

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 10, 2010

Legal Services Staff Attorneys

Chuck Olson
General Counsel

Joe Burford
Trial Services Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Coordinator

Gary Bergman
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

THIS WEEK:

- **Marijuana Possession**
- **DUI; Search & Seizure**
- **Search & Seizure**
- **Entrapment, Jury Charge**
- **First Offender Act, Sentencing**
- **Double Jeopardy**
- **Detention; Obstructing and Officer**
- **Juveniles; O.C.G.A. § 15-11-30.2**
- **Battery; Jury Charges**
- **Possession; Insufficiency of Evidence**
- **DUI; Search & Seizure**
- **Expert Witness; Qualification**
- **Prior Crimes; O.C.G.A. § 24-9-84.1**
- **Judicial Comment**

Marijuana Possession

Smith v State, A10A1223

Appellant was found guilty of possession of less than one ounce of marijuana and had his probation revoked. The evidence showed that police pulled over a van where appellant was sitting in the passenger seat. Appellant was given permission to leave while 2 adult passengers were arrested based on active warrants, and the driver was questioned. After appellant left, police found marijuana on the center console and marijuana residue on the passenger seat. Appellant was later arrested, but no marijuana was found on his person. Appellant contended the evidence was insufficient to revoke his probation because the State failed to prove that he possessed the marijuana in issue. The Court agreed.

The Court has routinely held that though a person is not in actual possession, if he knowingly has both the power and intention to exercise dominion or control over a thing at a given time, then he is in constructive possession of it. This may be proved by circumstantial evidence, but those circumstances were not presented here. Appellant did not try to flee, he cooperated with police, and there was no evidence he tried to hide or conceal anything. His mere spatial proximity to the marijuana was insufficient to support a finding of intent to exercise dominion and control over it. The Court reversed the order of revocation.

DUI; Search & Seizure

Polk v State, A10A1472

Appellant was convicted for DUI and a traffic offense. The evidence showed that an officer stopped appellant for failure to maintain lane and “laying drags” after observing that appellant was weaving back and forth over the center lines and fog lane. The officer had appellant step out of the car and perform field sobriety tests. Based on his performance, appellant was arrested for driving under the influence of alcohol. Appellant contended that the stop of his vehicle was pretextual and lacked reasonable articulable suspicion of criminal activity. The Court disagreed.

To justify stopping a car, an officer must have specific articulable facts that are sufficient to raise a reasonable suspicion of criminal conduct. In order to determine if an investigatory stop is unreasonably pretextual, the Court relies on whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose. *Allenbrand v State*, 217 Ga. App. 609 (1995). Here, the evidence of appellant’s

erratic driving along with a videotape that was not inconsistent with the officer's testimony were enough to support the trial court's finding of reasonable articulable suspicion for the traffic stop.

Search & Seizure

Williams v State, A10A1450

Following a bench trial, appellant was convicted of possession with intent to distribute marijuana. The evidence showed that an officer initially observed a car with a broken taillight, but lost sight of the car. After calling for back up, officers found this car parked at a residence. Officers informed a female occupant of the house that they were going to impound the car, to which she responded by yelling profanities at the officers. Officers arrested the woman for disorderly conduct, and when appellant said something in response he was arrested as well. Based on information the woman gave, officers were concerned there was a minor left unsupervised in the house, so they entered the home, claiming exigent circumstances. Though the girl inside told them there was no one else in the house, the officers continued to search. They even looked under the bedcovers, where they found several bags of suspected marijuana. Appellant contended that officers had no authority to enter his home because his arrest was not supported by probable cause, and as a result the officers were not authorized to arrest him and remove him from his home. The Court agreed.

The Fourth Amendment prohibits officers from entering a person's home without consent or a warrant. An exception to the warrant requirement exists "where the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Love v State*, 290 Ga. App. 486, 487 (2008). The trial court found that the officers' belief that a minor child was being left without adult supervision provided exigent circumstances authorizing entry into the house. However, the Court held, the issue was whether appellant's arrest, which created the exigent circumstances, was supported by probable cause.

The Court found that there was no probable cause to arrest appellant for the traffic violation because the State never established that appellant owned the car at issue or that

appellant was driving the car at the time of the taillight violation. Additionally, because neither officer testified that appellant did anything to place them in reasonable fear of their safety or that he used fighting words, there was no probable cause for the disorderly conduct arrest. Thus, absent a basis to lawfully arrest appellant, there was no exigent circumstance that justified the warrantless entry into his home.

Entrapment, Jury Charge

Quarterman v State, A10A0851

Appellant was convicted of selling cocaine and selling cocaine within 1,000 feet of a housing project. The evidence showed that an officer trying to make an undercover narcotics purchase was approached by appellant after asking to purchase some "hard," or crack cocaine. Appellant sold the crack cocaine to the officer, and the officer turned over the crack as well as the audio and video recording of the transaction. After he was arrested, appellant recognized the undercover officer and admitted what he had told the officer about the sale. Among other things, appellant contended that the trial court erred by failing to charge the jury on entrapment, his sole defense. The Court disagreed.

Pursuant to O.C.G.A. § 16-3-25, a "person is not guilty of a crime if, by entrapment, his conduct is induced or solicited by a government officer or employee, or agent of either, for the purpose of obtaining evidence to be used in prosecuting the person for the commission of the crime." However, there is no entrapment unless the agent used undue persuasion, incitement or deceit to induce him to commit a crime he was not predisposed to commit. Here, the officer made the inquiry to a woman, who yelled out to a group of men with the inquiry. Appellant then approached the car and displayed the crack cocaine to the undercover officer. Here, there was no evidence of undue persuasion. Thus, the trial court did not err in failing to charge the jury on entrapment.

First Offender Act, Sentencing

State v Neal, A10A1618

Appellee pled guilty to statutory rape. The evidence showed that at the plea hearing Appellee requested that he be granted

first offender status, but the court denied the request and accepted the guilty plea, entered judgment of conviction and sentenced him to five years on probation. Appellee filed a motion to modify the sentence which the trial court granted. The State appealed and the Court reversed.

Under the plain language of O.C.G.A. § 42-8-60, a trial court is only authorized to grant first offender treatment *before* a defendant has been adjudicated guilty and sentenced. *Burchette v State* 274 Ga. App. 873. Thus, because the trial court had accepted appellee's plea, entered a final judgment of conviction, and imposed a lawful sentence, the court's subsequent attempt to impose the first offender treatment was a nullity.

Double Jeopardy

Appling v State, A10A1596

Appellant was indicted for aggravated battery, three counts of aggravated assault and two counts of possession of a firearm during the commission of a felony. The evidence showed that during the trial an unresponsive witness made a statement indicating that appellant was running from probation at the time of the incident. The jury was excused and the trial court stated it would grant a mistrial at appellant's request, but appellant refused. When the jury returned, a curative instruction was given and the prosecutor asked the witness not to go into matters she was told not to. Appellant then moved for a mistrial, and based on the previous unresponsive testimony about probation, the court granted his motion. Appellant contended that the court then erred in denying his plea in bar on double jeopardy grounds. The Court disagreed.

Where a mistrial is granted at the request of the criminal defendant, retrial is not prohibited on the basis of double jeopardy unless it is established that the State intended to goad the defendant into moving for a mistrial. Here, appellant's character was not put into evidence by any improper conduct of the prosecutor, but by a witness' unresponsive answer to a question. Additionally, because the State had not yet presented the testimony of numerous witnesses, including the alleged victims, the State had nothing to gain from delay. The prosecutor was aggressively seeking a conviction, not a mistrial. Thus, the Court affirmed.

Detention; Obstructing an Officer

Mack v State, A10A1008

Appellant was convicted for misdemeanor obstruction of an officer. The evidence showed that an officer stopped a vehicle in which appellant was a passenger, after seeing it illegally pass another car on a double yellow line. Appellant, who was visibly injured, urged the driver to ignore the traffic stop and take him to the hospital. When driver refused, appellant stated he would walk to the emergency room. Believing that appellant was intoxicated, the officer tried to escort appellant back to the vehicle. When appellant refused and clenched his fists as though he were about to strike the officer, he was arrested for obstruction. Appellant contended that all evidence and testimony should have been suppressed because the officer had illegally detained him by preventing him from leaving. The Court disagreed.

Pursuant to O.C.G.A. § 40-6-95, a person who is intoxicated to a degree which renders him a hazard shall not walk or be upon any roadway. Additionally, an officer may briefly detain an individual based on a reasonable suspicion that the person is, or is about to be, engaged in criminal activity. Here, appellant's appearance, the smell of alcohol, and his stated plan to walk to the hospital gave the officer reasonable suspicion that he was about to be an intoxicated pedestrian in violation of the statute. Appellant's refusal to comply with the officer's instructions during the detention provided probable cause for the arrest. Thus, the trial court properly denied the motion to suppress.

Juveniles; O.C.G.A. § 15-11-30.2

In the Interest of K.P., a Child, A10A1358

A delinquency petition was filed in the juvenile court charging appellant with burglary. The evidence showed that three adults, who were indicted for burglary of a carwash, implicated appellant, a 17 year old, in the burglary. Appellant indicated he had been at the carwash on the night in question and had "received money from it." Appellant's history with the juvenile court included adjudications on three felonies and he was on probation when the burglary at issue took place. The State moved to transfer his case to superior court, and fol-

lowing a hearing, the juvenile court granted the motion. Appellant contended that the juvenile court erred by finding that his and the community's interests required the transfer to superior court. The Court disagreed.

Pursuant to O.C.G.A. § 15-11-30.2, a juvenile court has the discretion to transfer a case to superior court upon finding that there are reasonable grounds to believe the child was at least 15 years of age at the time, had committed the delinquent act alleged and the interests of the child and community require that he be placed under legal restraint and the transfer be made. The Court held that in light of the juvenile's extensive past history with the juvenile system, his lack of rehabilitation, and his self-imposed emancipation from his parents, the juvenile court did not abuse its discretion. Because of the juvenile's lack of cooperation and failure to adhere to his probationary requirements, the juvenile was not amenable to treatment in the juvenile system. The Court affirmed.

Battery; Jury Charges

Wallin v State, A10A1177

Appellant was convicted of aggravated assault, two counts of battery, and other traffic violations. The evidence showed that appellant stormed into the victim's residence carrying a three-foot-long post with a bolt protruding from one end. He struck the victim repeatedly, and then choked him, hit him with a fist, and bit him. As he left the scene, an officer pulled him over for driving without a tag. Appellant contended that the trial court's charge erroneously authorized the jury to find him guilty of committing battery by intentionally causing *substantial physical harm*, a method of committing the crime not alleged in the indictment. The Court agreed.

Generally, it is not error to charge an entire Code section even if a portion of that charge may be inapplicable to the facts in evidence. However, "the giving of a jury instruction which deviates from the indictment violates due process where there is evidence to support a conviction on the unalleged manner of committing the crime and the jury is not instructed to limit its consideration to the manner specified in the indictment." *Doomes v State*, 261 Ga. App. 441, 444 (2003). Here, the indictment only alleged that appellant committed battery by intentionally causing

visible bodily harm by choking and biting the victim. Consistent with statutory definition of battery, however, the trial court instructed the jury that "[a] person commits the offense of battery when that person intentionally causes substantial[] physical harm or visible bodily harm to another." The trial court, therefore, did not limit the jury's consideration of the charges to the manner alleged in the indictment. The Court held that because the instruction deviated from the indictment in this way, it was reasonably possible that the jury convicted appellant on the unalleged manner of committing the crime. Thus, there was substantial error in the charge as a matter of law and appellant's battery convictions were reversed.

Possession; Insufficiency of Evidence

Bodiford v State, A10A1114

Appellant was convicted of possession of marijuana with intent to distribute and possession of marijuana within 1000 feet of a publicly owned housing project. The evidence showed that when officers went to appellant's residence to arrest him for an alleged probation violation, they found him sitting in the passenger seat of a car; his cousin was in the driver's seat. There was bag containing a green leafy substance on the passenger seat beside appellant, near the center console. Upon being identified, both individuals fled the scene through the passenger side. The car belonged to the cousin's mother and another person. Appellant turned himself in to the authorities later. Upon investigation of the scene, two bags containing suspected marijuana were found on the passenger seat, two in the glove compartment, and more suspected marijuana was found on the driver's side. As of appellant's trial, the other individual had not been arrested or charged. Appellant contended that the evidence was insufficient to support the convictions. The Court agreed.

Where two occupants of a vehicle are contended to be in joint possession of contraband, but the State does not charge one of those occupants, the State bears the burden of showing that the defendant was in sole constructive possession of the contraband. Constructive possession exists where a person knowingly has both the power and intention to exercise dominion over a thing. *Taylor v*

State. 303 Ga. App. 88 (2010). Here the State conceded that the other individual had equal access to the marijuana and that he was not charged. No evidence showed that appellant actually possessed or handled the drugs or that he alone had the power and intention to exercise control over the drugs. Thus, the convictions were reversed.

DUI; Search & Seizure

Clark v State, A10A1332

Appellant was convicted for driving with an unlawful alcohol concentration and failure to wear a seatbelt. The evidence showed that an officer noticed that appellant was having trouble maintaining his lane in his vehicle. She allowed appellant to pass her and noticed his seat belt “hanging down to the side.” After stopping him to investigate the possible seat belt violation, she noticed signs of intoxication and gave him several field sobriety tests. The officer noticed “clues” consistent with alcohol impairment, and a chemical test revealed a blood alcohol content of .106. Appellant argued that the court erred in denying his motion to suppress all evidence on the grounds that the traffic stop was improper and the officer lacked probable cause to arrest him for driving under the influence. The Court disagreed.

A law enforcement officer may effect a stop if she “has a clear and unobstructed view of a person not restrained as required by O.C.G.A. § 40-8-76 (b).” *Bell v State*, 248 Ga. App. 254, 256 (2001). A seat belt violation, including a motorist’s failure to use as shoulder strap, is a proper basis for a traffic stop. Here, the trial court found sufficient evidence to support a finding that the officer did have a clear view of appellant as he passed the patrol car. Additionally, appellant’s admitted use of alcohol and visible signs of intoxication provided further probable cause for his arrest.

Expert Witness; Qualification

Rushing v State, A10A1569

Following a bench trial, appellant was convicted of theft by taking. The evidence showed that appellant entered into a verbal agreement with a trucking company to purchase a six car hauling trailer, making first payment on day of pick-up and then monthly payments until it had been paid in full. Appellant took the

trailer, but made no payments for several weeks. When the company attempted to repossess the trailer, appellant refused to disclose information about its location. A grand jury indicted him for theft by taking. At trial, a witness was offered and tendered as an expert in the field of valuation of equipment, and he testified as to the fair market value of the trailer. Appellant contended that the trial court abused its discretion in arbitrarily qualifying the witness as an expert. The Court disagreed.

The decision to qualify or reject a witness as an expert rests within the sound discretion of the trial court and will not be disturbed on appeal absent manifest abuse. To qualify as an expert, generally all that is required is that a person be knowledgeable in a particular matter. Here, the witness testified to over 25 years of experience in the repossession business, and that he had been qualified as an expert 15-20 times in other court proceedings. Thus, the trial court did not abuse its discretion in qualifying him as an expert witness.

Prior Crimes; O.C.G.A. § 24-9-84.1

Crowder v State, A10A1601

Appellant was convicted of aggravated assault. The evidence showed that appellant, in a dispute with the victim over a former girlfriend, cut the victim numerous times with a razor blade. The victim had injuries that required 45 to 50 stitches and staples. On the morning his trial was to begin, he filed a written notice of intent to introduce the victim’s prior VGCSA conviction, which was more than 10 years old, for impeachment purposes. Appellant contended that the trial court erred in refusing to admit into evidence the victim’s previous conviction. The Court disagreed.

O.C.G.A. § 24-9-84.1(b) provides that a conviction more than ten years old “is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.” Here, defense counsel served the notice of intent the day after jury selection, but before the presentation of evidence to that jury. Thus, there was little, if any, advance notification, so the State did not have time to prepare. Additionally, the prejudicial effect of the victim’s prior conviction outweighed any probative value. Thus, the

evidence of the conviction was inadmissible, and the trial court did not err in precluding appellant from introducing it.

Judicial Comment

Callaham v State, A10A1519

Appellant was convicted of aggravated assault and possession of a firearm during the commission of a felony. The main issue at trial was the identity of the shooter. The victim and the victim’s neighbor identified appellant as the shooter. On cross, defense counsel was able to get the victim’s wife to concede that she did not I. D. appellant. Appellant also testified that someone else shot the victim. Following the prosecutor’s cross of appellant, the trial court asked appellant, “[D]o you know why the neighbor that lives across the street would come in here and say you’re the one that shot? He’s not related to anybody.” Defense counsel objected and moved for a mistrial, but the court simply offered a curative instruction telling jurors that they determine credibility and should disregard any implication from the court’s question. Appellant contended that the trial court violated O.C.G.A. §17-8-57 by expressing its opinion about the credibility of a witness. The Court agreed.

O.C.G.A. §17-8-57 provides “it is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused.” Any violation of this Code section shall be held to be error and the decision of the case reversed. Here, the court’s question and comment clearly intimated that the testimony was believable because the neighbor was an independent witness. This was not an excusable ‘slip of the tongue’ and the curative instruction did not eradicate its inappropriate comments. Any reasonable juror might well construe the trial court’s words as an expression of opinion on the credibility of the witness, and “no man could dare say that they were not thereby influenced to some extent.” The conviction was reversed and remanded.