Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 4, 2013

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Resource Prosecutor

Lalaine Briones
Domestic Violence, Sexual Assault, and Crimes Against Children Resource Prosecutor

Todd Hayes
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Clara Bucci
State Prosecutor

Fay Eshleman
State Prosecutor

THIS WEEK:

Restitution; Probation Revocation

Polly v. State, A13A0825 (9/20/13)

Appellant pled guilty to 55 counts of criminal factoring of financial transaction card records, 39 counts of theft by conversion, four counts of theft by taking, and one count of theft by deception. He was sentenced to twenty years, with eight months to serve in confinement and the balance to be served on probation. Appellant negotiated with the State the terms of his probation to avoid the significant jail time that he faced. As a special condition of probation, appellant was required, among other things, to pay $30,000 in restitution to his victims. The negotiated restitution was to be paid in monthly installments of $500 over a period of five years, beginning with his release from jail. After he was released, he did not pay the restitution as required and at a probation revocation hearing, the conditions of his probation were subsequently amended to require him to provide proof of any earned income, a written statement of his monthly expenses, and proof of any child support payments he made. At a second probation hearing, appellant stated there was no way he could pay the restitution and that he wanted the trial court to just revoke his probation. The trial court obliged.

Appellant contended that the trial court erred when it modified the conditions of his probation to require him to provide proof of his child support payments, because it constituted an illegal increase in his sentence. Specifically, he asserted that proof of the child support payments illegally increased his sentence because it increased the monthly amount he was required to pay as a condition of his probation. The Court disagreed. In Georgia, a trial court has the power to modify or change the conditions of a defendant's probation at any time, provided the change or modification does not represent an increase in the defendant's sentence. Appellant's child support obligations were imposed by a different court at some time before he was sentenced in his criminal case. Further, the condition did not require that appellant make the payments, but only to provide proof of them. Overall, the purpose of the verification was imposed to ensure that appellant was making all of the restitution payments he was financially capable of making. Thus, the condition did not constitute an illegal increase in his sentence.

Appellant also contended that the trial court erred when it revoked his probation without determining whether appellant had the financial ability to make both the required monthly restitution payments and his child support payments. Appellant relied on *Bearden v. Georgia*, 461 U.S. 660 (1983), which held

that where the State, through its sentencing court, determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it. The Court found *Bearden* inapplicable because in that case, the defendant's sentence was imposed unilaterally by the sentencing court. Here, however, appellant negotiated and agreed to all of the terms of his probated sentence, which included the condition requiring him to pay $500 in restitution to avoid incarceration. Further, in negotiating the probation terms, appellant had the superior knowledge over the district attorney as to whether he had the ability to pay. Thus, having breached the plea agreement that he negotiated, appellant could not insist that he remain on probation and be excused from performance due to indigence.

Obstruction; Jury Charge

Kendrick v. State, A13A1562 (9/26/13)

Appellant was convicted of misdemeanor obstruction of an officer. The evidence showed that an officer conducted a stop of a vehicle which contained four occupants. During the investigation, the officer suspected that the driver was under the influence. A short time after the officer began his investigation of the driver, appellant drove into the parking lot of an adjacent business. Appellant walked over to the officer's scene and after ignoring several warnings from the officer to return to her vehicle, the officer placed her under arrest. At trial, the jury viewed a video recording of the encounter, and the officer testified that appellant's refusal to obey his commands interfered with his ability to perform his DUI investigation.

Appellant argued that the trial court erred by refusing to charge the jury that "[s]omething more than mere disagreement or remonstrance must be shown." The Court disagreed. The requested charge was simply a corollary to the requirement that the State prove every element of the crime charged. The trial court charged the jury on the elements of the offense, including that "[t]he accused must have knowingly and willfully obstructed or hindered the officer," and that the State had the burden of proving every element of the crime as charged beyond a reasonable doubt. The Court held that the charge as a whole adequately covered the principle of law embodied in the requested charge and provided appellant the support to which she was entitled for her argument to the jury that she should have been acquitted because the State proved only disagreement or remonstrance. Thus, the trial court did not err by refusing to give the requested charge.

Sufficiency of the Evidence; Hearsay Opinion Evidence

Clement v. State, A13A1279 (9/26/13)

Appellant was convicted of misdemeanor theft by taking and criminal damage to property in the second degree. Appellant contended that there was insufficient evidence to convict him of criminal damage to property in the second degree because the State failed to prove that the damage exceeded $500, an essential element of the indicted crime. The Court agreed.

A cable network manager testified that a total of 200 feet of fiber optic cable and 50 feet of copper cable had been cut by appellant. To replace the wire cut and restore services to its customers, the cable network manager testified that it cost $384 dollars in costs for replacement materials and $1,929 in labor expenses. As to how labor expenses were calculated, the network manager testified that he used a "loaded labor rate" which was computed by the company's asset protection department. However, the loaded labor rate chart developed by the asset protection department and relied upon by the network manager to calculate the labor expenses was not introduced into evidence at trial, and no one from the asset protection department was called as a witness. Upon the close of the State's case-in-chief, appellant moved for directed verdict on the count of criminal damage to property in the second degree, contending that the State had failed to prove through competent evidence that the damage exceeded $500. As to the network manager's testimony regarding his calculation of $1,929 in labor expenses, appellant argued that the testimony was hearsay and lacked probative value because the figure came from a chart created by a third party that was never introduced into evidence by the State.

When reviewing the sufficiency of the evidence, the Court stated that it must review the evidence in the light most favorable to the verdict, with the defendant no longer enjoying a presumption of innocence. In addition, the Court determines only whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Further, in determining whether the evidence was sufficient to support the verdict, the Court cannot consider hearsay testimony, which is wholly without probative value even if introduced without objection. To sustain a conviction for criminal damage to property in the second degree under O.C.G.A. § 16-7-23(a)(1), the State must present competent evidence showing that the defendant intentionally caused in excess of $500 in damage to the property of another person without his or her consent.

The Court found the testimony of the network manager problematic because he served as a conduit for another's opinion. A witness acts as a mere conduit and does not provide an independent expression of opinion if his or her testimony is derived purely from a mechanical application of a formula found in a document prepared by another. The network manager did not have personal knowledge of the labor expenses that were incurred in repairing the cable service and was merely a conduit for the opinion(s) of the company's asset protection department. Thus, the opinion testimony derived from the formulated labor expense rate provided by the network manager was inadmissible hearsay and without probative value.

Furthermore, the Court stated, even assuming the network manager's testimony regarding the company's labor expenses served as competent evidence, it nevertheless could not have been considered in calculating the damage to the property under *Waldrop v. State*, 231 Ga.App. 164, 164-166 (1998). There, the Court held that the expenses incurred by the owner of the damaged property for the owner's labor in dealing with the damage could not be used as a substitute for the value of the damage to the property and therefore, could not be considered in determining whether the damage exceeded $500. Additionally, including the owner's labor in the damage calculus would have constituted an improper expansion of the meaning of the statute because the crime in its essence is criminal damage to property, not total

expenses of the owner in connection with the property damage. Thus, the expenses incurred by the company for its own labor in dealing with the damage to the telephone line could not be considered in determining whether the damage exceeded $500. Accordingly, the Court held, the only probative evidence of damage to the property presented by the State was the network manager's testimony that the company had incurred $384 in costs for replacement materials. As such, the State failed to establish that the damage exceeded $500, an essential element of the crime of criminal damage to property in the second degree, and appellant's conviction on that count was reversed.

Right to Trial by Jury; Waiver

Talton v. State, A13A1223 9/25/13

Appellant was convicted of sexual crimes in relation to minor victims. He contended that he did not knowingly, voluntarily, and intelligently waive his right to a jury trial. The record showed that at the time appellant was to appear for trial, his attorney told the court that, against his advice, appellant wanted a bench trial. Appellant told the court that he understood he had an absolute right to a jury trial, and knew that if he waived that right, the trial court would hear and rule on the evidence presented. After opening statements and before any witnesses were sworn, however, the State said that it would not consent to a bench trial and insisted on a jury trial. Appellant indicated, through his lawyer, that he still wanted a bench trial, but the trial court continued the case. After a six-week continuance, appellant again insisted on continuing with the bench trial and stated that he understood that the judge would preside as the trier of fact.

After his conviction, appellant contended that he that he did not knowingly, voluntarily, and intelligently waive his right to a jury trial. Specifically, he argued that there was no evidence establishing that he knew the difference between a jury trial and a bench trial. Further, he argued that he did not understand that there would be a process of jury selection, that the State did not present any extrinsic evidence at the motion for new trial hearing, and that the State had not met its burden of proving a knowing, voluntary, and intelligent waiver.

The Court stated that a criminal defendant must personally and intelligently participate in the waiver of the constitutional right to a trial by jury. When the purported waiver of this right is questioned, 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. Further, the question of whether a defendant is capable or incapable of making a knowing and intelligent waiver of his rights is to be answered by the trial judge and will be accepted by the Court unless such determination is clearly erroneous.

The Court held that the record provided ample evidence that appellant waived his right to a jury trial. A colloquy between appellant and the trial court revealed that he understood his right to a jury trial and if he waived that right, the court would hear the evidence. Further, appellant testified that he was not pressured, coerced, threatened, was not under the influence of drugs or alcohol, and had proceeded against the advice of his attorney. The record also disclosed appellant's reasoning for the decision, that he was worried about the reactions of the jury to the severe charges against him. In addition, the trial court again questioned appellant's decision to waive a jury trial following the continuance.

Appellant also argued that his decision was not voluntary because the trial court heavily advocated in favor of proceeding without a jury, thus influencing his choice. At the initial trial date, when the State objected to proceeding with a bench trial after appellant requested one, the trial court, after learning the victims' ages, asked the prosecutor if he wanted to "spare them a jury trial" and also said, after pointing out that a number of jurors would be disqualified because of personal experiences with molestation, that "it may be more efficient to proceed without a jury if [appellant] [was] waiving his right to a jury. And not requiring the girls to testify in front of a jury is, I think, really in their best interest." Again, the Court disagreed. The statements made from the trial court to the State occurred after appellant had chosen the bench trial. The record showed that the trial court did not make promises of a reduced sentence or any other benefit to appellant, nor did it urge appellant to choose a bench trial or tell him he risked an increased sentence if he chose a jury trial. Also, the comments made by the trial court were directed to the State, not to appellant. Consequently, the record supported the trial court's finding that appellant consulted with his attorney and made an intelligent, voluntary, and knowing decision to waive a jury trial.

DUI; Implied Consent

Lee v. State, A13A1067 (9/26/13)

Appellant was convicted of DUI. The evidence showed that appellant told the officer that he had consumed one beer and agreed to perform field sobriety evaluations. After failing a horizontal gaze nystagmus evaluation, appellant refused to submit to a field alco-sensor evaluation and asked for a blood test. The officer arrested appellant for DUI, read to him the applicable implied consent notice and requested that he submit to a breath test. Appellant, who spoke English as a second language, indicated that he did not understand the notice. The officer transported appellant to the jail, where he instructed him on how to provide a proper breath sample. Appellant performed the breath test as instructed, the results of which showed a blood-alcohol concentration of 0.118 and 0.125 grams.

Appellant contended that the trial court erred when it denied his motion in limine regarding the results of the breath test. Specifically, he argued that his implied consent was effectively withdrawn because the language of the statute was read in English, a language not entirely familiar to appellant. The Court noted that the implied consent statute, O.C.G.A. § 40-5-55(a), provides that any person who operates a motor vehicle in this state and is arrested for DUI is deemed to have given consent to chemical tests of his bodily substances to determine the presence of alcohol or drugs. That consent may be withdrawn. O.C.G.A. § 40-5-67.1(b) requires arresting officers to read the appropriate informed consent notice to the arrested person, informing him, among other things, that he has a right to independent tests after submitting to state testing and that his refusal to submit to state testing may be offered into evidence against him at trial. Further,

§ 40-5-67.1(b) authorizes arrested persons to withdraw their implied consent by refusing to submit to testing and provides that any person who is dead, unconscious, or otherwise in a condition rendering such person incapable of refusal to submit to testing shall be deemed not to have withdrawn his implied consent.

The Court cited a line of Georgia cases which held that drivers are entitled only to be advised of their rights under the implied consent law, which requires the implied consent notice be read to them. The law does not require the arresting officer to ensure that the driver understands the implied consent notice. The rationale underlying this rule was obvious to the Court: To allow an intoxicated driver's professed inability to understand the implied consent warning to vitiate either the implied consent or the revocation of it, would undermine O.C.G.A. § 40-5-55(a) as to render it meaningless. Further, implied consent warnings are a matter of legislative grace, and due process does not require that the warnings be given in a language that the driver understands. Therefore, the Court held, a non-English speaking driver is not in a condition rendering such person incapable of refusal under O.C.G.A. § 40-5-55(b).

Sentencing; Asportation

Arnold v. State, A13A1240 (9/27/13)

In 1999, appellant pleaded guilty to charges of kidnapping, rape, and possession of a firearm during the commission of a crime and received a sentence of 15 years in prison. After a successful *habeas* challenge, appellant withdrew his plea and was granted a jury trial. The jury acquitted him of the rape and possession charges, but convicted him on one count of kidnapping, for which the trial court imposed a 20-year sentence.

Appellant contended that the trial judge was not permitted to increase his sentence for kidnapping from 15 years to 20 years because to do so was unconstitutionally vindictive under *North Carolina v. Pearce*, 395 U.S. 711 (1969). In *Pearce*, the Supreme Court held that due process prohibits vindictiveness from playing any part in a new sentence imposed by a trial court after a criminal defendant has successfully attacked his conviction and obtained a new trial. The Supreme Court announced a general requirement that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear on the record. Otherwise, a presumption of vindictiveness arises that may be overcome only by objective information justifying the increased sentence.

However, the Court noted, in *Alabama v. Smith*, 490 U.S. 794 (1989), the Supreme Court limited its holding in *Pearce,* concluding that the presumption of vindictiveness has no application to a sentence imposed after a trial that is greater than one imposed after a guilty plea. In *Smith*, the Court reasoned that in the course of the proof at trial, the judge may gather a fuller appreciation of the nature and extent of the crimes charged, the defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation, and after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present. As to appellant, the Court applied the limitation as prescribed by *Smith*. Although not present when appellant was originally sentenced, the trial judge stated at sentencing that the 20 year sentence imposed was decided carefully and was based on "much more" evidence than was offered at the original plea hearing.

Appellant also contended that the trial court improperly instructed the jury on the issue of asportation and that he was therefore entitled to a new trial. The Court found that the charge given to the jury was a correct statement of the law on asportation at the time of appellant's trial: "Only the slightest movement of the victim is required to constitute the necessary element of asportation." The Court noted that because *Garza v. State* 284 Ga. 696 (2008) applied retroactively, appellant was entitled to a jury instruction consistent with that rule. Given that the charge was erroneous, the Court then looked to whether it was highly probable that the error contributed to the judgment. Here, the evidence showed that appellant forcefully dragged the victim from her bedroom, through and out of her house, across her yard, and into her neighbor's yard in the darkness of the early morning hours. His movements of her were not an inherent or integral part of any other offense, and the movements presented a significant danger to the victim in that they enhanced appellant's control over her and decreased her chance of rescue by her teenage son. Therefore, the Court concluded, the failure to instruct the *Garza* asportation factors to the jury did not contribute to the verdict.

Variance

Thompson v. State, A13A1629 (9/25/13)

Appellant was convicted of burglary. The evidence showed that appellant and the victim had been in a previous relationship. On the day of the crime, appellant's then girlfriend drove him to the victim's apartment where appellant stated to the girlfriend that he was there to collect money from a friend. When the victim refused to answer the door, appellant kicked down the door, entered, took the victim's cell phones and television, and poured bleach on many of the victim's household items. The victim testified that she never gave appellant permission to take her television, and she denied that she owed him any money.

Appellant contended that there was a fatal variance between the allegations in the burglary count of the indictment and the proof at trial because the indictment alleged that appellant entered the victim's apartment with intent to commit theft while the evidence at trial showed intent to commit criminal damage to the property in the second degree. The Court disagreed. First, appellant did not raise his fatal variance argument in the trial court and thus waived the issue for consideration on appeal.

In any event, the Court found, appellant's argument was without merit. At the time of the offense, O.C.G.A. § 16-7-1(a) (2010) provided that: "A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another[.]" Here, the indictment alleged that appellant "did unlawfully, without authority, enter into the dwelling house of [the victim] with the intent to commit a theft therein." In support of that allegation, the State presented evidence that on the way to the victim's apartment, appellant told his girlfriend that he was going to the apartment because a friend owed him money. There was also evidence that appellant, after kicking in the door to the victim's apartment, took her television because she refused to give him money and left the premises with it. The victim testified that she did not give appellant

permission to take her television and did not owe him any money. Therefore, even if appellant had preserved the enumeration of error, there was no variance, much less a fatal variance, between the allegations in the burglary count of the indictment and the proof at trial.

Self Defense Immunity; Motions to Reopen Evidence

State v. Cooper, A13A1094 (9/26/13)

The State indicted Christopher Cooper on two counts of aggravated assault for striking two persons with a crow bar, Latrenia Walls on two counts of aggravated assault for striking two persons with a crow bar, and Lonell Walls on one count of simple battery for striking someone with his fists. In pleas in bar, the defendants moved for immunity from prosecution under O.C.G.A. § 16-3-24.2, arguing that they had acted in defense of themselves and others. At the hearing on the motions, the State chose not to put on any evidence or cross-examine any defense witnesses. After the hearing, the State moved to reopen the evidence. The trial court granted the defendants' motions for immunity and denied the State's motion to reopen the evidence. The trial court found that the defendants reasonably believed that there was a danger of imminent death or great bodily injury to one or more of their group and that the force used was necessary to defend themselves from a violent attack, entitling them to immunity. The State appealed.

The State argued that the record was devoid of any evidence to support a finding that the defendants were acting in self-defense or defense of others. O.C.G.A. § 16-3-21 provides "[a] person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to defend himself or herself or a third person against such other's imminent use of unlawful force; however, . . . a person is justified in using force which is intended to or likely to cause death or great bodily harm only if he or she reasonably believes that such force is necessary to prevent death or great bodily harm to himself or herself or a third person or to prevent the commission of a forcible felony." A person who uses force in accordance with O.C.G.A. § 16-3-21 "shall be immune from criminal prosecution therefor" and the defendant(s) bear "the burden of showing by a preponderance of the evidence he is entitled to immunity."

The Court noted that the evidence at the hearing was uncontroverted because the State presented no evidence. Further, had the State cross-examined the defense witnesses or presented evidence of its own, a different picture of the altercation could have emerged before the trial court. Thus, the uncontroverted evidence was sufficient to support the conclusions both that Cooper, Latrenia Walls and Lonell Walls reasonably believed that there was a danger of imminent death or great bodily injury to one or more of their group and that the force they used was necessary to defend themselves from a violent attack.

The State also argued that the trial court erred in denying their motion to reopen the evidence. The record showed that after the hearing on the defendants' motions for immunity, but before the trial court ruled on those motions, the State moved to reopen the evidence. In support of its motion, the State argued that "[a] review of the case law appears to demand the testimony of the victims," and that "[a]ny error in the State's presentations on the motion[s] would only hurt the victims in this case, and is due [to] the State's misinterpretation of the law." The State made no proffer of the testimony that the victims would provide. Additionally, reopening the evidence fell within the sound discretion of the trial court and the failure to include in the record a proffer of the testimony for which a party sought to have the evidence reopened precludes the Court from ascertaining whether harm resulted from the decision not to reopen the evidence. Because the State failed to introduce evidence on immunity and failed to make a proffer to the trial court, the Court found no abuse of discretion of the trial court's denial to reopen the evidence.

Probation Revocation; Judicial Recusal

Bickel v. State, A13A1333 (9/24/13)

Appellant was convicted of child molestation in 2002 and sentenced to 20 years on probation. In 2012, the State sought to revoke his probation for possession and use of marijuana and for alcohol intoxication in violation of his sex offender special conditions of probation. After a hearing, the trial court found that appellant had violated numerous terms of his probation and sentenced him to five years of incarceration.

Appellant argued that the trial court erred by sentencing him to five years of incarceration after revoking his probation because he has a mental disorder that affects his ability to comply with the provisions of probation. Specifically, appellant's doctor testified that appellant used marijuana in order to treat his depression and that his condition has been difficult to treat. However, the Court found, the fact that appellant chose to self-medicate his depression with marijuana rather than with other forms of treatment, medicinal or otherwise, did not establish error on the part of the trial court in sentencing him to incarceration on the basis of the violations.

Appellant also argued that the judge who presided over his revocation hearing should have granted his motion for a new trial on the basis that the judge had extra-judicial knowledge of appellant's marijuana use, which the judge had garnered from a consultation that appellant sought from him during earlier divorce proceedings. The record showed that after the revocation hearing, appellant told a third party about the judge's representation, who later relayed that information to appellant's revocation attorney.

The Court noted that Canon 3 (E)(1)(a) of the Georgia Code of Judicial Conduct states that, "[j]udges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including" cases in which "the judge has . . . personal knowledge[] of disputed evidentiary facts concerning the proceeding." According to the preamble of the Code, "knowledge . . . denotes actual knowledge of the fact in question[, and a] person's knowledge may be inferred from circumstances." Further, Rule 25.1 of the Uniform Rules for the Superior Courts provides "[a]ll motions to recuse or disqualify a judge presiding in a particular case or proceeding shall be timely filed [within five days after the affiant first learns of the alleged grounds for disqualification, and not later than ten days prior to the hearing at issue] in writing and all evidence thereon shall be presented by accompanying affidavit(s) which shall fully assert the facts upon which the motion is founded."

Here, the Court found, although appellant's revocation hearing occurred on April 25, 2012, his motion for new trial alleging that the judge had extra-judicial knowledge of relevant facts was not filed until May 23, 2013. Even assuming that appellant did not realize that the judge would preside over the hearing, it was well outside of five days from the time appellant would have realized the conflict at the hearing. Furthermore, the motion lacked any supporting affidavit on the matter. Therefore, the Court held, the motion failed on the grounds that it was neither timely nor legally sufficient. Moreover, even if appellant had timely filed such a motion, it did not appear that he provided the judge with any information different from that which appellant himself presented at the revocation hearing—his history of marijuana use to treat his ongoing issues with depression.