

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 6, 2011

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THIS WEEK:

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Garza; Retroactivity

Hammond v. State, S10G1263 (4/26/2011)

In *Hammond v. State*, 303 Ga. App. 176 (2010), the Court of Appeals affirmed appellant's convictions for sexual battery, aggravated sodomy, kidnapping with bodily injury, aggravated assault, burglary and false imprisonment. The Court granted review to determine whether the holding in *Garza v. State*, 284 Ga. 696 (2008) applied retroactively and if it did, whether the trial court's refusal to give appellant's requested instruction on asportation constituted reversible error.

At trial, appellant requested, and the judge agreed to give, a jury charge on the asportation element of kidnapping that read, "[T]he movement necessary to constitute asportation must be more than a mere positional change. It must be a movement that is not merely incidental to the other criminal act, but movement designed to carry out better the criminal activity." Instead, however, the trial court issued the pattern charge on kidnapping applicable at the time.

In 2008, the Supreme Court of Georgia overruled prior law regarding the need for only slight movement to satisfy the asportation element of kidnapping and set out the four-factor *Garza* test. The U.S. Supreme Court and the Georgia Supreme Court have repeatedly held that a substantive change in case law should be applied retroactively and that a substantive change includes decisions that remove certain conduct from the reach of criminal statutes. By overruling the slight movement standard, the Georgia Supreme Court in *Garza* removed from the reach of the kidnapping statute any conduct that included only slight movement of the victim but did not meet the new four-factor test for asportation. Therefore, the Court found, the rule established in *Garza* was substantive and should be applied retroactively. Consequently, appellant was entitled to a jury instruction consistent with the new rule. However, because appellant's conduct in this case met the new criteria for asportation under *Garza*, the Court found that the error of the trial court probably did not contribute to the judgment of guilt. Therefore, the error of the trial court was not reversible and the Court affirmed the decision of the Court of Appeals.

Aggravated Assault, Reckless Conduct

Jones v. State, S11A0031 (4/26/2011)

Appellant was convicted of murder and firearms offenses in connection with the shooting death of his girlfriend. At trial, appellant asserted a defense of accident, testifying that he went to the victim's home around 3:00 a.m. to check on their baby. The victim began crying when she saw appellant carrying a gun and he reassured her that the gun, which did not have a magazine in it, was not loaded. Testifying that

he acted to allay the victim's fears, appellant pointed the gun at her, believing she would calm down if she heard the gun click harmlessly when he pulled the trigger. The gun fired, however. Appellant argued that the trial court erred by failing to give his requested charge on the lesser included offense of involuntary manslaughter because the evidence supported a finding that the victim's death unintentionally resulted from an unlawful act other than a felony, OCGA § 16-5-3 (a), namely, the misdemeanor of reckless conduct. OCGA § 16-5-60 (b).

However, the Court found that appellant's admitted act of purposefully putting a gun to the fearful victim's head and pulling the trigger constituted the felony offense of aggravated assault, not reckless conduct. Further, appellant's claim that he believed the gun was unloaded does not negate any element of aggravated assault because a firearm pointed at a victim and reasonably appearing to the assault victim to be loaded is a deadly weapon as a matter of law, regardless of whether it is loaded. Appellant's testimony that the victim began crying when she saw the gun provides evidence that she perceived it to be a loaded weapon that could be used to inflict a violent injury, and this perception was certainly reasonable. Moreover, the Court found, the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault.

Reciprocal Discovery; Continuance

Norris v. State, S11A0469 (4/26/2011)

Appellant and his co-defendant were convicted of felony murder, aggravated assault, and possession of a firearm during the commission of a felony. Appellant argued that the trial court erred when it refused to grant a continuance after the State violated the reciprocal discovery statute, OCGA § 17-16-1 et seq. Because appellant opted into reciprocal discovery, the prosecuting attorney was required to furnish defense counsel with the State's witness list no later than ten days before trial. However, after that deadline had passed, the prosecutor amended the list of State's witnesses from two to 47 witnesses. Most of the witnesses had been listed in the discovery reports.

The Court determined that appellant was aware of all of the witnesses' identities

except one and knew of the State's intention to call many of them as witnesses. However, because the discovery reports did not contain sufficient contact information for several of the witnesses, the trial court was authorized to exercise its discretion in choosing a remedy. "It is usually a sufficient remedy for the defense to be afforded an opportunity to interview the witness." OCGA § 17-16-6 lists a continuance as another possible remedy.

At a pre-trial hearing, defense counsel moved for a continuance. Instead of granting that motion, the trial court directed the State to compile a list of essential witnesses whom defense counsel would be permitted to interview after jury selection. However, at that time, three of the witnesses refused to be interviewed. The prosecutor noted that they could not be compelled to be interviewed and that defense counsel could proceed with interviews of any who were willing to speak. Appellant's attorney said nothing. The trial commenced, and neither defendant made any further objection.

Defense counsel declined to make a second attempt to interview the witnesses despite the State's invitation to do so early the next day. Moreover, defense counsel asked for no additional relief. Appellant never requested the exclusion of testimony, nor did he argue that any undisclosed witnesses' testimony should have been excluded.

The Court held that appellant cannot complain of a ruling his own procedure or conduct aided in causing. Furthermore, appellant failed to identify any testimony which was a surprise or to show that, with a continuance, he would have uncovered helpful information which he did not already know. Under all of these circumstances, including appellant's failure to show that he was prejudiced, the Court held that the trial court had not abused its discretion when it denied the motion for continuance. Moreover, the Court found, in light of the overwhelming evidence it was highly probable that the denial of a continuance did not contribute to the jury's verdict.

Venue

Brinson v. State, S11A0191 (4/26/2011)

Appellant was convicted and sentenced for felony murder and aggravated battery in connection with the death of his infant daughter. He argued that the State failed to

prove venue in Effingham County. At trial, the State demonstrated that the crime occurred at appellant's address in the City of Rincon but it failed to show that Rincon lies entirely within Effingham County. However, the State did show that Effingham County 911 dispatchers received appellant's 911 call and dispatched Effingham County EMS and Rincon police to appellant's address. Moreover, the victim's attending physician telephoned the Effingham County Sheriff's Office to report that a crime was committed at appellant's address. Finally, an Effingham County arrest warrant showing appellant's address to be in Effingham County was introduced in evidence. Viewing the direct and circumstantial evidence as a whole, the Court found the evidence sufficient to prove venue beyond a reasonable doubt.

Merger

Benn v. State, A11A0109 (4/19/2011)

Appellant was tried before a jury on a multi-count indictment and found guilty of the following, among others: (count 1) aggravated battery upon a peace officer victim engaged in the performance of official duties; (count 2) aggravated assault with intent to murder upon the same peace officer; (count 3) aggravated assault with a deadly weapon upon the same peace officer. Appellant argued that the trial court erred by failing to merge counts 1 and 3.

The Court noted that because appellant fired two shots at the police officer in quick succession without any "deliberate interval" between the shots, this constituted only one act of assault, not two acts. Accordingly, the same conduct by appellant provided the evidence sufficient to support the guilty verdicts on counts 1 and 3. However, the Court ruled that there was no merger and no error in convicting and sentencing appellant for both offenses. One method of committing the offense of aggravated battery is to maliciously cause bodily harm to a victim by seriously disfiguring the victim's body. OCGA § 16-5-24 (a). Count 1 charged that appellant committed the offense of aggravated battery on the police officer by causing her to suffer a seriously disfiguring scar as a result of the bullet wound to her chest. One method of committing the offense of aggravated assault is to assault a victim with a deadly weapon. OCGA § 16-5-21 (a) (1). Count 3 charged that

appellant committed the offense of aggravated assault by shooting the police officer with a revolver. Under OCGA § 16-1-6 (1) and *Drinkard v. Walker*, 281 Ga. 211, 213 (2006), one crime is “included in” another crime where it 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 other crime. To determine under OCGA § 16-1-6 (1) whether the criminal provisions in counts 1 and 3 merged because one was included in the other, the Court applied the *Drinkard* “required evidence” test to determine whether each provision requires proof of a fact which the other does not. The Court ruled that because the offense of aggravated battery in count 1 required proof of an additional fact —bodily harm by serious disfigurement of the victim’s body —which the offense of aggravated assault in count 3 did not, there was no merger despite the fact that the offenses stemmed from a single act.

Aggravated Assault; Defense of Habitation

Kenny v. State, A11A0018 (4/21/2011)

Appellant was convicted of aggravated assault and argued on appeal that his actions were in defense of his habitation and authorized under OCGA § 16-3-23. The evidence showed that the victim and another man, employees sent to repossess vehicles by tow truck, went to appellant’s house to repossess appellant’s minivan. Appellant reached into the tow truck and grabbed the victim by the throat. The victim told appellant that he was there to repossess the van, and appellant placed a knife blade against the victim’s throat, dragged him out of the tow truck, and threatened to kill him if he did not leave the vehicle in appellant’s possession. At trial, appellant argued that he was only using the appropriate amount of justified force to defend his property. The trial jury found that such force was not necessary and found appellant guilty of aggravated assault.

The Court defined the defense of habitation under OCGA § 16-3-23, which provides that a person is justified in threatening or using force against another person if he reasonably believes that such threat or force is necessary to prevent or terminate the other person’s unlawful entry into or attack upon a habitation. The term “habitation” including motor vehicles.

The trial court found that the force used by appellant was not necessary to prevent the felony which appellant perceived the victim was committing, and the Court agreed that the trial court was authorized to make such a conclusion based on the evidence.

Search & Seizure

Hammont v. State, A11A0094 (4/21/2011)

Appellant was convicted of possessing less than one ounce of marijuana. Appellant argued that the trial court erred in denying his motion to suppress because law enforcement had no probable cause or reasonable articulable suspicion to search for drugs during the traffic stop that eventually led to his arrest. Specifically, appellant maintained that his detention “was illegally extended due to the State’s conversion of a routine traffic stop into a drug search absent the requisite reasonable suspicion of other illegal activity.”

First, the Court held that the stop of appellant and his friend was valid. The officer’s observation that the driver’s vehicle was traveling 40 miles per hour in a 35-mile-per-hour zone authorized him to initiate the traffic stop. Moreover, the officer was on the lookout for the vehicle based on information relayed by the county drug squad, and he stopped the vehicle for a legal reason —*i.e.*, the vehicle was speeding. When an officer observes a traffic offense, the resulting traffic stop does not violate the Fourth Amendment even if the officer has ulterior motives in initiating the stop, and even if a reasonable officer would not have made the stop under the same circumstances.

Second, the Court held that the stop was not illegally extended because “it does not matter whether the request to search comes during the traffic stop or immediately thereafter.” The record showed that the officer asked the driver for his license and insurance upon approaching the vehicle, and it was at this point the officer observed that the driver refused to make eye contact and was noticeably shaking. After inquiring as to why the driver had taken so long to pull over, the officer asked for and received consent to search the vehicle. The Court emphasized that there was no illegal detention “because [the questioning] was almost instantaneous,” and “the search of the vehicle was by consent of the driver.” Accordingly, the Court affirmed the trial court’s denial of appellant’s motion to suppress.

Gattison v. State, A11A0722 (4/20/2011)

Appellant was convicted of possessing less than one ounce of marijuana. Appellant argued that the trial court erred in denying his motion to suppress evidence of marijuana seized after he was stopped by a police officer. Police-citizen encounters are generally categorized into three tiers: consensual encounters involving no restraint; brief investigatory stops, which require reasonable suspicion; and arrests that must be supported by probable cause. The trial court found that the officer had a reasonable suspicion that appellant was engaged, or about to be engaged, in criminal conduct because “the body movements and actions between the members of the group indicated to the officer that a heated discussion was escalating to a physical fight on a public street.” Relying on *Nelson v. State*, 252 Ga. App. 454 (2001) for the proposition that a police officer has the inherent power to protect the lives, health and property of citizens, the trial court concluded that the officer properly detained appellant.

However, the Court ruled that the trial court’s reliance on *Nelson* was misplaced because in *Nelson* the officers witnessed an ongoing altercation, which gave them reasonable suspicion to perform an investigative stop. In contrast, in the instant case, the discussion had not yet escalated into a physical altercation, and it may never have. The officer’s actual testimony was that he “*wasn’t sure* if it was something that was escalating into a fight,” and “their body movements, facial expressions, . . . hands moving around a little bit, [were] kind of indicative of some kind of, you know, intense conversation, at least at a minimum.” Thus, the Court reasoned, this case was factually distinct from *Nelson*. The Court ruled that the officer observed nothing more than lawful conduct that did not give him a reasonable articulable suspicion of criminal activity, and therefore the stop of appellant was based on a mere hunch. Accordingly, the trial court erred in denying the motion to suppress.

Terroristic Threats, Merger

Clement v. State, A11A0241 (4/20/2011)

Appellant was convicted of terroristic threats, criminal damage to property in the second degree, criminal trespass, simple battery, and family violence battery. Appellant

contended that there was insufficient evidence to sustain his conviction for making terroristic threats against the victim. “A person commits the offense of a terroristic threat when he or she threatens to commit any crime of violence[] . . . with the purpose of terrorizing another[.]” OCGA § 16-11-37 (a). Thus, the State must establish two elements to sustain a conviction for making terroristic threats: (a) that the defendant threatened to commit a crime of violence against the victim, and (b) that the defendant did so with the purpose of terrorizing the victim. The Court held that both elements were established in this case.

Appellant also argued that the trial court unlawfully sentenced him by failing to merge his conviction for simple battery (OCGA § 16-5-23 (a) (2)), the punishment for which was enhanced because he and the victim had lived together, into his conviction for family violence battery (OCGA § 16-5-23.1 (a), (f)). The two battery convictions merged if “each battery was not a separate and complete criminal act but rather was part of a continuous criminal act, committed at the same time and place and inspired by the same criminal intent.” *Pierce v. State*, 301 Ga. App. 167, 177 (2009). The State conceded that appellant’s conviction for simple battery should have been merged into his conviction for family violence battery, and the Court agreed. Therefore, the Court vacated appellant’s judgment of conviction and sentence for simple battery and remanded the case to the trial court for resentencing.

Child Hearsay Act; Bolstering

Westbrooks v. State, A11A0167 (4/21/2011)

Appellant was convicted on one count of aggravated child molestation and three counts of child molestation. Appellant argued that the evidence was insufficient to support his convictions of aggravated child molestation and child molestation, arguing generally that the victim’s accounts of the abuse were inconsistent and lacked credibility.

The victim testified at trial that appellant touched her in a way that she did not like, but she did not provide any details about those incidents. However, the victim’s step-uncle and one of the forensic interviewers proffered evidence that appellant sexually molested the victim, pursuant to the Child Hearsay Act, which provides that “[a] statement made by a

child under the age of 14 years describing any act of sexual contact . . . performed with or on the child by another . . . is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability.” Thus, the Court ruled, there was competent evidence to support appellant’s convictions of aggravated child molestation and child molestation.

Although appellant argued that the victim’s reticence to provide any details of the sexual abuse and inconsistencies in some of her out-of-court disclosures rendered the evidence against him insufficient, the Court emphasized that witness credibility is in the province of the jury. Here, the jury clearly chose to believe the victim. Accordingly, appellant’s challenge to the sufficiency of the evidence was without merit.

Appellant also argued that the trial court erred in allowing one of the forensic interviewers to proffer evidence that improperly bolstered the victim’s credibility. In Georgia “the credibility of a witness is to be determined by the jury, and the credibility of a victim may not be bolstered by the testimony of another witness.” And “[i]mproper bolstering occurs when a witness gives an opinion as to whether another witness is telling the truth.” Appellant’s counsel objected twice during the State’s direct examination of the first forensic interviewer, who met with the victim shortly after she disclosed the sexual abuse to her step-uncle. The Court held that, contrary to appellant’s contention, the forensic interviewer’s testimony was relevant and did not directly address the victim’s credibility or express a direct opinion that the victim had been sexually abused. Accordingly, the trial court did not abuse its discretion in admitting the testimony.