

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 8, 2013

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THIS WEEK:

- **Search & Seizure; O.C.G.A. § 16-13-32.4**
- **Cocaine Possession; Search and Seizure**
- **Right to Counsel; Restitution**
- **Sentencing; Merger**
- **State's Right To Appeal; Transfer Orders**

Search & Seizure; O.C.G.A. § 16-13-32.4

Carter v. State, A12A2399 (1/25/13)

Appellant was found guilty of possessing marijuana with intent to distribute, possessing marijuana with intent to distribute within 1,000 feet of a school, possessing a firearm during the commission of a crime, and possessing a firearm on school grounds. The evidence showed that GSU police were investigating alleged marijuana sales, which were taking place from an on-campus apartment. A CI told the police that someone named "Taylor" was selling marijuana. The CI approached Taylor, who had no marijuana. Taylor offered to take the CI to a place where marijuana could be purchased. According to Taylor, he always purchased marijuana "from these guys." Through the CI, the police arranged two controlled buys. On both occasions, Taylor took the informant to an on-campus apartment. Taylor went inside briefly before returning with marijuana. The sales were made by Thompson, one of the residents of the apartment. Following the sales, an investigator with the police department obtained a warrant for the apartment. The investigator testified that the apartment has a common area with living space and a

kitchen and four separate bedrooms, labeled A through D, with locking doors. There were two bathrooms in the apartment, each with access from two of the bedrooms. Although Thompson was the only occupant involved in the sale of marijuana, the police obtained a warrant to search the entire apartment. While searching bedroom B, which was appellant's bedroom, police found a glass jar containing marijuana on a desk, digital scales, and plastic sandwich bags. In a small closet, police discovered a shoe box with marijuana in it and a laundry hamper containing a .22 caliber revolver.

Appellant argued that the trial court erred in denying his motion to suppress the evidence seized from his room because the search warrant for the entire apartment was overly broad. The Court disagreed. According to the affidavit presented to the magistrate, a CI made two controlled buys of marijuana during the past forty-eight hours. Each time, the CI went with Taylor to the same apartment, and Taylor returned with marijuana. During the buys, police were conducting surveillance of the apartment. Taylor told the police that he purchased marijuana "from 'these guys' because they always have the best." Based upon this information, the magistrate was authorized to conclude that more than one resident of the apartment was selling marijuana and that there was a substantial basis for believing that evidence of the crime could be found throughout the apartment.

Appellant argued that the evidence was insufficient to sustain his conviction for possessing marijuana with intent to distribute within 1,000 feet of a school. Specifically, he asserted that his college dorm room did not fall within the ambit of O.C.G.A. § 16-13-32.4, which criminalizes certain drug offenses "in, on, or within 1,000 feet of any real property

owned by or leased to any public or private elementary school, secondary school, or school board used for elementary or secondary education.” The Court noted that criminal statutes are construed strictly against the State, they must be read according to the natural and obvious import of their language, and their operation should not be limited or extended by application of subtle and forced interpretations. The Court found that O.C.G.A. § 16-13-32.4 had no application to colleges or universities and it was clear that the crime took place on a university campus. Thus, the Court held that appellant’s conviction for this crime must be reversed. However, the Court affirmed appellant’s convictions for possession of marijuana with intent to distribute, possession of a firearm during the commission of a crime and possession of a firearm on school grounds, as the evidence supported them.

Cocaine Possession; Search and Seizure

Carter v. State, A12A1740 (1/31/13)

Appellant was convicted of VGCSA. He contended that the trial court erred in denying his motion to suppress evidence. The evidence showed that an officer was on patrol in an area known for having high levels of drug traffic and prostitution, and where the officer had previously made numerous arrests or picked up wanted persons. At approximately 7:30 p.m., after dark, he noticed appellant pacing back and forth near a dumpster behind a business that the officer believed to be closed. The officer thought that appellant might be casing the business, or waiting to do a drug deal. When the officer approached and asked appellant what he was doing, appellant said he was just hanging out. The officer then asked appellant if he had a weapon, and appellant said he had a Leatherman tool. The officer testified that he knew from experience that such tools generally have two or three folding knives in them. The officer asked if he could retrieve the Leatherman. Appellant said yes and pointed to his pocket. When the officer pulled out the Leatherman, a baggie was pinched in its folding mechanism. The officer asked what was in the baggie, and appellant replied that it was probably crack cocaine. The officer field-tested the substance, which tested positive for cocaine.

Appellant asserted that the trial court erred in denying his motion to suppress evidence, arguing that the officer stopped and searched him without a particularized and objective basis for suspecting that he was engaged in criminal activity, and that the State did not meet its burden of proving the search was lawful. Appellant further argued that his consent to the search of his person was invalid because it was the product of an illegal second-tier detention.

However, the Court found, this was a first-tier encounter and as such, police may approach citizens, ask for identification, ask for consent to search, and otherwise freely question the citizen without any basis or belief of criminal activity so long as the police do not detain the citizen or convey the message that the citizen may not leave. Contrary to appellant’s contentions, a request to search made during the course of a first-tier encounter does not transform the encounter into a second-tier stop. Merely requesting consent for a search is not a seizure and does not require articulable suspicion. Given appellant’s consent to the search, the officer had a valid prior justification for his intrusion into appellant’s pocket, where he inadvertently discovered the baggie with crack cocaine residue in it when he retrieved the Leatherman to which the baggie was attached. Appellant admitted it contained crack cocaine. The officer placed appellant in handcuffs and seized the baggie to field test its contents only after appellant admitted that the baggie contained crack cocaine. The Court noted that because the incriminating evidence was in plain view when the officer removed the Leatherman from appellant’s pocket, the officer was authorized to seize the baggie. Thus, the Court found, the trial court did not err in denying appellant’s motion to suppress.

Right to Counsel; Restitution

Gibson v. State, A12A2022 (1/31/13)

Appellant pleaded guilty to theft by receiving, theft by taking, theft by deception, falsification of a vehicle identification number, and removal of a vehicle identification number in connection with the theft of a classic Ford Mustang. The record showed that at the plea hearing, appellant’s counsel indicated that he was willing to pay restitution, but disagreed with the amount proposed by the State. The

trial court accepted the plea and directed that appellant remain in the courtroom so that his staff could schedule a date for his return for the restitution hearing. Sentence was entered accordingly. At the restitution hearing, appellant’s counsel was present, but appellant did not appear. Counsel provided no explanation or excuse for the absence of her client. The victim presented testimony regarding his expenses and damage to the vehicle. When appellant’s counsel rose to cross-examine, the trial court refused to allow her to cross-examine the witness, produce any evidence, or make argument regarding the amount of restitution in the absence of her client. An order was entered directing that appellant pay \$1,692.00 in restitution.

Appellant argued that the trial court erred in ordering the amount of restitution without allowing his counsel to cross-examine the witness or meaningfully participate in the hearing. He also argued that the trial court erred in holding the hearing without his presence. The Court first considered whether a restitution hearing is a “critical stage of proceedings” in which a defendant has a right to counsel. The Court noted that a defendant is entitled to representation by counsel at any “critical stage of the proceedings,” including sentencing. The Court noted that while there were no Georgia decisions directly on point, other states which have considered the question have held that a restitution hearing is part of sentencing and therefore a critical stage at which the defendant is entitled to counsel. After carefully reviewing these decisions, the Court found the reasoning persuasive and therefore concluded that a separate hearing to determine the amount of restitution to be made part of a defendant’s sentence is a critical stage of the proceedings.

Thus, the Court of Appeals reversed the order directing appellant to pay \$1,692.00 in restitution for the crimes to which he pled guilty and remanded the case for a new restitution hearing, holding that the trial court erred in refusing to allow appellant’s counsel to cross-examine the victim or present argument on appellant’s behalf at the restitution hearing. However, the Court held, the trial court did not err in proceeding with the restitution hearing in appellant’s absence because his counsel was present and did not provide any reason for appellant’s absence, thus raising a presumption that appellant voluntarily waived his right to attend.

Sentencing; Merger

Reddings v. State, S12A1663 (2/4/13)

Appellant was convicted of murder, aggravated assault, and two counts of possession of a knife during the commission of a felony in connection with the stabbing death of the victim. Appellant argued that the trial court committed reversible error by failing to merge the aggravated assault conviction with the murder conviction. The Court agreed.

The Court noted that O.C.G.A. § 16-1-7(a) affords a defendant with substantive double jeopardy protection by prohibiting multiple convictions and punishments for the same offense. Furthermore, O.C.G.A. § 16-1-7(a)(1) prohibits a defendant from being convicted of more than one crime if one crime is included in another, and aggravated assault is included in the crime of malice murder when the former is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the latter. Therefore, where a victim suffers a series of injuries inflicted by a single assailant in rapid succession, each injury does not constitute a separate assault. Here, the Court found, there was no evidence of any interval, deliberate or otherwise, separating the infliction of the victim's non-fatal wounds from the infliction of the wounds that killed her. The medical examiner opined that the victim's death was caused by stab wounds to her torso, neck, and head. The evidence showed that the victim had also sustained injuries to her back and hand. However, there was no evidence regarding the order in which these various wounds were sustained and no evidence to support the finding of a "deliberate interval" between the inflictions of any of the wounds the victim suffered. Accordingly, the Court held that it must vacate appellant's aggravated assault conviction and the associated weapons possession conviction.

State's Right To Appeal; Transfer Orders

State v. Johnson, S12A2085 (2/4/13)

The State appealed from the order of a superior court transferring Johnson's case to juvenile court. The record showed that when Johnson was 15 years old, he was arrested for the alleged murder of his grandmother. Johnson was held in a youth detention center

until he was released on \$50,000 bond, with conditions that included home confinement and electronic monitoring under O.C.G.A. § 17-6-1.1. More than seven months later, Johnson was indicted for murder in superior court. Johnson then filed a motion asking the superior court to transfer his case to the juvenile court pursuant to O.C.G.A. § 17-7-50.1, which states in relevant part: "(a) Any child who is charged with a crime that is within the jurisdiction of the superior court, as provided in Code Section 15-11-28 or 15-11-30.2, who is detained shall within 180 days of the date of detention be entitled to have the charge against him or her presented to the grand jury. . . .(b) If the grand jury does not return a true bill against the detained child within the time limitations set forth in subsection (a) of this Code section, the detained child's case shall be transferred to the juvenile court and shall proceed thereafter as provided in Chapter 11 of Title 15." Johnson claimed that both his time in the youth detention center and on bond under the home confinement and electronic monitoring program constituted "detention" within the meaning of § 17-7-50.1(a). And because he was not indicted within 180 days of being so detained, he was entitled to have his indictment dismissed and his case transferred to the juvenile court under § 17-7-50.1(b). The trial court issued an order denying Johnson's motion to dismiss the indictment but granting his motion to transfer the case to the juvenile court, ruling that the home confinement and electronic-monitoring program qualified as detention under § 17-7-50.1(a). The State then filed this direct appeal.

The Court held that the State could not appeal a transfer order entered under O.C.G.A. § 17-7-50(b), since such an order is not listed as a type of trial court ruling that the State may appeal under O.C.G.A. § 5-7-1. In so holding, the Court rejected the State's contention that an order transferring a case from superior court to juvenile court under § 17-7-50(b) amounts to "an order . . . setting aside or dismissing an indictment," which the State may appeal under § 5-7-1(a)(1), since § 17-7-50.1(b) does not speak of *setting aside*, *dismissing*, or taking any other action regarding an indictment returned against a juvenile. The Court further noted that it was clear from the legislative history that the General Assembly, by adding the provision to § 5-7-1 specifically authorizing the State to appeal from a superior court order transfer-

ring a case to juvenile court under O.C.G.A. § 15-11-28(b)(2)(B) - giving the superior court discretion to transfer the case to the juvenile court after indictment and *after investigation and for extraordinary cause* - did not mean such a transfer order to be equivalent to an order dismissing or setting aside an indictment under § 5-7-1(a)(1) but instead meant to extend the State's appeal rights to such transfer orders. Finally, the Court ruled that, having determined that the State was not authorized to bring this appeal, it lacked jurisdiction to consider its merits and expressed no opinion as to the trial court's transfer order.