patterson, District Attorney, John McClellan, Jr., Asst. D.A.

WILLIAMS V. HEARD ET AL. (S17A1004)

A woman who won a Democratic primary election for a seat on the **Baker County** school board, then ran unopposed in the November general election, is appealing a judge’s refusal to dismiss her opponent’s challenge of the primary election as fraudulent and irregular.

FACTS: Brendette Williams and Sharon Heard ran for the Elmodel District seat on the Baker County Board of Education in the Democratic primary election held May 24, 2016. Following Heard’s defeat by 21 votes, the results were certified on May 27 as accurate, but Heard requested a recount. On June 3, 2016, a recount was conducted and the results were recertified as accurate. Heard then filed a “Petition to Contest Primary Election,” alleging “misconduct, fraud or irregularity” on the part of the Baker County Board of Elections after certain poll workers allegedly made statements to voters in the polling place urging them to vote for Williams and not for Heard. Williams presented a motion asking to intervene as a party in the case, as well as a motion asking the judge to dismiss Heard’s petition as having been filed too late and a motion asking the judge to recuse himself. The judge granted Williams’ motion to intervene and also granted Heard’s request to access the election materials, which included the Recertification of Results from the June 3 primary. The trial court subsequently denied Williams’ motion to dismiss the case and her motion to disqualify the judge. On Nov. 14, 2016, the Georgia Supreme Court granted Williams’ application to review the trial court’s denial of Williams’ motions. Meanwhile, while Williams’ application was pending, the general election was held Nov. 8, 2016 and Williams, who was unopposed, was elected to the school board. Heard then filed an “Application for Injunction/Temporary Restraining Order” to prevent the Elmodel District seat from being filled on Jan. 1, 2017 until the appeal in the state Supreme Court could be resolved. Shortly after, Williams filed an emergency motion with the Georgia Supreme Court

to prevent the trial court from stopping the seat from being filled and this Court denied the motion on Nov. 21, 2016. On Nov. 28, 2016, the trial court ruled in favor of Williams, granting her application for a temporary restraining order to “preserve the status quo” and prevent the Elmodel District seat from being filled for the time being. Williams now appeals to the state Supreme Court.

ARGUMENTS: Williams’ attorney argues that the trial court erred in denying Williams’ motion to dismiss the case because a) the case is moot because there has been a general election since the primary; b) even if it were not moot, the trial court erred in denying the motion to dismiss because Heard missed the deadline for filing her petition to contest the primary results; and c) the trial court erred by denying Williams’ motion asking the judge to disqualify himself. “The most important single fact in this case is the Appellee, Sharon Heard, lost the May 24, 2016 primary election to Appellant [Brendette Williams], by a margin that did not qualify for a mandatory recount,” the attorney argues in briefs. “The Baker County Board of Elections and Registration allowed a discretionary recount during a mandatory recount in another election district of Baker County, in the Newton District.” The chair of the elections board later testified that the board was merely doing Heard a favor by allowing a recount in her case because they were already conducting a mandatory recount. Subsequently, the recount in the Williams-Heard election “netted no difference in the initial count and certification of May 27, 2016, and no official recertification was delivered to the Office of the Georgia Secretary of State Elections Division following the voluntary recount. . . .” The trial court committed reversible error by changing the five-day deadline set by Georgia statute for filing a challenge of the primary results, which would have required Heard to file her petition five days after the May 27 certification or June 1. Instead, the “losing candidate” was given an extension and permitted to file it June 8. The trial court erred in permitting her to do so in conflict with other cases decided by the state Supreme Court which has determined that such a voluntary recount does not extend the five-day deadline for filing a challenge. The trial judge also erred in failing to disqualify himself from presiding over an election challenge as he had only served as a juvenile court judge in Lowndes County who now enjoys senior status but who never served as a superior court judge. “As a consequence, there is a need for this Court to definitively rule upon the issue of whether any senior judge from any level of courts in our state. . . satisfies the statutory requirement, or must the presiding judge be a senior superior court judge or current superior court judge from another circuit as provided in the subject statute governing these proceedings?”

Heard’s attorney argues this case is not moot “because it involves a primary election contest, notwithstanding that the general election has occurred.” While Georgia law provides as a general rule that the “established rule in Georgia is that a primary election contest becomes moot after the general election has taken place,” other states and jurisdictions, such as Florida and Arizona, recognize exceptions to that general principal of law, the attorney argues. Here, Heard was unable to have a hearing on her petition contesting the primary election as irregular, leaving her without an apparent remedy other than filing an application for an injunction to preserve the status quo until her case could be heard. The trial court also did not err when it denied Williams’ motion to dismiss the case on the ground that Heard was late in filing her petition. The results of the recount were recertified on June 3 and posted in the Baker County courthouse. Therefore, Heard, who filed her petition on June 8, filed it within the five days of the recertification, as required by law. Finally, the trial judge did not err in denying Williams’ motion to recuse. The

law states that, “The superior court having jurisdiction of a contest case governed by this article shall be presided over by a superior court judge *or senior judge*.” Other parts of the Georgia Code state that “a judge who ceases to hold office *may become a senior judge* and in that capacity *may be called upon to serve as a justice or judge in any court of this state....*”

Attorney for Appellant (Williams): Henry Williams

Attorney for Appellee (Heard): Lawton Heard, Jr.