Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 16, 2015

THIS WEEK:

Juveniles; Dispositional Confinement

In the Interest of B. L., A15A1480, A15A1480 (9/22/15)

Appellant appealed from an order denying his motion to dismiss the delinquency petition. The record showed that on January 6, 2015, a detention hearing was held and appellant was ordered detained for the purpose of "protect[ing] the person or property of others or of the child." His adjudication occurred on January 16; he was ordered released to house arrest on February 15; and his disposition occurred on February 20, after which he was placed on probation without further confinement. Based on the 30-day maximum dispositional confinement in O.C.G.A. § 15-11-601(b) and the credit due for time served in a secure residential facility before disposition, appellant argued that his confinement past February 4 (for a total of 41 days) was unlawful. The Court disagreed.

The Court noted that O.C.G.A. § 15-11-601(a) authorizes the juvenile court to enter certain orders following a disposition hearing for a juvenile found to have committed a delinquent act. In addition, under subsection (b), if a child commits an offense that would be a felony if committed by an adult, or if the child has a sufficient record of prior offenses, the juvenile "court may order such child to serve up to a maximum of 30 days in a secure residential facility." And under subsection (c), and O.C.G.A. § 15-11-604(a), a child committed to a "secure residential facility" must be given credit for time served under certain circumstances.

But, the Court stated, despite the 41-day confinement, the juvenile court complied with the statutory limits relied upon by appellant. First, the juvenile court's disposition order did not include any confinement in a "secure residential facility," so the 30-day confinement limit in subsection (b) was not directly implicated by the disposition order. Second, by its plain terms, the credit-for-time-served requirement in subsection (c) addresses dispositional confinement, not other confinement. Thus, subsection (c) applies to dispositions of confinement for children detained after the adjudication hearing. Similarly, the credit for time served afforded by O.C.G.A. § 15-11-604 "shall be applied toward the child's disposition."

Here, however, appellant was not ordered to a secure residential facility as part of his disposition; his confinement was entirely predispositional, Thus, appellant's disposition did not fail to account for any credit he was due because his disposition did not include any confinement. Moreover, despite having continued appellant's disposition, the juvenile court ordered that he be released within 30 days of his adjudication date, ensuring that his confinement would not extend past the earliest date the 30-day maximum disposition term would have elapsed. Under these circumstances, the Court concluded,

the juvenile court did not violate O.C.G.A. §§ 15-11-601 or 15-11-604, nor did it err by denying appellant's motion to dismiss the delinquency petition against him.

911 Calls; Crawford v. Washington

State v. Gunn, A15A1521 (9/23/15)

The State appealed the trial court's order granting Gunn's motion to exclude a 911 call made by the purported victim in the State's prosecution of Gunn for family-violence battery. Gunn filed his motion after the victim informed the State that she would not return to Georgia to testify, and the trial court agreed with Gunn that admission of the recorded call at trial would violate his Sixth Amendment right to confrontation.

The record showed that the alleged victim called 911 following an altercation with Gunn and that, during the course of the call, the victim drove away from the scene of the altercation and to a location where she could meet with law enforcement. The Court noted that the record contained the two transcripts that purported to memorialize the conversation between the victim and the 911 operator—one prepared by the State and one prepared by Gunn, but that the original tape was not in the record.

The Court stated that 911 calls, or portions of 911 calls, can fall under the category of "testimonial statements," depending on a determination as to the primary purpose for the call. Thus, in certain circumstances, a 911 caller may shift from a non-testimonial statement into a testimonial one and that, therefore, trial courts must decide whether a caller's primary purpose has shifted in such a manner as to render portions of the call testimonial in nature, and should selectively redact portions of the recording when that is the case. The relevant inquiry is not the actual or subjective purpose of the individuals who are involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.

Here, the Court noted, there were "glaring inconsistencies between the parties' two prepared transcripts" and the relatively brief 911 call at issue was made while the alleged victim began to, and did drive away from the scene of the altercation. And given the timing of the call and the victim's actions while making the call, *listening* to the recording would allow the trial court (and the Court of Appeals) to hear the victim's tone of voice, assess her level of composure, and glean clues about the environment in which she made her call. These details will provide greater context for the circumstances in which the call was made, and this information could certainly impact an assessment of whether the call at any point evolved from a non-testimonial to testimonial statement. Accordingly, the Court vacated the trial court's order and remanded to the trial court for reconsideration of Gunn's motion after listening to the recording of the 911 call, which, the Court noted, should also be made part of the record for any subsequent appeal.

Search & Seizure; Consent

Fontaine v. State, A15A1044 (9/25/15)

Appellant was convicted of multiple counts of VGCSA, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. He contended that the trial court erred in denying his motion to suppress. The evidence showed that an officer went to a motel to investigate a report of a possible methamphetamine lab in room 101. He did not have a search warrant. The officer knocked on the door of room 101, and appellant answered. The officer told appellant why he was there and asked for permission to search the room, which appellant gave. Upon entering the room, the officer noticed two others in the room. The officer went immediately to the trash can located under the sink in the bathroom because a hotel trash can is "a common hiding place." He picked up the trash can and found it "oddly heavy," so he removed the bag. Under the bag, wrapped inside a shirt, he found a handgun, a digital scale, and a number of Ziploc bags. He also found pills and other substances that later tested positive for methamphetamine, morphine, and oxycodone.

Appellant contended that the trial court erred by denying his motion to suppress because the officer's foray into the trash can exceeded the scope of the consent he had given, rendering the search invalid and tainting his subsequent custodial statements. Specifically, that he agreed only to let the officer look for a methamphetamine lab, not scour the hotel room for narcotics and a small trash can is unlikely to house an "active methamphetamine lab."

The Court stated that the intrusiveness of a consensual search — including the type, duration, and physical zone of the intrusion — is limited by the permission granted, and only that which is reasonably understood from the consent may be undertaken. Here, the Court noted, the officer specifically testified on cross-examination that a methamphetamine lab can be small and located in a garbage can. Accordingly, in light of this evidence that a small, portable methamphetamine lab could fit inside a hotel trash can, as well as the officer's trial testimony that trash cans are common hiding places, the trial court did not err by denying appellant's motion to suppress.

Sentencing; Plea in Bar

Levin v. State, A15A1519 (10/1/15)

In 1994, appellant was convicted of multiple crimes including kidnapping with bodily injury, aggravated battery, aggravated assault, and burglary. In 2014, the Court reversed his conviction for the kidnapping, concluding that the evidence was insufficient to support a finding of asportation under *Garza*. *Levin v. Morales*, 295 Ga. 781 (2014). The Court also noted that the aggravated battery conviction had been merged into the kidnapping conviction and stated "[n]ow that the kidnapping conviction has been reversed, on remand the trial court will need to revisit sentencing appellant on the conviction for aggravated battery." Over appellant's plea in bar, the trial court resentenced him on the aggravated battery to 20 years.

Appellant contended that the trial court erred by denying his plea in bar as to the resentencing on the aggravated battery conviction because the resentencing violated his protection against double jeopardy. Specifically, he contended, because the greater offense (kidnapping with bodily injury) was reversed due to insufficient evidence, double jeopardy bars resentencing on the merged offense of aggravated battery. The Court disagreed.

Where a defendant is tried and convicted of a crime, and that conviction is reversed due to insufficient evidence, procedural double jeopardy bars re-prosecution for that same crime and any lesser included crime. Here,

however, appellant was not re-prosecuted, but merely resentenced as the Georgia Supreme Court had instructed. The evidence was sufficient to support appellant's conviction for aggravated battery, and therefore, the trial court did not err by resentencing him on that count of the indictment.

Juvenile Proceedings; Sufficiency of the Evidence

In the Interest of A.A., A15A1221 (9/28/15)

Appellant was adjudicated delinquent on the offenses of obstruction of a law enforcement officer, illegally carrying a weapon without a license, loitering/prowling, and possession of a firearm under the age of 18 years old. The record showed that at a motion to suppress, testimony was presented that a uniformed officer on foot patrol at an apartment complex observed two individuals, each wearing gang attire, standing between two of the apartment's buildings. The apartment complex had a no loitering policy, which was communicated through signs posted on every building of the complex, and had authorized the law enforcement to patrol the property to enforce that policy. As the officer approached the two individuals, appellant fled in contravention of the officer's verbal command to stop. The officer pursued him. During the pursuit, appellant tumbled down a bank, and the officer observed a firearm fall out of appellant's pants. The officer and another officer were able to intercept appellant and place him into custody.

Immediately after the trial court denied the motion, defense counsel requested that the juvenile court render its decision on the adjudication of delinquency based on the evidence presented at the motion hearing, because the State's evidence at a "full-scale" hearing on the charges would be the same and because appellant did not wish to present any evidence on his own behalf. The State posed no objection to this procedure. Therefore, the juvenile court adjudicated appellant for committing all the delinquent acts charged.

Appellant contended that the State failed to present sufficient evidence to demonstrate that the firearm that fell from his pocket met the requirements of the firearm offenses with which he was charged. The Court agreed. First, the juvenile complaint alleged that appellant was in possession of a "handgun" in violation of O.C.G.A. § 16-11-132, which prohibits any person under the age of 18 from possessing or having under his control a "handgun." The Georgia Code contains a very specific definition of the term "handgun" as used in O.C.G.A. § 16-11-132, defining it, in pertinent part, as "a firearm of any description, loaded or unloaded, from which any shot, bullet, or other missile can be discharged by an action of an explosive where the length of the barrel, not including any revolving, detachable, or magazine breech, does not exceed 12 inches." O.C.G.A. § 16-11-125.1 (1). The State never introduced into evidence either photographs of the firearm recovered during the incident or the firearm itself. And the officer referred to only a "firearm," "weapon," or "gun," but never identified the recovered weapon as a handgun or described the length of its barrel. Accordingly, the State failed to carry its burden of proving that appellant was in possession of a handgun in violation of O.C.G.A. § 16-11-132.

Next, the complaint also charged appellant with carrying a concealed weapon by possessing a "Lorcin .380" and carrying it in a concealed manner in violation of O.C.G.A. § 16-11-126, which prohibits, inter alia, the possession and carrying of a "handgun" or a "long gun" by persons prohibited by law from such possession. O.C.G.A. § 16-11-126. The Court noted that the same definition of "handgun" applies to this statute as well, and the Code defines the term "long gun" in specific terms based on the length of its barrel and its overall length, as well as by its design for or use of certain ammunition. O.C.G.A. § 16-11-125.1 (4). Thus, once again, because the State failed to present any evidence with regard to the weapon recovered from appellant, the Court found that it must reverse his adjudication of delinquency on the charge of violating O.C.G.A. § 16-11-126. In so ruling, the Court rejected the State argument that because the hearing began as a motion hearing and was later converted to an adjudicatory hearing at appellant's request, it constitutes "induced error" by the defense because the State, by not objecting, acquiesced to it.

Finally, the Court also found that the State failed to prove venue. During the hearing, the officer testified that he observed two individuals loitering outside the apartment complex, but he never testified that the complex was in the county or that his pursuit of appellant occurred there. The State presented no other evidence of venue, and nothing in the record indicated that the trial court took judicial notice of the location of the apartment complex. And, although the defense counsel stated in closing that the apartment complex was in the county, such a statement did not relieve the State of its burden to present evidence establishing beyond a reasonable doubt that the apartment complex where the alleged offenses occurred was in the county. A defendant may stipulate to venue, but the record must reflect that the defendant expressly authorized such stipulation and that the stipulation was intended to obviate the need for direct proof. Nothing in the record indicated that defense counsel intended her statements to be a stipulation of venue or that appellant authorized such a stipulation.

Juveniles; O.C.G.A. §17-7-50.1

State v. Baxter, A15A1272 (9/22/15)

The State appealed from an order transferring a case against Baxter, a 16 year old, from superior court to juvenile court pursuant to O.C.G.A. §17-7-50.1. The record showed that on February 4, 2014, Baxter was arrested and held in custody for aggravated sexual battery. The superior court had exclusive jurisdiction over him pursuant to O.C.G.A. § 15-11-560(b)(7). On March 13, 2014, a non-transcribed meeting was held in chambers in which defense counsel indicated Baxter would waive the 180-day time limit for indictment. The case was scheduled to go before the grand jury on March 17, but it was not presented after defense counsel filed a written "Waiver of Statutory Right to Indictment Within 180 Days." On Oct. 15, Baxter filed a motion to transfer the case to juvenile court pursuant to O.C.G.A. §17-7-50.1. The Court granted the motion and also denied the State's motion for an extension of time pursuant to O.C.G.A. §17-7-50.1(a).

The Court, noting that this is a case of first impression, stated that the plain language of O.C.G.A. § 17-7-50.1(a) provides that a child charged with a crime within the superior court's jurisdiction "who is detained *shall* within 180 days of detention be entitled to have the charge against him or her presented to the grand jury." The statute also provides that if the grand jury does not indict the detained child within the specified time, "the

detained child's case *shall* be transferred to the juvenile court." Thus, because the case was not presented within 180 days, it was mandatory that the case be transferred to the juvenile court. And, the State's motion for an extension of time was untimely because it was filed more than 180 days after Baxter was detained. An extension of the 180-day time limit must be sought and granted *before* the time limit expires or the superior court loses jurisdiction over the case.

Nevertheless, the State argued, the waiver of the 180-day time limit, which was filed before the time limit expired, was valid. The Court disagreed. The plain language of the statute indicates that the legislature intended to set time limitations for the State to act in those situations in which a juvenile is detained, and the superior court is exercising jurisdiction over the case pursuant to O.C.G.A. § 15-11-560(b). Those time limitations would be eviscerated if Baxter's waiver was enforced. Once those time limitations have expired without the juvenile being indicted, the only action the superior court is authorized to take is to transfer the case to the juvenile court, as the superior court did here. Moreover, it is a general rule that parties may not create subject matter jurisdiction in a court by consent. Although the superior court had exclusive original jurisdiction over Baxter's case, it could not unilaterally extend that jurisdiction indefinitely, contravening the plain language of the statute.

In so holding, the Court further rejected the State's contention that the 180-day requirement found in O.C.G.A. § 17-7-50.1 does not affect jurisdiction in any way because it is merely a statute of limitation, which is subject to waiver. The Court also rejected the State's contention that it detrimentally relied on the waiver, causing the State to forbear bringing the case before the grand jury and that Baxter potentially acted in bad faith. The Court stated as follows: "Although we are sympathetic to the State's position in this case, the State was well aware of the mandatory time limitations set forth in the statute and was not precluded from seeking an extension of time to present the case to the grand jury. Further, there is no evidence in the record of bad faith by Baxter."