Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 22, 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:

Financial Transaction Card Theft

Amaechi v. State, A10A1416 (10/5/10)

Appellant was convicted of financial transaction card theft. Appellant argued that the State failed to prove that he committed the offense in the manner specified in the accusation. Specifically, that the accusation charged that appellant had committed the offense by obtaining the credit card "from [the victim's] possession." The evidence established that representatives of Discover Card grew suspicious of a request for a new card in the victim's name. They set up a controlled deliver using an invalid card in the victim's name. Appellant signed for the parcel from Discover, claiming that the victim lived at the address and that the victim gave him permission to take possession of the parcel. The victim never had actual possession of the credit card after its issuance.

The Court held that because the victim was the cardholder on the account, he had the authority to exercise dominion and control over the credit card that had been issued in his name. The evidence therefore reflected that while the victim was not in actual possession of the credit card, the victim was in constructive possession of the card, which was sufficient to establish the allegation set forth in the accusation.

Appellant also contended that the State failed to prove that the credit card was a financial transaction card, as defined by OCGA § 16-9-30 (5), since it was invalid and could never be used in a financial transaction. The Court held that the evidence established that the card was a credit card as described under the statute. Moreover, the credit card was introduced into evidence at trial and, thus, was identifiable by the jury as a card included in the statute. And significantly, OCGA § 16-9-31 (a) (1) does not distinguish between valid, revoked, or unrevoked cards in proscribing the offense. Accordingly, the State was not required to show that the card was used or could have been used in order to establish appellant's commission of the offense.

Indictments; OCGA § 50-27-27

Doe v. State, A10A1793 ((10/5/10)

Appellant was convicted of attempting to influence the winning of a prize by tampering with lottery equipment in violation of the Georgia Lottery for Education Act. Appellant claimed that the indictment was defective. The indictment charged appellant "with the offense of FALSELY UTTERING A STATE LOTTERY TICKET ([OCGA §] 50-27-27), a Felony, for that the said accused. . . did, with intent to influence the winning of Georgia Lottery prizes by tampering with lottery materials, to wit: said accused did take [lottery

tickets]…" Appellant argued that that the indictment was defective because it referenced "falsely uttering" a state lottery ticket, which is proscribed under OCGA § 50-27-27 (a), whereas the particular averments presented in the indictment alleged an attempt to influence the winning of lottery prizes through tampering with lottery materials, which is proscribed under OCGA § 50-27-27 (b). The Court held that it is immaterial what the offense is called as long as the averments of the indictment are such as to describe an offense against the laws of the State. Here, the indictment informed appellant that he was accused of attempting "to influence the winning of Georgia Lottery prizes by tampering with lottery materials[,]" and appellant was apprised of what he should be prepared to defend against at trial. While appellant claimed that the reference to "falsely uttering" a lottery ticket was extraneous and prejudicial, mere surplusage does not vitiate an otherwise sufficient indictment.

Appellant also argued that OCGA § 50-27-27 (b) did not apply to his conduct. Citing *Riddle v. State*, 301 Ga. App. 138, 139 (1) (2009), the Court held that appellant's actions were for the purpose of influencing the winning of a prize offered by the Georgia Lottery Corporation because he took the tickets in order to win lottery prizes for himself even though such conduct deprived other customers of the opportunity to lawfully purchase those tickets. In addition, his action of leaning over the counter that stored the tickets, rolling the tickets off the plastic wheels on which they were housed, ripping the tickets off the rolls, and taking them for his own use constituted "tampering with lottery . . . materials." Given that the State presented evidence that appellant violated both the "influencing" and "tampering" elements of OCGA § 50-27-27 (b), he was properly convicted of violating that statute.

Batson; Remand

Smith v. State, A10A1704 (10/1/10)

Appellant was convicted of attempted child molestation and other crimes. He contended that the State's peremptory strikes deprived him of a fair trial under *Batson v. Kentucky*, 476 U. S. 79 (1986). The venire in this case consisted of 57 whites and three African-Americans, such that it was approximately five percent African-American. The State used two of its six peremptory strikes, or 33 percent of such strikes, on the two African-Americans reached from the venire before the completion of the panel. Appellant made a *Batson* challenge, but the trial court held that because no prima facie case of discrimination was made out, no further proceedings on appellant's challenge was necessary.

The Court held that a defendant can establish a prima facie case of purposeful discrimination in selection of the petit jury on evidence that the prosecutor struck all black members of the venire. Once the defense makes this prima facie showing, the burden shifts to the State to come forward with a race-neutral explanation for challenging black jurors. Since the State's use of two peremptory strikes against the two African-Americans reached in the course of voir dire resulted in the "total exclusion" of African-Americans from the jury, a prima facie case of racial discrimination was established. Therefore, the case was remanded on the question of whether the State exercised *any* of its strikes for a racially discriminatory reason, for if it did, the rule of *Batson* was violated.

Motion to Withdraw Guilty Pleas; Collateral Consequences

Clark v. State, A10A2114 (10/5/10)

Appellant pleaded guilty to failing to register as a sex offender. Within a few days, he moved to withdraw his guilty plea. He maintained that when meeting with probation, he learned for the first time that one of the special conditions of probation was that he could not have any contact or reside with any minor under the age of 16, including his own daughter, who at that time was residing with him at his parents' residence. Appellant argued that had he known this he would not have pled guilty and therefore his plea was involuntary and unknowing.

The Court disagreed. Once a sentence has been entered, a guilty plea may only be withdrawn if the defendant establishes that such withdrawal is necessary to correct a manifest injustice —ineffective assistance of counsel or an involuntary or unknowingly entered guilty plea.

Appellant did not claim ineffective assistance of counsel and conceded that the State met its burden in all respects except as to his lack of knowledge regarding the special condition of probation that he could not reside with or contact his minor daughter. However, the Court held, special conditions of probation are collateral consequences of a plea, and there is no constitutional requirement that a defendant be advised of such collateral consequences in order for his guilty plea to be valid as voluntary and knowing. Because the information about the probation condition did not lengthen or alter the range of the pronounced sentence, and further because the trial court even told appellant during sentencing that he would have to comply with the conditions of probation given to him by the probation supervisor, his alleged lack of knowledge regarding this condition did not render his plea involuntary or unknowing.

Sexual Offender Registration; OCGA § 42-1-12 (g)

In re White, A10A0974 (10/6/10)

Appellant appealed from the trial court's order denying his petition for release from the requirement that he register as a sexual offender for life. The record showed that appellant was sentenced to 12 years for statutory rape on July 15, 1998, and served eight months of his sentence in a Department of Corrections Probation Detention Center. He was released from the center in March 1999 pursuant to an order modifying his sentence, and the trial court terminated his probation on July 25, 2005. In May 2009, he petitioned the superior court to release him from the Sex Offender Registration requirements pursuant to OCGA § 42-1-12 (g), which was denied.

OCGA § 42-1-12 (g) (1) provided that the trial court "may issue an order releasing the sexual offender from further registration if the court finds that the sexual offender does not pose a substantial risk of perpetrating any future dangerous sexual offense." Under the pre-2010 version of OCGA § 42-1-12, a successful petitioner must show 1) he was sentenced pursuant to OCGA § 17-10-6.2 (c), which allows the trial court to deviate from the mandatory minimum sentences for specified sexual offenses if the offender meets certain criteria; and 2) ten years have elapsed from the date of his release from "prison, parole, supervised release, or probation." OCGA § 42-1-12 (g) (2).

Appellant contended that the trial court erred in determining that he failed to prove that the ten year period had elapsed. Specifi-

cally, he contended that he was released from the detention probation center in 1999 and for all intents and purposes, this was the equivalent of being released from prison. The Court disagreed, citing *Pitts v. State*, 206 Ga. App. 635, 637 (3) (1992), and *Penaherrea v. State*, 211 Ga. App. 162 (1993). Appellant's "argument that his confinement in a probation detention center was equivalent to confinement in prison is not persuasive." Therefore, the time did not begin to run until his release from probation in 2005. Since he petitioned for release from the registration requirements in 2009, the trial court did not err because 10 years had not elapsed.

The State argued that the trial court erred in determining that appellant satisfied OCGA § 42-1-12 (g) (2) (A), because he was not sentenced under OCGA § 17-10-6.2 as the statute allowing the petition requires because OCGA § 42-1-12 became effective on July 1, 2006, years after appellant was sentenced, and thus he could not have met the literal requirement that he be sentenced under that statute. But, the Court held, a defendant sentenced before the effective date of OCGA § 17-10-6.2 may still petition the court for removal from the sex offender registry if he were sentenced to less than the mandatory minimum sentences of confinement for the eligible offense, even though his sentence did not cite OCGA § 17-10-6.2. "To construe [OCGA § 42-1-12 (g) (2)] otherwise would plainly contravene its objective to provide petitioners a basis for seeking relief from the continuing duty to register as sexual offenders.

Rape Shield Statute

Tidwell v. State, A10A2183 (10/1/10)

Appellant was convicted of two counts of aggravated child molestation (oral sex from each of two girl victims) and three counts of child molestation (his having a 13-year-old touch his private part, his touching her breasts, and his having intercourse with a 15-year-old). At trial, the State presented testimony from an examining nurse that the 15-year-old's vaginal hymen had scar tissue indicating penetration and that the 13-year-old's hymen did not. Appellant contended that the trial court erred in denying his motion to admit evidence that the 15-year-old had been having sex with her boyfriend, which evidence would have shown that someone other than he had caused the penetration injuries to the 15-year-old's hymen.

The Court agreed and reversed his convictions. The Rape Shield Statute excludes evidence relating to the past sexual behavior of the complaining witness, but there are exceptions. Where evidence of sexual activity between the victim and persons other than the defendant has relevance on some issue other than consent, the Court has allowed its admission by creating exceptions to the Rape Shield Statute. Thus, when the State introduces medical evidence which indicates that the child has been sexually abused it has been permitted to allow evidence that the victim's medical symptoms were caused by someone else other than the defendant. Such was the case here. Appellant sought to introduce evidence that the 15-year-old had been having sex with her boyfriend, which evidence would have provided an alternate explanation why the 15-year-old's hymen had been penetrated. Absent the evidence of the sexual relationship with the boyfriend, the obvious inference was that Appellant had caused the penetration injuries. "Indeed, the State hammered this very point home when during its closing argument, it urged to the jury *four times* that the physical evidence of penetration injury to the 15-year-old's hymen corroborated her testimony of sexual intercourse with [appellant], and even went so far as to say that the lack of penetration to the 13-year-old's hymen was entirely consistent with her testimony also…. With his hands tied by the exclusion of the evidence regarding the 15-year-old's sexual relationship with her boyfriend, [appellant] was not allowed to present an effective defense as to these points." Thus, the Court found, reversal of the convictions on all counts was required.

In so holding, the Court also emphasized that this result was necessitated by the State's decision to present evidence of the penetration damage to the 15-year-old's hymen. "It was the State's affirmative act of 'opening the door' to this area that required the trial court to allow [appellant] to present evidence that someone other than himself caused the injury."

Juveniles; Restrictive Custody

In the Interest of J.W., A10A1473 (10/5/10)

Appellant was adjudicated delinquent for acts which would have constituted aggravated assault and aggravated battery if committed by an adult. He argued that the trial court abused its discretion by placing him in restrictive custody. OCGA § 15-11-63 (a) (2) (B) (ii) lists aggravated assault and aggravated battery as "designated felony act[s]," and OCGA § 15-11-63 (b) provides that the juvenile court may order restrictive custody for a juvenile found to have committed a designated felony. Generally, the court must consider five factors in determining whether to order restrictive custody, including the needs and best interest of the juvenile; his record and background; the nature and circumstances of the offense; the need for community protection, and the age and physical condition of the victim. OCGA § 15-11-63 (c). The code further provides, however, that "[n]otwithstanding subsection (c) of this Code section, the court shall order restrictive custody in any case where the child is found to have committed a designated felony act in which the child inflicted serious physical injury upon another person who is 62 years of age or more." OCGA § 15-11-63 (d). Here, the trial court first found appellant delinquent for committing the acts that would constitute aggravated assault and aggravated battery if he were an adult, and subsequently committed him to confinement for two years because of the victim's age and injuries. "While we have found no cases specifically addressing OCGA § 15-11-63 (d), given the legislative mandate in the subsection, once the juvenile court determined that the victim was 62 or older and suffered serious injuries, it was required to sentence [appellant] to restrictive custody." Having no discretion in the matter, the trial court was not required to make findings of fact regarding the factors listed in OCGA § 15-11-63 (c).

Expert Testimony

Escoe v. State, A10A0896 (10/5/10)

Appellant was convicted of burglary. He argued that the trial court abused its discretion in certifying the investigator as an expert in burglary because his testimony only concerned matters within the jury's common knowledge. An expert witness is anyone who, through training, education, skill, or experience, has particular knowledge that the average juror would not possess concerning questions of science, skill, trade, or the like. In a criminal case, an expert is permitted to state an opinion

that, based on his experience and training in the field of criminal investigation and crime scene reconstruction, the physical evidence was consistent with a hypothetical sequence of events surrounding the crime. Here, the investigator testified that he had investigated hundreds of burglaries, and had obtained additional training in the area of burglary investigation to enhance his investigative skills. The investigator also testified that, based on his experience and training, cobwebs indicated the back door had been opened recently; and that burglars use gloves to avoid leaving fingerprints and place items near the door so they can leave the premises quickly. The Court held that this testimony does not invade the province of the jury.

Appellant also argued that the investigator's testimony that tools were "pooled" by the door to make a quick getaway and that burglars used gloves to avoid leaving fingerprints went to the ultimate issue to be decided by the jury: "whether a burglary was in progress." The Court disagreed. The ultimate issue was not whether the victim interrupted a burglary, but whether appellant committed a burglary. Since the expert did not testify that he thought appellant had committed a burglary, he did not testify as to the ultimate issue.