

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 15, 2017

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THIS WEEK:

- **Traffic Offenses; Habeas Corpus**
- **Sentencing; OCGA § 16-13-31 (g)**
- **Ineffective Assistance of Counsel; Procedural Bar**
- **Ineffective Assistance of Counsel; Plea Bargaining**
- **DUI; Williams**

Traffic Offenses; Habeas Corpus

Munye v. State, A17A1188, A17A1189, A17A1190 (8/1/17)

On Sept. 2, 2014, Munye was convicted of driving with a suspended license by the now defunct Dekalb County Recorder's Court. On Oct. 7, he pled to a second driving with suspended license charge before the same court. In June of 2015, Munye moved to vacate his convictions on the grounds that they were void because the Recorder's Court lacked jurisdiction over his state law traffic offenses and was limited to only county ordinance violations. He also moved to vacate his sentences as void for the same reason. The trial court denied the motions.

Munye first argued that the trial court erred in dismissing his motion to vacate his criminal convictions. The Court disagreed. The Court stated that a motion to vacate a judgment of conviction as void is not an appropriate remedy in a criminal case. Rather, a defendant attacking his underlying conviction is limited to timely filing a motion for new trial, a direct appeal from his criminal conviction, a motion to withdraw his guilty plea, an extraordinary motion for new trial,

a motion in arrest of judgment, or a petition for the writ of habeas corpus.

Munye argued that his motion should have been construed as a timely motion in arrest of judgment under OCGA § 17-9-61. However, the Court found, his motion to vacate his conviction as void could not be construed as a motion in arrest of judgment or other alternative motion attacking his underlying conviction in light of OCGA § 40-13-33 (a), which provides as follows: "Any challenge to a misdemeanor conviction of any of the traffic laws of this state or the traffic laws of any county or municipal government which may be brought pursuant to Chapter 14 of Title 9 [habeas corpus] must be filed within 180 days of the date the conviction becomes final." A defendant's failure to comply with the 180-day time limitation divests a court of jurisdiction to hear the challenge to the traffic conviction. OCGA § 40-13-33 (d).

The Court stated that the 180-day limitation period contained in OCGA § 40-13-33 (a) applies not only to attacks by petition for habeas corpus relief, but also applies broadly to any challenge to a misdemeanor traffic conviction that could have been brought by means of a petition for habeas corpus, regardless of whether the challenge was actually made by that procedure. And here, Munye could have challenged his misdemeanor traffic convictions by means of habeas corpus. Thus, because Munye undisputedly filed his motion attacking his misdemeanor traffic convictions more than 180 days after his convictions became final in the Recorder's Court, his motion was time-barred under OCGA § 40-13-33 (a), no matter how that motion was construed. Accordingly, the Court held, his direct appeal from the dismissal of his motion to vacate his convictions was dismissed.

Munye also contended that the trial court erred in denying his motion to vacate his sentences as void. The Court again disagreed. A sentence is only void if the court imposes a punishment that the law does not allow and where the sentence imposed falls within the statutory range of punishment, it is not void. Munye contended that the sentences imposed upon him should have been restricted to the more limited punishments available for county ordinance violations contained in the DeKalb County Code of Ordinances. However, the Court found, Munye was not prosecuted and convicted in DeKalb Recorder's Court of county ordinance violations, but rather for state law traffic misdemeanors over which the DeKalb Recorder's Court claimed to have jurisdiction to adjudicate and impose punishment. Thus, the real issue here was not whether the state law sentences exceeded the statutory range of punishment, but rather whether the DeKalb Recorder's Court had subject matter jurisdiction to adjudicate and impose punishment for state law traffic misdemeanors or instead was limited to adjudicating and imposing punishments for county ordinance violations. And any challenge to the subject matter jurisdiction of the Recorder's Court was a challenge to his underlying convictions rather than his sentences. Accordingly, because Munye failed to raise a colorable claim that his sentences were void, the trial court's denial of Munye's motion to vacate his sentences was not subject to direct appeal and was dismissed.

Sentencing; OCGA § 16-13-31 (g)

Reed v. State, A17A0975 (8/2/17)

Appellant pled guilty to one count each of trafficking in methamphetamine, possession of marijuana with intent to distribute, and possession of more than an ounce of marijuana. Appellant contended that the trial court erred in failing to sentence him below the mandatory minimum pursuant to OCGA § 16-13-31 (g) (2) (A). Specifically, he contended that the trial court abused its discretion in failing to depart from the 15-year mandatory minimum "based on quantity alone." Thus, he argued, under OCGA § 16-13-31 (g) (2), more than mere quantity must be considered and, in his case, there was no aggravating evidence. Furthermore, he contended, the State presented no evidence that he was a "leader" or "kingpin"

or that he maintained an organized methamphetamine distribution network; no firearms were involved; he had no prior felonies; his pre-trial drug screens were all negative; and all the witnesses who testified at the plea hearing on his behalf indicated that he was a productive member of society. Finally, appellant also argued that the trial court utilized a mechanical sentencing scheme "that prevented proper consideration" of the request for a deviation. The Court disagreed.

First, the Court found, the record contained no evidence that the trial court declined to deviate "based on quantity alone." The record also failed to support appellant's mechanical sentencing claim. Such a claim requires a clear statement in the record that constitutes either a general refusal to consider a deviation or an erroneous expression of belief that the law does not permit the exercise of such discretion. But here, the Court found, the trial court's statements during the sentencing hearing clearly indicated an awareness that it had the discretion to deviate from the mandatory minimum sentence and there was nothing in the trial court's statement that indicated it was applying a mechanical policy or that there was an outright refusal to consider appellant's request to deviate.

Moreover, the Court found, contrary to appellant's arguments, the statute does not state that the trial court must depart from the mandatory minimum sentence in the event it finds the presence of all five factors. It also does not require consideration of aggravating evidence to support a decision not to depart from the mandatory minimum sentence. And here, the Court concluded, the record from the plea hearing reflected that the trial court was well aware of its discretion to depart from the mandatory minimum sentence and the factors contained in OCGA § 16-13-31 (g) (2) (A) and the trial court concluded that the fifth factor – the "interests of justice" – did not weigh in appellant's favor. Accordingly, the Court held, the trial court did not abuse its discretion in refusing to deviate from the maximum sentence.

Ineffective Assistance of Counsel; Procedural Bar

Holloway v. State, A17A0950 (8/2/17)

Appellant was convicted of burglary and hijacking a motor vehicle. He contended that

he received ineffective assistance of counsel.

Citing *Glover v. State*, 266 Ga. 183, 183-84 (2) (1996), the Court noted that appellant conceded in his enumeration of errors that he raised the issue of ineffective assistance of counsel for the first time in his brief to the Court. Also, the Court noted, appellant never filed a motion for a new trial and instead filed multiple motions for out of time appeal, one of which was made with the assistance of appointed appellate counsel. Thus, not only did appellant not move for a new trial at any point in the proceedings, he also pursued his appeal to the Court, at least in part, with the assistance of a new appellate counsel who would have been free to raise ineffective assistance of counsel as a basis for a new trial with the trial court. Therefore, the Court concluded, as appellant and his new appellate counsel did not seize the opportunity to address the issue of the trial counsel's ineffectiveness with the trial court, *Glover* barred the Court from considering his ineffectiveness claim on appeal.

Ineffective Assistance of Counsel; Plea Bargaining

Daniel v. State, A17A0746 (8/2/17)

Appellant was convicted of one count of first degree burglary, four counts of entering an auto, two counts of financial transaction card theft, and two counts of identity theft. The court sentenced him to 20 years to serve as a recidivist pursuant to OCGA § 17-10-7 (c). Appellant argued that his trial counsel was constitutionally deficient for failing to correctly advise him about mandatory recidivist sentencing during plea negotiations and that, had he properly understood recidivist sentencing, he would have accepted the State's plea offer. The Court agreed and reversed.

First, the Court found that although trial counsel understood that persons sentenced as recidivists were ineligible for parole, he mistakenly believed that the trial court had discretion to not sentence appellant as a recidivist. Thus, the Court found, because trial counsel misunderstood the law in this regard, he did not properly advise appellant during plea negotiations that he faced a mandatory sentence as a recidivist and would be ineligible for parole pursuant to OCGA § 17-10-7 (c) if he was convicted at trial. Consequently, the Court held that trial counsel's performance was constitutionally deficient in the plea process.

The Court then turned to whether appellant was prejudiced by his counsel's deficient performance. The trial court found that appellant did not suffer prejudice because appellant failed to show that he would have accepted the State's plea deal if he had been properly advised. The Court found otherwise.

The Court noted that the trial court based its decision on its finding that appellant would not have accepted the plea deal in any event because he did not follow his counsel's advice to accept the State's offer, he maintained his innocence on the burglary charge, he believed he could win at trial, he believed that if he lost at trial his sentence would not be substantially worse than the State's offer, and he counteroffered with sentences which were not acceptable to the State. However, the Court found, the trial court's factual findings were clearly erroneous. First, the trial court should not have relied upon appellant's decision not to follow his trial counsel's advice or his beliefs concerning sentencing when trial counsel's erroneous advice left appellant without a proper understanding of the sentence he was facing. This circular logic could not support the trial court's finding that appellant would not have taken the plea. Second, although it was undisputed that appellant initially was reluctant to plead guilty to the burglary charge, he ultimately offered to enter a plea to just that charge, and the trial court's order disregarded this fact. Additionally, although appellant thought he would win at trial, he did not understand the gravity of the risk of losing at trial given that he was not properly advised that he would necessarily be sentenced as a recidivist and ineligible for parole. Finally, when asked if he would have accepted the State's offer had he understood his parole ineligibility after trial, appellant responded "Yes, ma'am. I believe I would have." Thus, the Court found, appellant made a showing that he was amenable to the State's plea offer of fifteen years with six to serve.

However, the Court found, because of the trial court's erroneous finding, it did not reach the other elements of the prejudice analysis - whether the prosecution would have withdrawn the offer and whether the trial court would have accepted the plea. Consequently, the Court remanded this case to the trial court to make the necessary factual determinations concerning the remaining elements of prejudice.

DUI; Williams

State v. Jacobs, A17A1288 (8/2/17)

Jacobs was accused of DUI. The trial court granted his motion to suppress the results of his breath test, finding that Jacobs did not give valid 4th Amendment consent. The State appealed, arguing that the trial court erred in suppressing the results of Jacobs's breath test based on its findings that the officer failed to designate the specific test for which he was requesting consent and that the way in which the officer read the implied-consent notice to Jacobs improperly asked him to choose one of the available chemical tests instead of asking him whether he would consent to a test in the first place. The Court agreed and reversed.

The Court noted that it was undisputed that before the breath test was administered to Jacobs, the arresting officer read Georgia's implied-consent statute for suspects who are 21 years old or older almost verbatim. But, instead of designating which test he was requesting, the officer asked Jacobs whether he would choose which test to take. There was no evidence that the officer used fear, intimidation, threat of physical punishment, or a lengthy detention to obtain Jacobs's consent to the breath test. There was also no evidence, and the trial court did not find, that the officer used physical force or the threat of such force to coerce Jacobs into agreeing to the breath test. In fact, the Court found, the officer testified that he did no such thing, and other than reading the implied-consent notice, he and Jacobs had no further discussions regarding his consent to the breath test. Moreover, there was no evidence that Jacobs's age, intelligence, or level of education hindered his ability to understand the implied-consent notice. To the contrary, evidence showed that Jacobs exercised his right to refuse to take any field-sobriety tests, which indicated that he was not so intoxicated that he could not make an informed decision regarding consent. Lastly, the officer, who was the sole person to observe Jacobs at the time, testified that when Jacobs consented to the breath test, he "seemed to understand . . . what [the officer] was asking of him[.]"

Nevertheless, the Court noted, without considering any of these factors, the trial court suppressed the breath-test evidence solely because the officer failed to designate the specific test that would be administered, and the last

question in the implied-consent notice "would lead a reasonable person to believe that the purpose of the question is to choose which test or tests would be administered, rather than to prompt a yes-or-no response as to whether the test would be administered in the first place." But, the Court stated, neither of those bases require the suppression of the breath-test results. Therefore, the Court concluded, because the implied consent warning begins by advising the defendant that Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine or other bodily substances, the officer's failure to designate the specific test to be performed did not change the substance or meaning of the implied consent warning.

Accordingly, the Court held, the record showed that the officer read the implied-consent notice verbatim with no further comments, threats, or coercion; Jacobs appeared to understand and answer the officer's questions appropriately; there was no evidence that Jacobs's youth or lack of education impaired his ability to consent; and Jacobs was advised of the various consequences of his refusal to consent to any testing. As a result, the State satisfied its burden of establishing that Jacobs's consent to the breath test was freely and voluntary given.