

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 5, 2016

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THIS WEEK:

- **Forfeitures; Appellate Jurisdiction**
- **Open Records; Pending Prosecution Exemption**
- **Ineffective Assistance of Counsel; Inexperience**
- **Mutually Exclusive Verdicts; Venue**
- **Rule of Lenity**
- **Search & Seizure**
- **Jury Charges; Justification**
- **Right to Be Present; Critical Stages of Proceedings**

Forfeitures; Appellate Jurisdiction

Ramirez-Ramirez v. State of Ga., A16A0441 (5/17/16)

The State filed a forfeiture complaint pursuant to former O.C.G.A. § 16-13-49(o) against real and personal property owned by appellant. After appellant filed an answer, the State filed an omnibus motion seeking default judgment, judgment on the pleadings and to strike the answer. On April 14, 2015, the trial court granted the motion in all respects. Appellant then filed on May 12, 2015, a motion for new trial. The trial court denied the motion and appellant timely appealed from that order.

The State moved to dismiss the appeal. The Court stated that the proper and timely filing of a notice of appeal is an absolute requirement to confer jurisdiction upon the appellate court. Appellant's notice of appeal was not filed within 30 days of the entry of the order granting the omnibus motion, and unless the motion for new trial was a proper

vehicle to extend the time for filing the notice of appeal, the notice filed in this case was not timely filed and deprived the court of any jurisdiction to consider the case on the merits of the appeal.

Objections which go to the judgment only, and do not extend to the verdict, cannot properly be made grounds of a motion for new trial. A motion for new trial seeks to set aside the verdict. No new trial is necessary to correct a judgment or decree. If a judgment or decree is erroneous or illegal, direct exception should be taken to it at the proper time. And here, the Court stated, the trial determination that appellant failed to file a timely sufficient answer to the forfeiture petition was a legal determination only, akin to an order on motion for summary judgment or declaratory judgment. Accordingly, a motion for new trial was not the appropriate vehicle for challenging the order granting the omnibus motion, and appellant should have filed a direct appeal of that order rather than a motion for new trial. Accordingly, appellant's appeal was therefore untimely, and the Court lacked jurisdiction to review the merits of the underlying orders.

Open Records; Pending Prosecution Exemption

Media General Operations, Inc. v. St. Lawrence, A16A0280 (6/15/16)

Ajibade was arrested on January 1, 2015 and died shortly thereafter while in the custody of the sheriff's office. The GBI and the Internal Affairs Division of the sheriff's office ("IAD"), immediately began investigating. In March or April of 2015, appellant submitted open records requests for the records pertaining to Ajibade's death, including video footage, incident or arrest

reports, and IAD investigation reports. The sheriff refused to provide the requested records pursuant to O.C.G.A. § 50-18-72(a)(4). In May, 2015, the GBI and the IAD investigations concluded, and the sheriff fired nine sheriff's deputies for their roles in Ajibade's death. Also in May, the sheriff and the district attorney filed a petition for declaratory judgment against appellant seeking a declaration that the items requested were exempt from disclosure because they were "part of an ongoing criminal investigation by the District Attorney's Office." In June, 2015, the district attorney indicted two of the fired deputies and a private employee who had worked as a nurse at the detention center. The charges included involuntary manslaughter, aggravated assault, cruelty to an inmate, falsifying records, and making false statements to a GBI agent. In July 2015, the trial court entered judgment in favor of the sheriff and district attorney, finding that the records were exempt from release pursuant to O.C.G.A. § 50-18-72(a)(4) because the prosecution was still pending.

The Court stated that the sole issue on appeal was whether the records were exempt from public disclosure under the "pending prosecution" exemption set out in O.C.G.A. § 50-18-72(a)(4), which provides exemption from disclosure as follows: "[r]ecords of law enforcement, prosecution, or regulatory agencies *in any pending investigation or prosecution of criminal or unlawful activity*, other than initial police arrest reports and initial incident reports; provided, however, that an investigation or prosecution shall no longer be deemed to be pending when all direct litigation involving such investigation and prosecution has become final or otherwise terminated; and provided, further, that *this paragraph shall not apply to records in the possession of an agency that is the subject of the pending investigation or prosecution*["] (Emphasis supplied.)

Appellant contended that the first clause of the cited subsection (pertinently, that records in any pending prosecution of criminal activity are exempt from disclosure) was not controlling. Instead, appellant contended, its records request was governed by the final clause of that subsection, which provides that the pending prosecution exemption does not apply to records in the possession of an agency that is the subject of the pending prosecution. Thus, appellant argued, the sheriff's office was "an agency that is the subject of the pending

prosecution" as contemplated by O.C.G.A. § 50-18-72(a)(4), because two sheriff's deputies and a nurse working at the detention center were indicted (and nine sheriff's office employees were fired) for their roles in Ajibade's death while he was an inmate in the custody of the sheriff's office, and the employees and staff had been acting in the course of their duties when the death occurred.

The Court, however, agreed with the sheriff and district attorney that the "agency" provision of the statute is inapplicable because the sheriff's office itself was not the subject of the pending investigation and prosecution; instead, individuals were. There is no evidence in the record that either the sheriff himself or the sheriff's office as a whole was the subject of the investigation or prosecution. The Court found that the correct reading of O.C.G.A. § 50-18-72(a)(4), and the one that is most natural and reasonable, is that the term "agency" is not synonymous with "employee." Under the circumstances of this case, the agency was not the subject of the prosecution. In fact, agency personnel requested criminal investigations of the individuals involved in Ajibade's death, conducted internal investigations of the individuals for possible violations of agency policies, fired several of those individuals, and referred the matter to the district attorney for possible prosecution. Thus, the sheriff's office and the district attorney met their burden of proving that the requested records are exempt from disclosure while the prosecution is pending. And the Court noted, as the sheriff's office and the district attorney conceded, the requested records will absolutely be subject to disclosure when the criminal prosecutions of the three defendants are no longer pending.

Ineffective Assistance of Counsel; Inexperience

State v. Banks, A16A0602 (6/8/16)

Banks was convicted of one count of aggravated child molestation and one count of child molestation. Three attorneys from the circuit public defender's office represented Banks at trial, one of whom was the chief circuit public defender. However, the record showed that designated lead counsel for Banks received confirmation that she passed the Georgia bar examination prior to trial, but had not been sworn in as a member of the State Bar of Georgia at the time of trial. The

trial court granted Banks' motion for new trial on grounds of ineffective assistance of counsel and the State appealed.

Banks contended that he received ineffective assistance due to lead counsel's failure to timely disclose Dr. Greg Cox as an expert witness, which resulted in a limitation of Dr. Cox's proposed testimony. However, the Court found, inasmuch as lead counsel had no role in notifying the trial court of Banks' intent to introduce expert testimony, there was no action or inaction to find erroneous. As a result, the Court concluded Banks failed to demonstrate ineffective assistance of trial counsel.

Banks also contended that lead counsel failed to present expert testimony on allegedly improper interview techniques during the forensic interview of the victim. The evidence showed that lead counsel approached the chief circuit public defender in advance of trial concerning the need for an expert on "the interview techniques by the two police officers." The circuit public defender replied only that they "couldn't get an expert." Lead counsel did not "follow-up after that conversation." The circuit public defender did not testify during the motion for new trial hearing. But, the Court found, premitting whether lead counsel erred in failing to do more to secure an expert witness in the field of forensic interviewing, Banks failed to show prejudice in this case because he offered no evidence as to what an expert would have opined.

Next, Banks alleged that trial counsel failed to obtain certified copies of convictions of either the mother and grandmother of the victim, each of whom were identified as potential witnesses for the State. But, the Court found, irrespective of whether lead counsel played any role in the search for prior convictions, Banks failed to introduce copies of any convictions, certified or uncertified, at the motion for new trial hearing. In the absence of any supporting evidence, Banks failed to establish that he was prejudiced by lead counsel's alleged error.

Finally, Banks contended that lead counsel lacked experience "to litigate a case of this magnitude." The Court noted that the trial court's finding of ineffectiveness was apparently based solely upon lead counsel's statement on cross-examination that she "didn't feel like there was any mentorship..." The Court noted all that lead counsel did to prepare for trial and all that she did during

trial. And, the Court stated, with no reference to a specific error by lead counsel, it could not be said that lead counsel's performance fell below an objective standard of reasonableness under the circumstances confronting counsel at the time without resorting to hindsight. To the contrary, the Court opined, lead counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Moreover, the Court found, Banks' argument targeting the inexperience and status of his lead counsel, and the trial court's reliance upon it, was flawed for at least two reasons. First, the argument viewed one attorney in a vacuum and necessarily ignored the fact that two additional experienced attorneys actively participated throughout Banks' trial, one of whom was the circuit public defender. Second, to the extent the designation of lead counsel was erroneous, Banks cannot invite error only to challenge the alleged error after an unfavorable result at trial. The record revealed that, on the morning of the second day of trial, two of Banks' three counsel were late. Lead counsel stated that, "since I have not yet been sworn in yet, I'm not sure that we can conduct — should conduct any proceedings before they get here." The trial court agreed. Similarly, lead counsel agreed that she was not permitted "to do work in the courtroom without a supervising attorney with [her.]" Finally, lead counsel did not express any objection to the trial court concerning her inexperience (although the Court noted, lead counsel "emphatically and even eagerly" testified to her own alleged ineffectiveness during Banks' motion for new trial hearing, stating at one point that she "basically escorted [Banks] to prison.").

Thus, the Court concluded, Banks failed to carry his burden to prove that lead counsel's performance was deficient, and that, but for the deficiency, there was a reasonable probability the outcome of the trial would have been different. Accordingly, the trial court's order granting the motion for new trial was reversed.

Mutually Exclusive Verdicts; Venue

Jones v. State, A16A0523 (6/9/16)

Appellant was convicted of theft by conversion and by bringing stolen property into the state. Briefly stated, the evidence

showed on December 3, appellant rented a Mazda in Chattanooga, Tennessee. The signed rental agreement provided that appellant could drive the car 800 miles per week and that appellant would return the car by December 9. At trial, appellant admitted that he had driven the car to California to see his son, stayed "just a couple of hours," and returned to the Southeast without meeting his son. On December 9, however, appellant ran out of gas in Atlanta. Appellant spent the night in Atlanta but did not call the rental company, which could not reach appellant and reported the car stolen on December 10. On December 11, a police officer driving on Interstate 75 in Gordon County recognized the car from a police alert for a stolen vehicle and stopped the car. Appellant was driving at the time of his arrest, and the car's odometer showed that it had been driven 5,109 miles, or more than four thousand miles over the authorized amount.

Appellant contended that the verdict was mutually exclusive as to the two crimes charged because it was impossible for him to have stolen the car in Tennessee and also to have possessed it lawfully in Georgia before converting it to his own use. The Court disagreed. As to the theft by conversion conviction, the Court noted that although appellant lawfully obtained the car, the jury was entitled to infer fraudulent intent to convert the car from appellant's setting out to drive thousands of miles away from Chattanooga even though the rental agreement specified that he drive the car no more than 800 miles. And, even though appellant's conversion of the car took place well before he arrived in Georgia, venue was established in Georgia because, as the trial court properly charged the jury, that conversion "shall be considered as having been committed in any county in which the accused exercised control over the property which was the subject of the theft." O.C.G.A. § 16-8-11. Because appellant was seen exercising control over the car in Gordon County, venue was appropriate in that county.

Furthermore, the Court stated, although venue in Georgia was sufficient, it did not mean that the conversion actually happened in Georgia such that appellant must have brought the car into Georgia lawfully. A person's "guilty knowledge" as to the status of property as stolen in another state can be established by direct or circumstantial evidence and can be

inferred from circumstances which would, in the opinion of the jury, lead a reasonable person to believe that the vehicle was stolen. Appellant himself testified that he drove the Mazda from Chattanooga to California after signing an agreement to drive it no more than 800 miles. The jury could reasonably infer that appellant fraudulently converted the car to his own use well before entering Georgia on his return trip to Chattanooga, and was also authorized to conclude that he knew he had thus converted the car when he entered Georgia, thereby bringing stolen property into the state.

Accordingly, the Court concluded, the verdict could not be characterized as mutually exclusive because the two crimes of theft by conversion and bringing stolen property into the state logically mutually exist — that is, the evidence before the jury authorized it to conclude both that appellant converted the car to his own use outside of Georgia and that he then brought the same car into Georgia.

Rule of Lenity

Martinez v. State, A16A0323 (6/9/16)

Appellant was convicted of robbery by sudden snatching (Count 1), four counts of forgery in the first degree (Counts 2-5), and giving a false name to law enforcement (Count 6). He contended the trial court erred by not applying the rule of lenity to Counts 2 through 5. He contended he should have been sentenced under O.C.G.A. § 16-10-20 for making a false statement or writing, which carries a punishment of imprisonment for one to five years and a fine, rather than under O.C.G.A. §§ 16-9-1(b) for forgery in the first degree, which, at the time of appellant's conviction, carried a punishment of imprisonment for one to ten years. The Court agreed.

The Court stated that the fundamental inquiry when assessing whether the rule of lenity applies is whether the identical conduct, meaning the specific conduct with which the defendant was charged, would support a conviction under either of two criminal statutes with differing penalties. Here, appellant was charged with four counts of forgery in that he did "unlawfully, with intent to defraud, knowingly make a signature on the signature line of [each of four separate documents], a writing, in the fictitious name of Oscar Cuello, and did utter and deliver said writing to the Sheriff's Department." Although the State

argued that O.C.G.A. § 16-10-20 does not require a showing of “intent to defraud” like the forgery statute, the Court found that O.C.G.A. § 16-10-20 requires the equivalent in that it requires the State to prove that the person knowingly and willingly engaged in concealing material facts, making fraudulent statements, or falsifying documents knowing them to be false or fraudulent. Moreover, O.C.G.A. § 16-10-20 carries a mens rea requirement that requires a defendant to know and intend, that is, to contemplate or expect, that the prohibited conduct will come to the attention of a state or local department or agency with the authority to act on it. Thus, although O.C.G.A. § 16-10-20 does not specifically state that the defendant must have acted with “intent to defraud” as is stated in the forgery statute, O.C.G.A. § 16-10-20 requires proof of the same mens rea.

Thus, the Court concluded, an examination of the plain meaning of the statutory language of the two crimes at issue shows that the specific conduct with which appellant was charged would support a conviction under either of two crimes, thereby creating an ambiguity regarding the crime for which appellant should be punished. Appellant was guilty of intending to defraud the sheriff’s department by knowingly making four writings in a fictitious name. Under O.C.G.A. § 16-10-20, appellant was guilty of knowingly and willfully making a false statement of his name, in four writings, with the intent to deceive a government entity, i.e., the sheriff’s department. The State did not argue that a rule of construction would resolve the above ambiguity, and the Court found no such rule. Therefore, because these two statutes provide for different penalties for the same conduct at issue in this case, the rule of lenity applies, and appellant must be resentenced accordingly. The Court therefore reversed appellant’s conviction on the four counts of forgery in the first degree and remanded for resentencing under O.C.G.A. § 16-10-20.

Search & Seizure

State v. Martin, A16A0512 (6/9/16)

Appellant was accused of possession of marijuana and possession of a drug related object. The trial court granted his motion to suppress and the State appealed. The evidence showed that an officer received a

dispatch concerning loud music coming from a suspicious vehicle at 235 Windsor Drive. While en route to 235 Windsor Drive, the deputy spotted a vehicle matching the description he was given parked in the driveway of 155 Windsor Drive. The tag number matched the number he received from dispatch. The deputy stopped and asked the two men standing next to the vehicle if they had been parked further down the road and whether they had been listening to loud music. Martin, the driver, denied playing loud music. The deputy then asked what the two were doing in the driveway. Martin replied that he had stopped to deliver a school book to a friend and that the two were talking. Next, the deputy asked Martin “if anything was in the vehicle that [the officer] need[ed] to know about or be concerned about.” Martin responded, “yes.” When the officer asked what was in the car, Martin stated that there was “some marijuana and a pipe.” The officer asked Martin to retrieve the items, and Martin produced a small bag containing a green leafy substance and a glass pipe and placed them on the roof of the vehicle. The trial court found that the officer’s question regarding the contents of the car amounted to a second tier seizure and suppressed the evidence.

The Court found otherwise. Instead, the Court found that the officer’s question concerning whether “anything was in the vehicle that [the officer] need[ed] to know about or be concerned about” did not escalate the encounter to the second tier. In fact, the Court stated, the officer’s inquiry, which Martin was free to decline, did not even rise to the level of requesting consent to search — which itself would have been permitted during a first tier encounter. Rather than terminate the encounter, as was his right, Martin offered an honest response to the officer’s question. The trial court’s attempt to distinguish between Martin “volunteer[ing] that he had marijuana and a pipe in his vehicle” and Martin “respond[ing] to a direct question” the officer was lawfully permitted to ask during a first tier encounter is a distinction without a meaningful difference. In short, if the officer could ask for consent to search during a first tier encounter, then he could ask the more innocuous question of whether the vehicle contained anything about which he should be concerned. Accordingly, the Court concluded that the officer’s inquiry concerning

the contents of what had been reported as a suspicious vehicle was permissible during a first tier police-citizen encounter. Because the trial court concluded that the officer’s question elevated the nature of his encounter with Martin to a second tier encounter requiring articulable suspicion, the trial court erred.

Jury Charges, Justification

Haynes v. State, A16A0326 (6/15/16)

Appellant was convicted of elder abuse and false imprisonment. The evidence showed that the victim was appellant’s elderly mother, who suffered from late-stage dementia and early Alzheimer’s disease. Appellant discharged his mother out of a residential nursing and rehabilitation center because he needed her Medicaid funds to cover household expenses. A health aide worker found the victim bruised and tied by her arms to the rail of a hospital bed in appellant’s home.

Relying on *Tarvestad v. State*, 261 Ga. 605 (1991), appellant contended that he restrained the victim for the victim’s own safety and that the trial court erred in denying his requested jury charge on justification. The Court disagreed. In *Tarvestad*, the husband, convicted of being a habitual violator, had orally requested the charge on justification where he had been driving his pregnant wife, in labor and unable to drive, to the doctor. No other options for Tarvestad were suggested by the evidence. Here, however, there was no evidence that indicated that the victim was in such immediate danger that appellant had to tie her to her bed instead of utilizing other options that were available to him. Specifically, the Court noted, appellant could have taken his mother back to the nursing center, called and requested assistance from the home health aide, or called 911. Accordingly, the Court concluded, the trial court did not err in failing to instruct the jury on justification under these circumstances.

Right to Be Present; Critical Stages of Proceedings

Pitt v. State, A16A0408 (6/15/16)

Appellant was convicted of multiple counts of child molestation. He contended that he was absent during a critical phase of his trial in violation of his constitutional rights to due process and a fair trial and is therefore

entitled to a new trial. Specifically, that he was absent during what he characterized as the trial court's "demand for an offer of proof as to the relevance of certain defense evidence." The Court disagreed.

The Court noted that while denial of the corresponding federal constitutional right to be present is subject to harmless error review on appeal, a denial of the right to be present guaranteed by the Georgia Constitution is presumed to be prejudicial unless the defendant waived his right or later acquiesced to proceedings conducted in his absence. But here, the Court found, the short portion of the trial in which appellant was absent was not a critical phase of the proceedings. The only issue discussed was a procedural question about a witness that the court never had to resolve because it was resolved by the parties once appellant was present in the courtroom, and thus, the brief discussion was not a portion of the proceeding where appellant had an unequivocal right to be present. Furthermore, the Court stated, given that appellant could not have made a meaningful contribution to the discussions about calling the new witness, his right to be present was not violated by his absence from those discussions. Accordingly, the trial court did not err in denying appellant's motion for new trial.