

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 17, 2011

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Identification

Cross v. State, A11A0494 (6/2/2011)

Appellant was convicted of two counts of burglary and argued that the trial court erred by overruling his objection to an in-court identification. The record showed that on re-direct, a witness was asked to identify the man she saw during the burglary. She identified appellant. Appellant contended that the trial court erred by allowing the witness to identify him at trial after having had an opportunity to see him sitting at the defense table during her earlier testimony. The Court found that based on its evaluation of the considerations outlined by the

United States Supreme Court in *Neil v. Biggers*, 409 U. S. 188, 199-200 (II) (1972), the procedure used in this case was not so impermissibly suggestive as to cause a very substantial likelihood of irreparable misidentification. The eyewitness focused on those committing the burglary before and after the burglary from the comfort of her own home and yard without stressful or distracting circumstances; she testified that she got a good look at them and their clothing; her description of the SUV used by the burglars matched the SUV stopped by the police less than a mile from the location of the burglaries, etc. Therefore, the Court affirmed the trial court's evidentiary ruling with regard to the eyewitness's in-court identification.

Jury Instructions

Mask v. State, A11A0024 (6/3/2011)

Appellant was found guilty of possession of a firearm by a convicted felon. First, he contended that the trial court erred in instructing the jury regarding possession of a firearm by a convicted felon. The record showed that the trial court charged the jury that: "any person who has been convicted of a felony who receives, possesses, or transports any firearm commits the offense of possession of a firearm by a convicted felon." Appellant asserted that the instruction was erroneous and harmful as a matter of law because the indictment charged him with "possessing a firearm after having been convicted of a felony," while the instruction as given permitted the jury to consider two other methods not charged in the indictment specifically, receiving or transporting a firearm. The Court found that although the indictment charged appellant with possession of a firearm, it did not, as he alleged, specify that he did so by actually having the firearm in his possession. The Court held that

to enable the jury to consider whether appellant “possessed” the firearm within the meaning of the statute, the trial court correctly instructed them on the definitions of the various forms of possession, distinguishing between actual and constructive possession. The trial court further instructed the jury that constructive possession required that a person knowingly had “both the power and the intention at a given time to exercise authority or control over a thing.” Considering the challenged instruction in the context of the trial court’s charge as a whole, the Court found no error.

Criminal Trespass

Reidling v. State, A11A0159 (6/1/2011)

Appellant argued for the reversal of his conviction for committing two counts of burglary by contending that insufficient evidence supported his convictions and that the trial court erred by denying his request for a charge on the lesser included offense of criminal trespass. The Court found that the evidence was sufficient for the conviction and that there was no basis for a lesser included offense of criminal trespass. The Court held that because appellant did not make a written request for the lesser charge, and because he denied being on the property for an unlawful purpose and there was no evidence presented about the dollar amount of the damages, the lesser included offense of criminal trespass was not warranted under OCGA § 16-1-21 (a) and (b). Therefore, the Court affirmed the trial court’s judgment.

Guilty Plea

James v. State, A11A0177 (6/1/2011)

The trial court sentenced appellant to serve 10 years under a false imprisonment charge and 12 months concurrently under a simple assault charge. Appellant then filed an unsuccessful motion to withdraw his guilty plea. He argued that the trial court abused its discretion in denying his motion since the State failed to present a sufficient factual basis to support the false imprisonment conviction. “After sentence is pronounced, withdrawal of a guilty plea is allowed only to correct a manifest injustice, and the trial court’s refusal to allow withdrawal will not be disturbed on appeal absent a manifest abuse of discretion.” The Court found that there was no abuse of discretion and that the State’s recitation of facts reflecting that

appellant had detained the victim on a bed and inside his residence presented a sufficient factual basis for the false imprisonment charge in accordance with OCGA § 16-5-41 (a) (“A person commits the offense of false imprisonment when, in violation of the personal liberty of another, he arrests, confines, or detains such person without legal authority.”) The trial court therefore did not err in refusing to allow withdrawal of the guilty plea on the basis alleged.

Search & Seizure

Morgan v. State, A11A0178 (6/2/2011)

Appellant contended that the search which led to his convictions for possessing controlled substances with the intent to distribute and possessing a firearm during the commission of a crime stemmed from an unconstitutional traffic stop. An officer, who made the traffic stop, testified that when he was patrolling one evening, he came upon a vehicle. The officer noticed that the passengers were staring at him and the vehicle had out-of-state tags. The officer decided to follow the vehicle and run the tags, at which point he witnessed them exit the neighborhood without signaling. He had been patrolling because of a recent string of burglaries in the area and testified that he stopped the vehicle because he suspected that the car’s occupants were involved in the neighborhood’s recent burglaries and because he believed that he had observed a traffic offense. When the officer approached the vehicle, he smelled the odor of marijuana, and a search of the vehicle yielded raw marijuana, other controlled substances, and firearms. Appellant was one of the passengers.

The trial court determined that the traffic stop was supported by the officer’s probable cause to believe that a turn signal violation had occurred, and the Court found that the trial court was authorized to find that the evidence placed the police vehicle in close spatial and temporal proximity to the appellant’s vehicle when it made its turn such that the officer had probable cause to believe that the driver of the vehicle had violated OCGA § 40-6-123 by turning without signaling. Therefore, the judgment was affirmed.

Staib v. State, A11A0355 (6/6/2011)

Appellant was found guilty of two counts of cruelty to children in the second degree, OCGA § 16-5-70 (c), and two counts of con-

tributing to the deprivation of a minor, OCGA § 16-12-1 (b) (3). She argued that the trial court erred in denying her motion to suppress evidence and erred in sentencing her.

Appellant contended that the trial court should have granted her motion to suppress evidence gathered subsequent to the search of her home without a warrant, which she argues the police were not authorized to conduct. The record showed that police received a call to the local hospital to investigate a domestic violence incident, because appellant and her husband had gotten in to a physical altercation and appellant was in the hospital for treatment of her injuries. When the police went to arrest appellant’s husband, they stepped inside of the house and observed extremely unsanitary conditions in the house and recognized that such conditions may constitute evidence of a crime. They also located appellant’s children who looked to be in poor condition, and they took pictures of the children and of the conditions that were in plain view. When appellant returned back to her home, she was arrested for cruelty to children. Appellant contended that the officers’ entry into her home was warrantless and illegal, and therefore any evidence produced by it should be inadmissible. The Court found that the trial court was authorized to find that the children’s age, their undisputed inability to care for themselves, and the lack of adult supervision due to their mother’s absence and their father’s arrest constituted an exigent circumstance which authorized the officers’ entry into the residence for the purpose of temporarily supervising the children until a responsible adult arrived to relieve them. The Court also found that once the officers were legally in the house pursuant to the exigent circumstances, they were authorized to photograph items of potential evidentiary significance that were in plain view, specifically, the family’s living conditions. Therefore, the Court held that the photographs were legally seized and, thus, admissible at trial.

Contempt

Newton v. Golden Grove Pecan Farm, A11A0310 (6/3/2011)

Following a hearing on August 2, 2010, the trial court adjudged appellant, a court-appointed receiver, guilty of criminal contempt, a judgment based on findings that she had exercised her authority as receiver in a way that was contrary to the known directions of

the court and that she and her lawyer, in the course of the August 2 proceedings, engaged in contemptuous conduct. The Court first looked to whether the trial court erred when it summarily adjudged appellant guilty of contempt based upon her conduct prior to the August 2 hearing, namely the preparation and filing of bankruptcy petitions in April. It held that the offense was properly characterized as indirect contempt and the law is clear that appellant was entitled to reasonable notice of the contempt charge before the commencement of the contempt hearing, so that she would have had an adequate opportunity to prepare and present a defense to the contempt charge. Since such reasonable notice was not given, the Court found that, absent a strong interest in summary adjudication, appellant was entitled to “more normal adversary procedures,” including reasonable notice and a reasonable opportunity to prepare a defense. Therefore, the Court vacated the trial court’s judgment to the extent it was based on a finding of contemptuous conduct before the August 2 hearing, and it remanded for further proceedings consistent with its opinion.

The Court also considered whether the trial court erred when it summarily adjudged appellant guilty of direct contempt based on something that she or her lawyer said or did during the August 2 “status conference.” The Court found that a trial court has the power, after affording the contemnor an opportunity to speak in his or her own behalf, to announce punishment summarily and without further notice or hearing. Direct contempt in the presence of the court traditionally have been subject to summary adjudication, to maintain order in the courtroom and the integrity of the trial process in the face of an actual obstruction of justice.” The Court found that the substance of the legal arguments made by appellant’s lawyer, which were invited by the court, at the August 2 hearing could not sustain the finding of direct contempt. Accordingly, the Court reversed the judgment of the trial court to the extent it is based on a finding of contemptuous conduct by appellant or her lawyer at the August 2 hearing. The judgment was reversed in part, vacated in part, remanded with direction.

First Offender Act

Mason v. State, A11A0591 (5/31/2011)

Appellant was indicted for first degree cruelty to children, an offense punishable by

up to 20 years of imprisonment. He entered a negotiated guilty plea to that charge and was granted first offender treatment. He was given a 15-year probated sentence, which included, as a special condition, confinement for a designated time period at a “Department of Corrections Detention Center.”

Appellant argued that the trial court was not authorized to sentence him to confinement in a probation detention center because OCGA § 42-8-35.4 (a), a provision of the State-wide Probation Act, allows the courts to confine only two types of individuals in probation detention centers: (1) “defendant[s] convicted of a felony”; and (2) designated misdemeanants. Appellant contended that he did not fall within either category because the plain language of OCGA § 42-8-60 (a) provides that first offender treatment occurs “before an adjudication of guilt . . . and without [the court] entering a judgment of guilt.”

However, the Court found appellant’s argument without merit because another provision of the First Offender Act, OCGA § 42-8-65 (c), provided that persons who have been sentenced to a term of confinement under OCGA § 42-8-60 (a) (2) “shall be deemed to have been convicted of the offense *during such term of confinement for all purposes* except that records thereof shall be treated as any other records of first offenders. . . .” Therefore, the Court found, during his term of confinement, appellant was deemed to be a convicted felon for purposes of OCGA § 42-8-35.4, and consequently, eligible to be confined at a probation detention center. The Court emphasized that the purpose of the First Offender Act is to protect the first offender from the stigma of having a criminal *record*, not to give him a lesser sentence.

Sentencing

Colson v. State, A11A0603 (6/2/2011)

Appellant was indicted for escape. He pled guilty and was sentenced to ten years, five to be served concurrently with any other sentence he was serving, and five to be served consecutively to any such sentence. Appellant later filed a motion asserting that his consecutive sentence was void and seeking a declaration that it should have run concurrently with his previous conviction.

The Court held that appellant’s sentence was not void because it was within the statu-

tory range of punishment permitted by OCGA § 16-10-52 (b) (1) (“[a] person who, having been convicted of a felony, is convicted of the offense of escape shall be punished by imprisonment for not less than one nor more than ten years.”). Nevertheless, appellant argued specifically that the trial court’s sentence was void because it imposed a split sentence: five years to be served concurrently, and five to be served consecutively. He contended that OCGA § 17-10-10 provides for a sentence to be concurrent or consecutive, but not both, and therefore his sentence was unlawful and void.

However, the Court found that appellant did not correctly interpret the law. OCGA § 17-10-10 (b) specifically provides that “the sentences shall be served concurrently, one with the other, *unless otherwise expressly provided therein.*” Moreover, the Court held that OCGA § 17-10-10 does not compel the trial court to set sentences to commence at the termination of all sentences previously imposed. Accordingly, the Court affirmed appellant’s sentence.

Identification

Leeks v. State, A11A0638 (6/1/2011)

Appellant was convicted of aggravated assault. He argued that the trial court erred in denying his motion to suppress the victim’s pre-trial identification of him as the perpetrator because the display of a single photo of him following the attack was impermissibly suggestive and that there was a substantial likelihood of irreparable misidentification.

The Court explained that while it has held that displaying a single photograph to a witness is impermissibly suggestive, such evidence should be suppressed only if a substantial likelihood of irreparable misidentification exists. The factors to be considered in evaluating the likelihood of misidentification include 1) the witness’ opportunity to view the criminal during the crime; (2) the witness’ degree of attention; (3) the accuracy of any prior description given by the witness; and (4) the length of time between the crime and the showup confrontation. The Court determined that in this case, the evidence at trial showed that victim 1) knew appellant from the neighborhood; 2) described him to an officer on the scene; 3) spent 30 minutes or more with him in his apartment; 4) quickly and confidently identified appellant as her assailant upon see-

ing his picture; and 5) identified him at the hearing on the motion to suppress and at trial. Therefore, the Court affirmed the trial court's denial of appellant's motion to suppress.

Double Jeopardy

Pope v. State, A11A0675 (6/1/2011)

Appellant was charged in a Fulton County indictment with attempt to commit burglary, theft by receiving a stolen auto, obstruction (Counts 1-3), and two counts of theft by receiving stolen laptop computers (Counts 4 and 5). The trial court held a hearing on appellant's plea. During the plea colloquy, the State informed the court that it was dead docketing Counts 4 and 5 because Gwinnett County was moving forward with the theft of the laptops. Appellant then pled guilty to Counts 1-3. The trial court accepted the plea and sentenced appellant. Less than a year later, appellant was charged in Gwinnett County with the two counts of burglary for the laptops. He filed a plea in bar on double jeopardy grounds, which the trial court denied.

Appellant first argued that the trial court erred in finding that he did not enter a guilty plea to Counts 4 and 5 of the Fulton County indictment. He contends that he pled guilty to all five counts during his plea colloquy with the court before the State announced it was dead docketing Counts 4 and 5. However, the Court found that appellant did not officially enter his plea until after the trial court had dead docketed Counts 4 and 5. Therefore, the trial court correctly concluded that appellant's guilty plea only applied to Counts 1-3 of the Fulton County indictment.

Appellant also argued that he was placed in jeopardy by the Gwinnett County indictment charging him with the same crimes that were the subject of the dead-docketed Counts 4 and 5 of the Fulton County indictment. The Court found, however, that because the trial court had not accepted a guilty plea to Counts 4 and 5 of the Fulton County indictment, jeopardy did not attach. Accordingly, the Court affirmed the trial court's denial of appellant's plea in bar.

Deportation, Effective Assistance of Counsel

Lopez v. State, A11A0676 (6/2/2011)

Appellant, an illegal immigrant, had entered into a negotiated guilty plea to driving

under the influence, endangering a child by driving under the influence, driving without a license, giving a false name, and felony cruelty to children. He was sentenced to ten years, the first one to be served in confinement. Appellant believed that he would be deported before he was ever confined. Appellant argued that his trial counsel was per se ineffective in failing "to specifically investigate the immigration consequences" of his plea to a felony. He also claimed that there was clear evidence in the record that had he known he would have to serve a year in jail, "he would never have entered the plea." Appellant conceded that he was told that a guilty plea would subject him to deportation. However, appellant argued that his attorney's failure to investigate and determine the specific consequences of the plea was per se ineffective.

The Court noted that in *Padilla v. Kentucky*, ___U. S.___ (2010), the Supreme Court held that immigration law is complex and, in cases where "the deportation consequences of a particular plea [may be] unclear or uncertain,... a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." The Court found that in this case, the record showed that appellant's trial counsel had made it clear to appellant that he was subject to deportation, and that he did not know when ICE would actually take physical possession of appellant. Although Appellant argued that his trial counsel's failure to investigate constituted per se ineffective assistance, the Court disagreed. The Court held that because trial counsel had fulfilled his obligation to inform appellant about the risk of deportation, his advice to appellant did not constitute ineffective assistance of counsel, per se or otherwise. Accordingly, the Court found no error in the trial court's denial of appellant's motion to withdraw his guilty plea.

Indictment: Demurrers

State v. Horsley, A11A0775 (6/3/2011)

Horsley and O'Toole were jointly indicted for terroristic threats, but the trial court sustained a general demurrer as to those counts. The State appealed, arguing that the indictment was sufficient to withstand a general demurrer. The Court held that because the indictment was written in the applicable

statutory language and the defendants would be guilty of those crimes if the alleged facts were taken as true, the trial court erred in sustaining the general demurrer. Accordingly, the Court reversed.

Jackson-Denno Hearings; Right to Remain Silent

Clark v. State, A11A0643 (6/2/2011)

Appellant was convicted of aggravated child molestation, child molestation, and cruelty to children on charges involving three children. Appellant argued that the court erred by admitting his in custody statement. He first contended that the interrogating officer made improper promises of a benefit in exchange for appellant's confession by offering to "help in the court proceedings." However, the Court found that according to the record, appellant had asked for help to control his urges and the officer told him that he needed to explain what urges he was referring to so that they could get him help. The officer also testified that she did not threaten appellant, make promises to him, or comment about any kind of lesser sentence. Therefore, the Court held that the evidence presented at the *Jackson-Denno* hearing was sufficient for the trial court to have concluded that the officer did not make any improper promises of benefit.

Appellant also argued that the court erred by admitting the portion of the confession related to aggravated child molestation because, before the questioning began, the officer only told him that she was investigating child molestation. The *Miranda* waiver form referred to cruelty to children in the first degree, child molestation, and contributing to the delinquency of a minor. Therefore, appellant argued, he was tricked into confessing to aggravated child molestation, which carried a 25-year, mandatory minimum sentence. However, the Court found that this argument was without merit because appellant knew the "substance of the charge."

Finally, appellant argued that he had invoked his right to remain silent. At one point during the interview, the officer asked appellant if he had anything else to add, and appellant said no. The Court held that appellant's response was not an indication that he wished to remain silent or that he was attempting to cut off questioning. At most, it was ambiguous, which is not enough. Appellant then asked

the officer a question, which continued the interview. Accordingly, the Court affirmed appellant's convictions.

Similar Transaction Evidence

Gaudlock v. State, A11A0671 (6/1/2011)

Appellant was convicted of unlawfully possessing both cocaine and more than an ounce of marijuana. He asserted that the trial court erred when it admitted evidence of a similar transaction. At trial, the court granted the prosecuting attorney's request to present evidence that appellant had been found in possession of cocaine less than two weeks before the incident that gave rise to the charges in this case. After a hearing, the trial court determined that the evidence of the previous incident was probative of whether appellant had an intent to possess cocaine during the incident in the case at hand.

Appellant conceded that the State presented this evidence for an appropriate purpose and that there was sufficient evidence to establish that appellant possessed cocaine on that previous occasion. Appellant argued, however, that the previous incident was not similar enough to the present incident because in the previous incident he sold cocaine, whereas in the present case he was charged only with simple possession. The Court rejected this argument, holding that the incidents were similar enough because both involved the possession of cocaine and had occurred in the same county within a span of two weeks.

Brady; Photographic Evidence

Jackson v. State, A11A0875; A11A0876; A11A0877 (6/6/2011)

Silas Jackson and Michael Phillips were convicted of two counts each of armed robbery, criminal attempt to commit armed robbery, aggravated assault, and possession of a firearm during the commission of a crime, and one count of theft by receiving stolen property. Based on a separate indictment, the jury also found Jackson guilty of two additional counts of aggravated assault.

Citing an error in the jury instructions, the trial court granted both defendants a new trial as to several charges. These appeals represent the defendants' challenge to their convictions on the remaining charges.

In Case Numbers A11A0875 and A11A0876, Jackson argued that the trial court erred in joining the robbery indictments with the two indictments for aggravated assault because they were unrelated. However, the Court found that the trial court was authorized to find that the events in the two indictments committed within a two-day period and involving guns and the same car constituted a series of connected acts. The Court also found that the joinder was not prejudicial because the same evidence could have been introduced at both trials had the indictments been tried separately. Jackson also asserted, without providing any supporting argument or authority, that the evidence against him was insufficient and that the trial court erred in admitting identification testimony. However, because Jackson based these allegations of error on the joinder, which the Court found was proper, the Court found them to be without merit. Accordingly, the Court affirmed Jackson's convictions.

In Case Number A11A0877, Phillips claimed, among other things, that the State failed to produce a written witness statement in violation of *Brady v. Maryland*, 373 U. S. 83 (1963). The Court found that although the evidence against Phillips was sufficient, the State's *Brady* violation required reversal. It was undisputed that the State failed to turn over to the defense a written statement that one of the victims gave to police. Phillips argued that the State's failure to disclose the victim's written statement deprived him of the opportunity to impeach the victim, especially because that victim was the only witness who identified Phillips.

The record showed that the police possessed the victim's statement, but it was not disclosed to Phillips in discovery before or during trial. Moreover, the prosecutor claimed that no such statement existed. The State argued that even so, Phillips could not satisfy the fourth requirement of *Brady*, namely that had the victim's statement been disclosed to the defense, the outcome of the trial would have been different. However, the Court found that, had they been given the statement, the defense may have been able to impeach the witness and the jury may have acquitted Phillips. Accordingly, the Court determined that the trial court had erred and remanded for a new trial.

The Court also addressed Phillips's claim that the trial court improperly restricted his

use of a photograph at trial. Phillips sought to present evidence that his hairstyle at the time of the crimes did not match the hairstyle purportedly worn by the robbers. To that end, he wanted to present a photograph taken of him at the time the crimes were committed. The trial court ruled that the defense could only tender the photograph if it laid a foundation by establishing who took the picture, where it was taken, and why it was taken. However, because the picture was a mug shot and the defense did not want the jury to know that Phillips was previously arrested, the defense chose not to tender the photograph.

The Court held that in order to lay a foundation for a photograph, a party merely has to show that the photograph fairly and accurately represents the object, scene, or person depicted. Therefore, the Court ruled, Phillips was not required to identify the circumstances in which the photograph was taken in order to establish a foundation. Phillips only needed to establish that it accurately depicted him. Accordingly, the Court held that the trial court erred in this regard as well.

Batson, Indictment

Craft v. State, A11A0162 (5/31/2011)

Appellant was convicted of aggravated assault, disorderly conduct, possession of a firearm by a convicted felon, criminal damage to property in the first degree, and possession of a firearm during the commission of a felony. He contended, among other things, that the trial court erred in denying his *Batson* challenge to one of the State's peremptory jury strikes, and that the court erred in instructing the jury that it could find him guilty of possessing a firearm during the commission of a felony in a manner not alleged in the indictment.

In response to the *Batson* challenge, the Court noted that the findings of the trial court are entitled to great deference, and should not be disturbed unless clearly erroneous. The record showed that appellant made a prima facie showing of racial discrimination because the State used six of eight peremptory strikes against prospective jurors who were members of racial minority groups. After the State offered explanations for the strikes, the court reinstated one juror (the alternate) but allowed the other five strikes to stand, ruling that the State's proffered explanations for those five strikes were race-neutral and that appellant had

failed to show discriminatory intent. The Court held that the State's explanations were race-neutral, and that the trial court was authorized to find that appellant failed to carry his burden of showing purposeful discrimination.

The Court agreed with appellant's second contention, which was that the court erred in instructing the jury that it could find him guilty of a felony in a manner that was not alleged in the indictment. The indictment alleged that appellant committed the offense by possessing a firearm while committing criminal damage to property in the first degree. In its charge to the jury, the court stated that a person commits the offense of possessing a firearm during the commission of a felony "when the person has on or within arm's reach of his person a firearm during the commission of any or any attempt to commit a felony, which is any crime against or involving the person of another." The Court found that the possession offense was defined by the trial court as predicated on *any* felony against or involving the person of another, evidence was presented that appellant committed another such felony, and the court did not instruct the jury to limit its consideration only to the predicate felony specified in the indictment. Thus, it found that under these circumstances there was a reasonable possibility that the jury found appellant guilty of committing the offense in a manner not charged in the indictment, and that appellant's right to due process accordingly was violated. The judgment was affirmed in part and reversed in part.