

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING NOVEMBER 5, 2010

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## THIS WEEK:

- **Sentencing; Right of Defendant to be Present**
- **Search & Seizure; Roadblocks**
- **Statute of Limitations**
- **Sentencing; Ex Post Facto Laws**

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### ***Sentencing; Right of Defendant to be Present***

*McGruder v. State, A10A1328 (10/15/10)*

Appellant pled guilty to armed robbery and possession of a firearm during the commission of a crime. He contended that the trial court erred in denying his motion to withdraw his guilty plea. The Court found no error because the motion was filed out of term and therefore, the trial court was without jurisdiction to hear the motion.

Appellant also contended that the sentence was void because the trial court amended the sentence in his absence. The record showed that the trial court sentenced him to a term of 15 years. The preprinted disposition form noted the guilty plea to both crimes, but in the sentence section of the form it stated only "Fifteen (15) years." At a hearing held less than a month later at which defense counsel but not appellant appeared, the trial court clarified the sentence as follows: "I'm going to sentence him to 10 on the armed robbery, 5 on possession of the firearm during the commission of the crime. Going to remold that sentence from 15 to 10, give him an extra 5. So that's what I intended at the time. I intended for him to have 15 total years." The Court held that where the defendant's sentence is mandatory or fixed in such a way that, at resentencing, the trial court

is without discretion, the resulting resentencing proceeding is purely ministerial, and it is unnecessary for the defendant to be present at the sentencing hearing or be represented by counsel. Here, the trial court's resentencing was purely ministerial and therefore could be performed in appellant's absence. Moreover, there was no harm because the amended sentence was the same as the original sentence.

### ***Search & Seizure; Roadblocks***

*Rappley v. State, A10A1460 (10/20/10)*

Appellant was convicted of DUI. She contended that the trial court erred in denying her motion to suppress. Specifically, she contended that the roadblock at which she was stopped was illegal. The Court stated that a police roadblock satisfies constitutional mandates where (1) the decision to implement the roadblock was made by supervisory personnel at "the programmatic level," rather than officers in the field, for a legitimate primary purpose; (2) all vehicles, rather than random vehicles, are stopped; (3) the delay to motorists is minimal; (4) the roadblock is well identified as a police checkpoint; and (5) the screening officer has adequate training to make an initial determination as to which motorists should be given field sobriety tests.

Appellant argued first that the evidence failed to show that the roadblock had been properly authorized by a supervisor. The Court disagreed. The purpose of this requirement is to prevent roving patrols in which field officers exercise unfettered discretion to stop drivers in contravention of constitutional protections against unreasonable seizures. The evidence showed that a lieutenant and a corporal with supervisory duties implemented the roadblock. Appellant argued that the internal rules of the

sheriff's department stated that a major should sign off on the roadblock and that while the corporal stated that the major did in fact do so, the major did not testify and the statement was hearsay. The Court stated that it is true that the State must introduce probative evidence from the supervising officer who had authorized the roadblock to establish that the roadblock had been duly authorized, and the hearsay testimony of one who was not the decision maker is insufficient to meet this burden. However, the evidence presented a conflict as to whether the final decision making authority was vested in the lieutenant or in the major and the trial court was authorized to resolve the conflicting evidence as to this disputed issue and find that the lieutenant's decision to implement the roadblock was valid.

Appellant also contended that that the evidence failed to show that the roadblock had been implemented for a legitimate primary purpose since a secondary order that designated additional purposes impermissibly expanded upon the roadblock's primary purpose. The evidence showed that the lieutenant and corporal designated that the primary purpose of the roadblock was to check driver's licenses and to identify DUI drivers. The GSP was assisting in the roadblock and at the hearing, appellant introduced into evidence a secondary order that was issued by the GSP for the roadblock. The Court held that in determining whether a roadblock was initiated for a legitimate, primary purpose, the trial court should look to the testimony of the supervisory officer as to the roadblock's purpose, rather than to the testimony of the field officers. Here, the GSP troopers merely served as field officers assisting with the roadblock under the lieutenant's supervision and command. Moreover, the additional purposes set forth in the GSP's secondary order included the performance of routine traffic checks for insurance, registration, seatbelt compliance, vehicle fitness, and vehicle safety compliance and each of these identified purposes has been held to be a legitimate primary purpose. Therefore, the trial court did not err in denying the motion to suppress.

### **Statute of Limitations**

*Martinez v. State, A10A1904, A10A1905 (10/19/10)*

Appellants, Martinez and Quiroz, were

charged jointly and severally in a 49-count indictment. After a jury trial, Martinez was convicted of 28 counts, including 10 counts of false imprisonment, six counts of armed robbery, four counts of burglary, three counts of aggravated assault, two counts of criminal attempt to commit armed robbery, one count of criminal attempt to commit burglary, one count of kidnapping, and one count of sexual battery. The jury could not reach a verdict as to 18 counts, and acquitted Martinez of the remaining three counts. Quiroz was convicted of 23 of those charges, including ten counts of false imprisonment, six counts of armed robbery, three counts of burglary, two counts of aggravated assault, and a single count each of kidnapping and sexual battery. The jury could not reach a verdict as to five counts and acquitted Quiroz of the remaining eight counts.

The record showed that Martinez, Quiroz and seven co-defendants were originally charged in a 24 count indictment in July, 2004, stemming from a string of home invasions occurring between February and April of 2004. In 2009, the indictment was amended. This new indictment added 25 counts against Martinez that were not included in the 2004 indictment. These new charges included 17 counts of false imprisonment and one count of kidnapping. The new indictment also substituted a charge of criminal attempt to commit burglary, in lieu of one of the burglary charges. Appellants contended that their prosecution for these new crimes was barred by the applicable statute of limitations.

The Court held that because these new crimes were all felonies, prosecution for these crimes had to "be commenced within four years after the commission of the crime," unless the victim of the crime was under the age of 18, in which case the prosecution had to "be commenced within seven years after the commission of the crime." OCGA § 17-3-1 (b), (c). The Court held that because the indictment was in 2009 on crimes occurring in 2004, the charges relating to adult victims were time-barred. As to the three charges of false imprisonment relating to child victims, these had a seven year statute of limitations and were not time-barred.

In so holding, the Court rejected the State's argument that because the new charges arose out of the same incidents that gave rise to the charges in the 2004 indictment, the 2009 indictment should be viewed only as

a superseding indictment and as such, the new charges in the 2009 indictment should "relate back" to the date of the 2004 indictment, and consequently, be viewed as having been indicted within the four-year statute of limitations. The Court, however, found no support for this argument in Georgia law: "A superseding indictment brought after the statute of limitation has run is valid as long as (i) the original indictment is still pending; (ii) the original indictment was timely; and (iii) *the superseding indictment does not broaden or substantially amend the original charges.*" Whether an amended indictment broadens or substantially amends the charges contained in the original indictment depends upon whether the new charges "contain elements that are separate and distinct" from the original charges. In other words, whether the evidence used to prove the crimes charged in the original indictment would be adequate to prove the new crimes charged in the amended indictment. Here, the charges contained in the 2004 indictment included burglary, armed robbery, aggravated assault, sexual battery, and criminal attempt to commit armed robbery. Thus, the State's decision to reissue the indictment so as to include the false imprisonment and kidnapping counts substantially amended the original charges because the offenses of false imprisonment and kidnapping contain elements that are separate and distinct from any of the crimes charged in the original indictment.

Nevertheless, the charge of criminal attempt to commit burglary, which was substituted in lieu of a count of burglary charged in the 2004 indictment did not broaden or substantially amend that charge. This is because the same evidence could be used to prove both the crime and criminal attempt to commit that crime. Therefore, Martinez's conviction on this count was affirmed.

### **Sentencing; Ex Post Facto Laws**

*Relaford v. State, A10A0801 (10/23/10)*

Appellant was convicted of two counts of failing, as a registered sexual offender, to report an address change. He argued that that the trial court erred by sentencing him to 30 years, 15 to serve, on the count that alleged a violation of OCGA § 42-1-12 "on or about April 4, 2007, the exact date being unknown to the grand jurors." By an amendment to

OCGA § 42-1-12 that was effective July 1, 2006, the sentencing range was increased from one-to-three years to ten-to-thirty years. Appellant argued that the sentencing range for his offense was one-to-three years. In support, he cited *Denson v. State of Ga.*, 267 Ga. App. 528 (2004) for the proposition that “[t]he ex post facto clause of the Georgia Constitution prohibits the infliction of a greater punishment than was permitted by the law in effect at the time of the commission of the offense” and contended that the following language included in the final charge authorized the jury to find that he committed that offense prior to July 1, 2006: “[I]f after considering the testimony and evidence presented to you together with other instructions of the Court you should find beyond a reasonable doubt that the defendant committed the offenses of failure of a registered sex offender to report an address change . . . as alleged in the indictment . . . during the statute of limitations, you could find the defendant guilty.”

The Court summarily rejected appellant’s assertion that this charge authorized the jury to find him guilty if it found, among other things, that he committed the offense *at any time* during the limitations period. (i. e. given that the indictment was returned on May 14, 2008, the jury could have found that he committed that offense as far back as May 15, 2004—well before the sentencing amendment.). Instead, the Court determined that because appellant’s argument hinged on a “mischaracterization of the cited language of the jury charge,” the contention was without merit.