

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 21, 2012

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THIS WEEK:

- **Firearms Offense; Merger**
- **Delinquency; Incarceration**
- **Cocaine Possession; Search & Seizure**
- **Probation Revocation**
- **Sentencing; Financial Transaction Card Theft**
- **Juveniles; Hearsay**

Firearms Offense; Merger

Gibson v. State, A12A2052 (12/10/12)

Appellant was found guilty of four counts of possession of a firearm by a convicted felon. He was sentenced to five years as to each count, to run concurrently. The record showed that the four counts pertained to only two firearms. Specifically, Counts 3 and 5 of the indictment charged appellant with possessing a single weapon, a Remington Model 1100 shotgun, on a single day, January 31, 2010. The two alternative counts were based on two different previous felony convictions. Similarly, the record showed that Counts 4 and 6 charged appellant with possessing a single weapon, an Intrac Arms shotgun, on that same day. Appellant contended that because the alternative counts concerned possession of a single weapon on a single day, Count 3 merged with Count 5 and Count 4 merged with Count 6.

The Court agreed. Although the State was doubly able to prove appellant's status as a convicted felon, given his two past felony convictions, Counts 3 and 5 both charged a single offense, that is, one act of being a felon in possession of a Remington Model 1100

shotgun on January 31, 2010. Because Counts 3 and 5 charged a single violation of Georgia law, the offenses merged and the trial court erred in imposing separate punishment for each count. Likewise, the Court found that appellant only committed one act of being a felon in possession of an Intrac Arms shotgun on January 31, 2010; thus, Counts 4 and 6 merged. Accordingly, the Court vacated the judgment and remanded for resentencing.

Delinquency; Incarceration

In the Interest of C.H., A12A1752 (12/11/12)

Appellant was charged in a delinquency petition with public indecency and with a violation of probation. Appellant admitted to both counts during a March 26, 2012, dispositional hearing, and the juvenile court sentenced him to concurrent periods of probation and to 30 days confinement in a youth development center, but the court allowed appellant to begin serving his period of confinement on May 31, 2012, after the end of the school year. In an order clarifying its disposition, the juvenile court noted that the adjudication of delinquency was founded on a finding that appellant's act of public indecency, if committed by an adult, would constitute a misdemeanor. On April 10, 2012, the juvenile court entered an order staying that portion of the adjudication concerning appellant's confinement until the resolution of this appeal.

Appellant contended that the juvenile court was not authorized to impose a period of confinement in a youth development center as a disposition for the delinquent act of public indecency. The Court agreed and vacated the court's disposition order and remanded the case for the entry of a new disposition order. The Court found that the juvenile court is

authorized to impose a period of confinement in a youth development center when a child has been adjudicated delinquent, but only if certain prerequisites have been met. O.C.G.A. § 15-1-66(b) provides that, at the conclusion of the dispositional hearing provided in subsection O.C.G.A. § 15-11-65(a), if the child is found to have committed a delinquent act, the juvenile court may, in the exercise of its discretion, order the child to serve up to a maximum of 30 days in a youth development center in those cases involving: (1) An offense that would be a felony if committed by an adult; or (2) An offense that would be a misdemeanor of a high and aggravated nature if committed by an adult and involving bodily injury or harm or substantial likelihood of bodily injury or harm, in addition to any other treatment or rehabilitation. O.C.G.A. § 15-11-66(b)(2) (A). Here, appellant's delinquent act did not constitute an act which, if committed by an adult, would be punishable either as felony or as a misdemeanor of a high and aggravated nature involving bodily injury or harm or the substantial likelihood of the same. Further, the Court stated that no other provision of O.C.G.A. § 15-11-66 allowed for the imposition of confinement to a youth development center under the circumstances of this case. Consequently, the Court held that the juvenile court's sentence exceeded that allowed by law and was void. The Court also noted that the State did not file a petition for probation revocation, and the juvenile court was not allowed to impose a period of confinement concerning the delinquent act of "violation of probation" by treating the dispositional hearing as a probation revocation proceeding.

Cocaine Possession; Search & Seizure

State v. Cleveland, A12A1148 (10/05/12)

The State appealed the trial court's order granting Cleveland's motion to suppress evidence seized in connection with his arrest for one count of possession of cocaine. The evidence showed that a deputy testified that he stopped a vehicle after observing that the front seat passenger was not wearing a seat belt. As he approached the car, the deputy noticed that Cleveland was a passenger in the back seat of the car and that he appeared to be "unusually nervous." The deputy was aware that Cleveland had previously been arrested for possession of

cocaine. The deputy noticed that Cleveland kept moving his hands, reaching toward the floorboard and moving clothing around in the back seat, prompting the deputy to call for backup. After another officer arrived, the deputy gave the driver a warning about the seat belt violation and told her that she was free to leave. While speaking to the driver, the deputy observed Cleveland watching them through the car's rear window and noticed him reach through to the front of the car. The deputy asked Cleveland to exit the vehicle and then conducted a pat-down search of Cleveland, told him to sit down and asked him to remove his shoes. In this instance, his concern was that Cleveland might have a weapon in his shoe, a razor blade or a pocket knife, or might have illegal drugs that he would attempt to hide or destroy. At some point, the officer told the deputy that Cleveland had thrown a bag of something that appeared to be crack cocaine from his right hand and then stepped on it. The officers subsequently recovered the bag, resulting in the charge in this case.

The Court found that the deputy had objectively reasonable grounds to conduct a pat-down search of Cleveland. However, the Court noted, the deputy's search went beyond a mere Terry-authorized pat-down when he directed Cleveland to remove his shoes. The Court found that such an intrusion beneath the surface of a suspect's clothing required further justification. The Court noted that the deputy never testified that he felt any object in or around Cleveland's shoes or that the shoes were of a material or thickness that would have prevented him from detecting a weapon during a pat-down search; thus, the State provided no evidence to justify requiring Cleveland to remove his shoes. Accordingly, the Court concluded that the trial court correctly found that the search of Cleveland's shoes was not justified under the facts as presented by the State. Furthermore, the Court noted, the State presented no evidence indicating that Cleveland's actions amounted to threatening or obstructive conduct that warranted an immediate intrusive search to investigate or eliminate a threat to his safety. Finally, the Court noted that although the State argued that the cocaine was not discovered as a result of asking Cleveland to remove his shoes, but rather it dropped from his hand, the prosecution failed to raise this argument below, and, in fact, conceded in its briefing to the trial court

that the pat-down search and asking Cleveland to remove his shoes ". . . led to [Cleveland] voluntarily throwing [the] drugs."

Probation Revocation

Dillard v. State, A12A2113, A12A2114 (12/12/12)

After a hearing, portions of the probated sentences appellant received on two separate burglary convictions were revoked. Pursuant to a granted application for discretionary appeal, appellant contended that the trial court erred in admitting into evidence photographs from a Facebook profile that appeared to show him holding a shotgun and that the evidence was insufficient to revoke his probation.

The record showed that an investigator saw photographs on a Facebook profile that appeared to depict appellant, whom the investigator confirmed was then on probation, holding a shotgun. The investigator contacted appellant's probation officer and learned that the probation officer was in the process of trying to locate appellant in order to have him arrested for violating the conditions of probation under his two burglary convictions, specifically, by failing to report to the probation officer as directed and by changing his residence without the probation officer's permission. Based on interviews with appellant's friends and information obtained from the Facebook profile, the investigator determined that appellant might be found at the home of a friend. When the investigator and appellant's probation officer went to the friend's residence, they found appellant alone in a bedroom with a shotgun propped beside the door; the investigator arrested appellant. The State then filed a petition for revocation of probation.

At the conclusion of the hearing, the prosecutor, without referring to any other basis for revoking appellant's probation, argued simply, "here he was in the same room with this weapon at the time of his arrest and he was a convicted felon. Case closed." The trial court stated, "[t]he Court will find that he has violated his probation as alleged [in the petitions]." The written revocation orders, however, stated only that the trial court found that appellant violated the conditions of his probation in each case by his unauthorized change of residence and by his failure to report to his probation officer as directed. The Court noted that the judgments as entered

appeared to have been based upon violations that were not charged in the State's petitions for revocation of probation. The Court further noted that appellant's claims of error on appeal, however, were premised on his understanding that the court's final, written orders contained a "scrivener's error" and that the court revoked his probation based upon a finding that he had possessed a firearm in violation of O.C.G.A. § 16-11-131(b) as alleged in the State's revocation petitions. Similarly, the State maintained that the court found by a preponderance of the evidence that appellant violated the terms of his probation by the commission of the offense of possession of a firearm and addressed his arguments on the merits. The Court found that it could not ascertain the true basis for the revocation of appellant's probation given the discrepancies among the allegations of the petition, the trial court's oral announcement of its decision, the parties' understanding of the trial court's ruling, and the written judgments. Thus, the Court remanded the case to the trial court for clarification.

Sentencing; Financial Transaction Card Theft

Davis v. State, A12A1423 (12/14/12)

In *Davis v. State*, A12A1423 (11/29/12), the Court of Appeals reversed appellant's 150 year sentence without the possibility of parole for three counts of theft by taking and 12 counts of financial identity fraud and remanded the case for re-sentencing, finding the sentence effectively exceeded the trial court's stated intent of a life sentence without parole, finding that an inference of gross disproportionality arose when comparing the gravity of appellant's non-violent property-related offenses with the severity of the sentence, and finding no other Georgia cases in which such a severe sentence was imposed for theft by taking or identity fraud, even in cases of recidivism. Appellant also argued that the trial court erred in relying upon his prior federal conviction to impose recidivist sentencing under O.C.G.A. § 17-10-7, because the State failed to establish that the conviction was a crime, which if committed in Georgia would be considered a felony. The Court found that it would be premature to address this issue on appeal as following remand, new evidence could be introduced and appellant would be resentenced, likely after January 1, 2013, when

Georgia's new evidence code went into effect and the hearsay rules change.

The Court vacated its original opinion and issued a substitute opinion, vacating appellant's sentence and remanded the case for re-sentencing. The Court held that the State did not establish that appellant's prior federal conviction was a crime, which if committed in Georgia would be considered a felony, and thus the trial court erred in relying upon that conviction to impose recidivist sentencing under § 17-10-7. In so holding, the Court noted that the State did not show that the value of the mail at issue in the federal indictment exceeded \$500. Specifically, the Court noted that the recidivist statute "imposes maximum sentences for any person convicted of a felony who was previously convicted under the laws of any other state [or of the United States] of a crime which if committed within this state would be a felony." *Woodson v. State*, 242 Ga.App. 67 (2000). The federal statute at issue made theft or other interference with the mail or receipt of stolen mail a felony, without regard to intent or value. However, the Court noted that Georgia law contained no comparable provision criminalizing the theft or possession of stolen mail per se. The most closely related offenses under Georgia law are theft by taking and theft by receiving stolen property. The prosecutor represented that appellant admitted possessing at least 800 pieces of stolen mail addressed to others and that the mail was used to cause losses in excess of \$10,000 to others. But, the Court noted, even though appellant or others may have used the mail to cause these losses, the State failed to prove the losses and the State presented no evidence concerning the value of the mail and certainly did not demonstrate that the mail or its contents had a value in excess of \$500. Rather the evidence established only that appellant possessed stolen mail, which was all the federal statute required. Thus, it was not necessarily the case that the defendant's federal conviction was for conduct which would be considered felonious under the laws of this state, and that conviction consequently cannot be considered a prior felony conviction within the meaning of O.C.G.A. § 17-10-7(c). Therefore, the Court held, because that trial court erred in imposing a sentence without the possibility of parole, the case was remanded for re-sentencing.

Juveniles; Hearsay

In the Interest of S.C.; In the Interest of L.R., A12A1896, A12A1897 (12/14/12)

S. C. and L. R. challenged Orders of Commitment issued by the juvenile court adjudicating them guilty of certain designated felonies. They asserted that the evidence was insufficient to support the juvenile court's adjudications of delinquency because the rulings were based solely upon hearsay evidence. The State conceded that the evidence was insufficient on this ground to support the juvenile court's judgments, and the Court accordingly reversed.

The record showed that complaints filed in the juvenile court charged both S. C. and L. R. with participation in street gang activity, discharging a firearm on a public street, and reckless conduct. In addition, S. C. was charged with criminal damage to property, and L. R. was charged with criminal damage to property in the first degree. At the hearing concerning the complaints against both S. C. and L. R., the State's only witness was an investigator in gang investigations. Over numerous hearsay objections from defense counsel, the trial court allowed the investigator to testify as to the events underlying the charges, as related to him by third parties. Based upon this testimony, the trial court adjudicated both S. C. and L. R., "guilty, at least [of] the designated felony." In the Order of Commitment relating to S. C., the juvenile court found that he committed the "Designated Felony Act[s]" of participation in street gang activity and criminal damage to property. And in the order pertaining to L. R., the juvenile court found that he committed the "Designated Felony Act[s]" of criminal damage to property in the first degree and participation in street gang activity. They were each ordered confined for 17 months, at which time they would both be 18. The Court found, and the State conceded that, the trial court erred in adjudicating S. C. and L. R. based upon the investigator's hearsay testimony. The Court stated that because hearsay evidence has no probative value, a juvenile court's adjudication of delinquency based solely on hearsay will not stand. Consequently, the evidence was insufficient to support the adjudications of delinquency and the juvenile court's judgments were reversed.