

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 20, 2013

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THIS WEEK:

- **Out-of-Time Appeals**
- **Sentencing; Recidivists**
- **Guilty Pleas; Sentencing**
- **Right to Jury Trial; Competency**
- **Drug Forfeitures; Sufficiency of Answers**
- **Impeding the Flow of Traffic; Waiver of Right to Jury Trial**
- **Right of Confrontation; Right of Cross-Examination**
- **Shoplifting; Prior Difficulties**
- **Juveniles; O.C.G.A. § 17-7-50.1**

Out-of-Time Appeals

Wimmer v. State, A13A1069 (9/6/13)

Appellant appealed from the denial of his motion for an out-of-Time Appeal. The record showed that in 1997, appellant was tried and convicted of robbery by intimidation, false imprisonment, interference with government property, and making a terroristic threat. The trial court did not advise appellant on the record that he had a right to appeal, to an attorney on appeal, or to a court-appointed attorney if he could not afford one. Appellant's court-appointed trial counsel never moved for new trial or filed a notice of appeal. In 2012, appellant filed a motion for out-of-time appeal, but the trial court did not conduct an evidentiary hearing on his motion. In his motion for out-of-time appeal, appellant asserted that he failed to appeal because his counsel, through negligence or ignorance, failed to adequately inform him of his appellate rights.

The Court stated that convicted defendants have a right to effective assistance of counsel on appeal from their conviction. An appellant is entitled to an out-of-time appeal if the appellant was denied his right of appeal through counsel's negligence or ignorance, or if the appellant was not adequately informed of his appeal rights. But when a convicted party by his own conduct or in concert with his counsel has slept on his rights, he forfeits his right to appeal. Thus, following a trial, when the movant alleges deprivation of the right to direct appeal due to trial counsel's ineffective assistance, judicial inquiry must be made whether appellant was responsible for the failure to pursue a timely direct appeal. And a trial court abuses its discretion when it fails to make such a factual inquiry.

Here, the Court found, and the State agreed, that the trial court failed to make the required inquiry and failed to make relevant findings. Therefore, the trial court's order was vacated and the case remanded for an evidentiary hearing and statement of findings on the record regarding whether the responsibility for failing to appeal rested on the defendant or his counsel.

Sentencing; Recidivists

Mack v. State, A13A1352 (9/6/2013)

Appellant appealed from an order denying his motion to modify his sentence. The record showed that in 2008, appellant was convicted of armed robbery and sentenced to life as a recidivist. His conviction was affirmed on appeal and the remittitur was returned to the trial court on June 22, 2012. On November 16, 2012, appellant filed a motion to modify his sentence, arguing that when read together, the sentencing provisions of the armed

robbery statute and the recidivist statute are ambiguous and that, in accordance with the rule of lenity, his sentence should have been reduced.

The Court noted that under O.C.G.A. § 17-10-1(f), a court may modify a sentence during the year after its imposition or within 120 days after remittitur following a direct appeal, whichever is later. Once this statutory period expires, as it had here when appellant filed his motion, a trial court may modify a sentence only if it is void. A sentence is void if the court imposes punishment not allowed by law. Therefore, in order to support a motion for sentence modification filed outside the statutory time period of O.C.G.A. § 17-10-1(f), a defendant must demonstrate that the sentence imposes punishment not allowed by law.

Appellant contended that his sentence was void because there is an inherent ambiguity between the recidivist statute, O.C.G.A. § 17-10-7(a), which provides that repeat offenders be sentenced to the “the longest period of time prescribed for the punishment of the subsequent offense,” and the armed robbery statute, O.C.G.A. § 16-8-41(b), which provides for a punishment of “imprisonment for life or by imprisonment for not less than ten nor more than 20 years.” Appellant contends that it is not possible to determine whether “the longest period of time” means life, or 20 years. The Court found that because appellant raised a colorable claim that his life sentence was not allowed by law, he was entitled to file his motion in the trial court and to file a direct appeal from the denial of his motion. Nevertheless, the Court found, his argument failed. The construction of O.C.G.A. § 17-10-7(a) as applied to the armed robbery statute is clear: The longest period of time prescribed for punishment of armed robbery is life imprisonment. Moreover, the Court found, there is no ambiguity in the application of O.C.G.A. § 17-10-7(a) to the sentencing provisions in the armed robbery statute. Appellant’s sentence of life imprisonment therefore fell within the statutory range and was not void.

Guilty Pleas; Sentencing

Franks v. State, A13A1446 (9/5/2013)

Appellant appealed from the denial of his motion to withdraw his guilty plea. The record

showed that on July 16, 2012, appellant pled guilty to 11 counts of armed robbery, and the trial court sentenced him to serve concurrent terms of 25 years in custody as to each count. On August 14, 2012, appellant filed a motion to withdraw his guilty plea, which he subsequently amended to assert that he had an absolute right to withdraw his plea because the 25-year sentences exceeded the statutory range of punishment for armed robbery and were thus illegal and void. After a hearing on the motion, the trial court acknowledged that the 25-year sentences were improper, but nevertheless denied the motion to withdraw and instead re-sentenced appellant.

Appellant argued, and the State agreed, that the trial court should have permitted him to withdraw his guilty plea because the original sentences were void. The Court agreed and reversed. The punishments for armed robbery are death, life imprisonment or imprisonment for “not less than ten nor more than 20 years.” O.C.G.A. § 16-8-41(b). Here, the trial court did not sentence appellant to death or life in prison, and instead imposed sentences of 25 years in custody for each count of armed robbery. Thus, the 25-year felony sentences entered by the trial court were outside the statutory range and void.

As a rule, a defendant has an absolute right to withdraw his plea before sentence is pronounced. Since a void sentence is the same as no sentence at all, the defendant stands in the position as if he had pled guilty and not been sentenced, and so may withdraw his guilty plea as of right before resentencing, even following the expiration of the term of court in which the void sentence was pronounced. Because the court imposed void sentences, appellant stood in the position as if he had pled guilty but not yet been sentenced, and thus had the absolute right to withdraw his plea before resentencing. The trial court’s denial of the motion to withdraw the plea prior to resentencing was therefore erroneous.

Right to Jury Trial; Competency

Birdette v. State, A13A1430 (9/10/13)

Appellant was convicted of rape. He contended that he did not knowingly, intelligently, and voluntarily waive his right to a jury trial. The record showed that a clinical psychologist named Dr. Jordan evaluated

appellant. He found appellant had a full-scale IQ of 52, which falls in the range of mild mental retardation, he read at a first-grade level, and his math skills were at a beginning second-grade level. Dr. Jordan estimated that appellant had a mental age of about 13 or 14. Nevertheless with regard to appellant’s competency to stand trial, Dr. Jordan concluded that appellant had an appropriate understanding of the charges against him; was able to communicate adequately information about his life history and the circumstances that brought him to the present situation; and was able to communicate well enough to be considered legally competent.

The Court stated that a defendant’s right to a jury trial is a fundamental constitutional right that the defendant must personally, knowingly, voluntarily, and intelligently choose to waive. The State bears the burden of showing that the waiver was made both intelligently and knowingly, either (1) by showing on the record that the defendant was cognizant of the right being waived; or (2) by filling a silent or incomplete record through the use of extrinsic evidence which affirmatively shows that the waiver was knowingly and voluntarily made. Here, the Court found, the record showed that the trial judge conducted a colloquy with appellant during which she explained that in a bench trial she would “sit as a jury . . . and make decisions about the facts as well as the law” and appellant affirmed that he had discussed the issue with his trial counsel and was giving up his right to a jury trial.

Appellant nevertheless contended that given his mental limitations, the trial judge should have provided a more extensive explanation of the consequences of a jury trial waiver and required appellant to repeat what she had explained, as Dr. Jordan recommended. The Court disagreed. A trial court may be authorized to find that an individual is capable of waiving his rights even though there is evidence to the effect that he is moderately retarded. Even assuming arguendo that the State could not carry its burden of proving a valid waiver based solely on appellant’s colloquy with the trial judge, the State also relied on trial counsel’s testimony at the motion for new trial hearing. Appellant’s trial counsel, who was well aware of Dr. Jordan’s evaluation, testified that he met with appellant on several occasions and explained

the differences between a jury trial and bench trial and the respective advantages of each. Trial counsel further testified that appellant agreed that they should go forward with a bench trial based on his recommendation. Further, although appellant testified that he went along with the bench trial because that is what his attorney told him to do, his entire testimony was contradictory and thus, the trial judge was entitled to credit his statements on cross-examination that his trial counsel discussed with him the nature of a jury trial and whether a jury trial or bench trial would be more advantageous. Appellant conceded on cross-examination that, based on his trial counsel's recommendation, he affirmed to the judge that he was waiving his right to a jury trial. Finally, the trial judge was entitled to consider Dr. Jordan's conclusion that appellant was competent to stand trial. Accordingly, since the trial court, having presided over the bench trial and motion for new trial hearing, was in the best position to determine whether, under all the circumstances, appellant validly waived his right to a jury trial despite his mental limitations, the Court found no clear error in the trial court's conclusion that appellant personally, knowingly, intelligently, and voluntarily waived that right.

Drug Forfeitures; Sufficiency of Answers

Morgan v. State of Georgia, A13A1238 (9/12/13)

The State filed a civil in rem forfeiture action against currency and property pursuant to O.C.G.A. § 16-13-49(o). Four individuals filed answers asserting claims to the various defendant personalty. The trial court dismissed their respective answers for failing to comply with the pleading requirements of O.C.G.A. § 16-13-49(o)(3).

The Court stated that under Georgia law, the sufficiency of an answer to a forfeiture petition "must be judged in light of the specific statutory requirements." O.C.G.A. § 16-13-49(o)(3) provides that an answer by an owner or interest holder asserting a claim to the property at issue in an in rem forfeiture proceeding must satisfy the general pleading rules applicable to all civil actions, as well as the foregoing requirements: (A) The caption of the proceedings as set forth in the complaint and the name of the claimant; (B) The address at which the claimant will

accept mail; (C) The nature and extent of the claimant's interest in the property; (D) The date, identity of transferor, and circumstances of the claimant's acquisition of the interest in the property; (E) The specific provision of this Code section relied on in asserting that the property is not subject to forfeiture; (F) All essential facts supporting each assertion; and (G) The precise relief sought.

The Court found that the trial court erred in dismissing the answers of three of the four appellants. Three appellants gave the required information and asserted sufficient supportive facts to assure some degree of legitimacy to their respective claims and to show innocent ownership. Although two appellants improperly relied on irrelevant sections of the statute in support of their respective claims, the Court nevertheless found that the answers on a whole were sufficient. However, as to the fourth appellant, the Court held that the trial court did not err in finding the answer was insufficient. The answer did not identify the transferor or specify the circumstances of her acquisition for any of the items of property. Furthermore, the fourth appellant asserted almost no specific facts of ownership and, instead, asserted merely conclusory allegations.

Having reached this conclusion, the Court then stated the following: "[W]e pause to remind our trial courts of the serious constitutional rights and liberties at stake in civil-forfeiture proceedings. Property ownership in the United States is a fundamental constitutional right, and Georgians are entitled to the procedural safeguards enshrined by our state and federal constitutions before the government may lawfully deprive them of their property rights. A trial court, then, has a solemn duty to ensure that before any citizen is deprived of real or personal property that he or she has been afforded due process of law. And when this process has not been provided to a claimant, we will not hesitate in remanding that case for further and proper consideration."

Impeding the Flow of Traffic; Waiver of Right to Jury Trial

Green v. State, A13A1260 (9/11/13)

Appellant was convicted following a bench trial of DUI (per se) and impeding the flow of traffic. The evidence showed that appellant was found in the driver's seat of his

vehicle that had its flashers on and was stopped in the lane of travel. He first contended that the evidence was insufficient to support his conviction for impeding the flow of traffic. The Court agreed. O.C.G.A. § 40-6-184(a)(1) provides that "[n]o person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation." The plain language of the statute establishes that one cannot impede the flow of traffic when there is no traffic to impede. Here, the Court found, there was no evidence that any vehicles attempted to pass appellant while he was stopped. Moreover, O.C.G.A. § 40-6-184(a)(1) provides an exception when driving at a reduced speed is necessary "for safe operation." Given that it was undisputed that appellant's vehicle had two flat tires, and that it was 3:00 a.m., the Court could not say that it was unreasonable for him to be stopped in his lane of travel. Consequently, the Court reversed his conviction.

Appellant also argued that the State failed to prove that he voluntarily, knowingly, and intelligently waived his right to a jury trial. The Court again agreed. A defendant's right to trial by a jury is a fundamental constitutional right that the defendant must personally, knowingly, voluntarily, and intelligently choose to waive. A defendant's consent to a trial without a jury need not be in any particular, ritualistic form; the trial court need only conduct an inquiry of the accused on the record so as to ensure that the waiver is knowing, voluntary and intelligent. When a defendant challenges his purported waiver of the right to a jury trial, the State bears the burden of showing that the waiver was made both knowingly and intelligently, either (1) by showing on the record that the defendant was cognizant of the right being waived; or (2) by filling a silent or incomplete record through the use of extrinsic evidence which affirmatively shows that the waiver was knowingly and voluntarily made. Such extrinsic evidence may include testimony by or an affidavit from trial counsel about his specific recollections; routine or standard practices; and evidence regarding the defendant's intelligence and cognitive ability.

Here, the Court found, the record did not contain a colloquy showing that the trial court asked appellant sufficient questions on the record to ensure that his waiver of his right to a jury trial was knowingly, voluntary,

and intelligent. The record also contained no writing signed by appellant demonstrating his waiver of his right. Nevertheless, the State attempted to satisfy its burden of showing a valid waiver through the use of extrinsic evidence. The State referred to the fact that appellant was represented by a very capable attorney and that appellant made no objection to the bench trial. However, the Court found, appellant's failure to object to the bench trial shows, at most, only that such waiver was voluntary, but it does not establish that the waiver was knowing and intelligent. Moreover, notwithstanding trial counsel's competence, the decision to waive the right to a jury trial rested with appellant, not trial counsel. Here, the record was devoid of any testimony from trial counsel indicating that appellant understood that he had a right to a jury trial and made a conscious choice to waive that right.

The State also argued that the trial court habitually made a statement at arraignments ensuring that defendants understood they had a right to a jury trial. The trial court conceded, however, that it was unclear whether a formal arraignment took place in this case, and the record failed to reveal that one occurred. But, the Court found, even if an arraignment took place, the trial court's statement was insufficient to establish a valid waiver because it offered no details of the colloquy habitually conducted at arraignments to make certain that the defendant was proceeding with a bench trial freely, voluntarily, and intelligently. Accordingly, the State failed to meet its burden of proving that appellant knowingly and intelligently waived his right to a jury trial.

Right of Confrontation; Right of Cross-Examination

Shelton v. State, A13A0951 (9/5/13)

Appellant was convicted of possession of marijuana with intent to distribute and possession of a firearm during the commission of a felony. The evidence showed that based on a tip from a CI, law enforcement stopped a vehicle. Appellant was the driver and her accomplice the only passenger. A search revealed the marijuana and a gun for which appellant had a carry license.

Appellant contended that the trial court erred by granting the State's motion in limine and preventing her from showing her

accomplice's alleged bias toward the State by cross-examining him about an unrelated pending charge. The record showed that the accomplice was charged with and pleaded guilty to the same possession charge as appellant. At appellant's trial, the accomplice testified that the marijuana found in the car was not his, but he did not accuse appellant of possessing it. The fact of the accomplice's guilty plea was elicited by the State during its direct examination, but, appellant was prevented from cross-examining him about any potential bias in favor of the State arising from unresolved charges in another case. The Court stated that the Confrontation Clause of the Sixth Amendment guarantees the defendant in a criminal trial both the general right to cross-examine witnesses against him and the more specific right to cross-examine a key state's witness concerning pending criminal charges against the witness. Distinct from introducing evidence of a prior conviction, which is a general attack on the credibility of the witness, evidence of a pending charge is a more particular attack aimed at revealing possible bias. What counts is whether the witness may be shading his testimony in an effort to please the prosecution. Thus, the Court found, because the trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination, it abused its discretion.

Nevertheless, the Court held, such error does not require reversal if the State shows that the error was harmless beyond a reasonable doubt. The Court noted that the accomplice testified that the marijuana was not his, but he did not accuse appellant of possessing it, instead saying that he didn't know who it belonged to and that he never saw it in the car. Thus, his testimony was not wholly favorable to the State. Further, putting aside the accomplice's testimony, it was undisputed that appellant drove to her accomplice's residence, and she had rented the vehicle in which they briefly rode together and in which the marijuana was later found. It was likewise undisputed that marijuana packaging materials were found openly sitting in appellant's door pocket. Finally, a small quantity of packaged marijuana was found in the patrol car where appellant was sequestered; the vehicle had been searched and found to be free of contraband prior to her entry, and appellant was the only person transported

in the vehicle that day. Thus, in light of the marijuana in the patrol car and the packaging materials in appellant's car door, the Court concluded that the erroneous restriction on her cross examination of her accomplice was harmless beyond a reasonable doubt.

Appellant also contended that the trial court erred by forbidding her from asking the following question of a police investigator: "To your knowledge, is [the accomplice] a drug dealer?" Appellant argued that she intended to use the evidence to show that the accomplice was a drug dealer, so he had a propensity to possess the marijuana found in the vehicle appellant drove. But, the Court stated, so broadly phrased, the question could be interpreted as an attack on the accomplice's character or veracity by specific instances of prior misconduct, which must be done using a certified conviction. Further, appellant was permitted to examine the accomplice about whether he possessed the drugs and whether he was using them at the time of the offense. Accordingly, the trial court did not abuse its discretion by sustaining the State's objection to the question as posed.

Shoplifting; Prior Difficulties

Latimore v. State, A13A1054 (9/12/13)

Appellant was convicted of felony shoplifting from Home Depot. The evidence showed that appellant engaged in what is termed a "double shop," where one person purchases items from a store and then passes the receipt along to a second person who then enters the store and selects the same items listed on the receipt. The second person walks out of the store without paying for the items, but if confronted produces the receipt of the earlier purchase as evidence of the current purchase.

Appellant contended that the trial court erred in allowing prior difficulty evidence. Specifically, he contended that the evidence of prior difficulty did not show bent of mind as the trial court concluded. The Court noted that prior difficulty evidence is admissible to demonstrate the relationship between the victim and the defendant and such evidence may show the defendant's motive, intent, and bent of mind in committing the act against the victim which results in the current charges. But, the Court has not limited prior difficulty evidence to only those circumstances, and

that evidence of prior difficulties between a defendant and a corporation may be admitted under proper circumstances. Here, the evidence showed appellant shoplifted at a Home Depot in another county, was given a criminal trespass warning not to return to any Home Depot location for one year following this act, and yet still returned to the that location within one year and attempted to return “a high dollar faucet” with another person. This evidence, the Court held, was admissible as evidence of a prior difficulty and was relevant to prove appellant’s bent of mind to victimize Home Depot.

Juveniles; O.C.G.A. § 17-7-50.1

Edwards v. State, A13A1019 (9/13/13)

In this case of first impression, appellant was granted an interlocutory appeal from the denial of his motion to quash his indictment and transfer the case to juvenile court. The record showed that appellant, a juvenile, was arrested for kidnapping and armed robbery. The superior court had exclusive jurisdiction pursuant to O.C.G.A. § 15-11-28(2)(A) (vii) because he allegedly committed armed robbery with a firearm. A detention order was entered on August 25, 2011, and appellant was initially detained at a Youth Detention Center and then released on bond on December 18, 2011. Appellant was indicted on June 1, 2012, over 280 days after he was first detained. Appellant filed a motion to quash the indictment and transfer the case to juvenile court, based on the State’s failure to obtain an indictment within 180 days of his detention as mandated by O.C.G.A. § 17-7-50.1. The superior court denied the motion, reasoning that because appellant’s actual incarceration was less than the 180 days prescribed by O.C.G.A. § 17-7-50.1, the superior court retained jurisdiction.

The Court noted that in construing any statute, the Court must first look to the language of the statute. O.C.G.A. § 17-7-50.1(a) and (b) provide as follows: “(a) Any child who is charged with a crime that is within the jurisdiction of the superior court, as provided in Code Section 15-11-28 or 15-11-30.2, *who is detained* shall within 180 days of the date of detention be entitled to have the charge against him or her presented to the grand jury. The superior court shall,

upon motion for extension of time and after a hearing and good cause shown, grant one extension to the original 180 day period, not to exceed 90 additional days. (b) If the grand jury does not return a true bill against the detained child within the time limitations set forth in subsection (a) of this Code section, the detained child’s case shall be transferred to the juvenile court and shall proceed thereafter as provided in Chapter 11 of Title 15.” (Emphasis supplied).

The Court noted that the trial court appeared to have concluded that the clock stopped running on the 180-day time limit when appellant was released on bail. However, the Court found, the statute’s 180-day time limit during which the State had to obtain a true bill began to run when appellant was detained, and there is nothing in the statute that abrogated the time limit once the clock started running. Equally clear, the Court stated, once the 180-day time limit expired without the case being presented to the grand jury and absent a motion to extend the time by the State, the superior court lost jurisdiction over the case. Further, under the plain mandate of subsection (b) of the statute, once the grand jury failed to return a true bill within 180 days of the juvenile’s detention, the only action the superior court was authorized to take was to transfer the case to the juvenile court and any indictment the grand jury returned after the 180 days was void. Accordingly, the Court held, the trial court’s order denying appellant’s motion to quash the indictment and transfer the case to juvenile court was vacated and the case remanded with directions to transfer the case to the juvenile court for appropriate proceedings.