Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING OCTOBER 5, 2018
Issue 40-18

THIS WEEK:

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Possession of Child Pornography; Unit of Prosecution

State v. Williams, A18A0853 (8/14/18)

Williams was indicted on 48 separate counts of sexual exploitation of children in violation of OCGA § 16-12-100 (b) (8), after a search of several electronic devices located in his home allegedly uncovered numerous images of child pornography. Each count of the indictment described an image depicting a minor engaged in specific sexually explicit conduct "separate and distinct from any other count alleged." Williams filed a demurrer seeking to dismiss counts two through forty-eight of the indictment, arguing that they were multiplicitous of the first count. The trial court agreed, concluding that the legislature's use of the phrase "any material" in OCGA § 16-12-100 (b) (8) meant that a "simultaneous possession of multiple pornographic images, in a single location, on one specific day" was intended to constitute a single act of possession. The State appealed.

The Court stated that multiplicity is the charging of the same crime in several counts of a charging document. Because it is the task of the legislature, not the courts, to define crimes and set the range of sentences, the determination of whether a course of conduct can result in multiple violations of the same statute is a matter of statutory interpretation. Thus, the Court stated, when faced with a multiplicity challenge, it is required to ascertain the "unit of prosecution," or the precise act or conduct that is being criminalized under the statute.

The Court noted that OCGA § 16-12-100 represents the State's compelling interest in safeguarding the physical and psychological well-being of minor children by protecting them from being subjects of pornography, which is obviously harmful to their psychological, emotional, and mental health. In furtherance of that goal, the legislature authorized equal punishment not only to those who participate in making and selling child pornography, but to those who view and possess it. Therefore, the Court stated, reading the statute within the context of these objectives, it has "little trouble concluding that … subsection (b) (8) criminalizes each individual act of possessing or controlling an image depicting child pornography." In fact, the Court opined, "[g]iven the text and context of subsection (b) (8), it would make little sense to conclude that one who possesses vast amounts of child pornography is entitled to a volume discount when it comes to prosecution and sentencing." Accordingly, the Court reversed the trial court's dismissal of counts two through forty-eight.

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Criminal Contempt; Due Process

In re Williams, A18A1384 (8/15/18)

Appellant appealed from an order of the juvenile court holding her in direct criminal contempt. The record showed that appellant, who represented the Department of Family and Children's Services, was held in contempt after her phone sounded during a dependency hearing.

As an initial matter, the Court noted that although the judge filed a brief as an "appellee," the judge before whom the allegedly contemptuous conduct occurred is not a "party" to appellate review of a contempt finding, as is reflected in the style of a contempt case before the Court, i.e., "In re" and the name of the alleged contemnor. Accordingly, no appellate appearance by the judge who entered the contempt order is authorized. Accordingly, the Court struck the judge's appellee's brief from the record.

Turning to the merits, the Court stated that criminal contempt is a crime in the ordinary sense. Although the trial judge has the authority to summarily punish for contemptuous conduct committed in his or her presence, due process requires that such punishment cannot be meted out until the contemnor is given reasonable notice of the charge and an opportunity to be heard. This is so because of the "heightened potential for abuse posed by the contempt power." And here, the Court found, while the juvenile court judge entered a summary order setting out the basis for the finding of contempt, the order did not include any finding that appellant was given an opportunity to speak on her own behalf or attempt to explain her actions before she was found in contempt. And since there was no transcript of the contempt hearing in the record, the Court could not determine whether appellant was afforded any meaningful opportunity to be heard. Accordingly, because the record did not show that appellant was extended the minimum requirements of due process of law, the judgment of contempt was reversed.

Search & Seizure; Ordinance Violations

State v. Alford, A18A0939 (8/24/18)

Alford was charged with possession of cocaine and misdemeanor marijuana. The evidence showed that two officers were dispatched to a neighborhood where a city code enforcement officer had observed two men drinking alcohol in a vehicle parked on the road. As both officers approached the vehicle, they smelled burnt marijuana. Alford, the passenger in the vehicle, admitted that he was drinking a beer seen in the vehicle next to him. The officers arrested Alford for the open container city code violation and then searched the vehicle because of the smell of marijuana. The officers located the drugs in a backpack found on the front passenger floorboard where Alford had rested his feet. Alford admitted owning the backpack and the drugs found inside it.

Alford filed a motion to suppress, which the court granted. The court stated, "According to the arresting officer, the basis for the arrest was a violation of the open container ordinance; however, at the hearing the State failed to produce a certified copy of that ordinance. Therefore, the ordinance may not serve as a basis for upholding the arrest and subsequent search." The State appealed.

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The State first contended that Alford, as a passenger in the vehicle, lacked standing to challenge the search of the vehicle where his backpack was found. The Court disagreed. Irrespective of whether Alford had a privacy interest in the vehicle in which he was a passenger, he had a reasonable expectation of privacy in the searched backpack, given that it was found on the passenger side floorboard and Alford told the officer that it belonged to him.

Next, the State argued that Alford's written motion to suppress failed to provide it with sufficient notice that one of the legal issues at the suppression hearing would be whether the State had established a lawful arrest through the tender of a certified copy of the open container ordinance. The Court again disagreed. The Court noted that Alford's motion to suppress stated in relevant part: "The Defendant shows that on or about June 26, 2014, he was illegally detained and charged with the above-stated [drug] offenses in violation of OCGA § 17-4-20 in that the arresting officer did not have probable cause to believe that the defendant was guilty of any crime, offense, or ordinance." Where a defendant challenges the legality of his arrest, and the State relies on an ordinance to justify the arrest, the State must introduce a certified copy of the ordinance at the suppression hearing. Accordingly, the Court found, given that the State had notice before the suppression hearing that Alford was challenging the legality of his arrest, the State was on notice that it had to introduce competent evidence to prove the legality of that arrest at the hearing, which in this context meant a certified copy of the open container ordinance.

Finally, the State argued that even if it failed to prove the lawfulness of Alford's arrest based on an open container ordinance violation, the officer's search of the backpack in the vehicle was not tainted by the unlawful arrest and should not have been suppressed as fruit of the poisonous tree. Specifically, the State contended that the officers already had probable cause to search the backpack in the vehicle, pursuant to the automobile exception to the warrant requirement, based on the smell of marijuana they had detected coming from the vehicle when they approached it, separate and apart from Alford's arrest. The Court agreed that even where contraband could not be properly seized from a vehicle as incident to an arrest, the contraband is not fruit of the poisonous tree, if the contraband would have been inevitably discovered during a search based on probable cause because the officer smelled marijuana in the car.

But here, the trial court did not address and rule on whether the drugs discovered during the subsequent search of the backpack in the vehicle constituted tainted fruit of the arrest based on the officers' testimony regarding the smell of marijuana. Also, the Court noted, in its order, the trial court, as part of its summary of the testimony at the suppression hearing, pointed out that the arresting officer "stated that he had smelled the odor of burnt marijuana" before searching the vehicle and finding the backpack where the drugs were discovered. However, the trial court did not further state in its order whether it credited the officer's testimony regarding the odor and did not address whether the officer was qualified to make such a determination. Nor did the trial court address the "fruit of the poisonous tree" doctrine after concluding that the State failed to prove the legality of Alford's arrest. Therefore, the Court held, under the circumstances, the judgment was vacated and remanded for the trial court to address the application of the "fruit of the poisonous tree" doctrine in the first instance.

Sex Offenders; Release from Registration Requirements

Strickland v. State, A18A1266 (8/27/18)

In 2017, appellant petitioned for release from the requirement that he be registered as a sex offender as a result of a 1992 conviction for aggravated child molestation. The trial court denied the petition based on the finding that appellant had

pled guilty to committing an act of aggravated child molestation which specifically involved physical injury to the victim. Appellant sought discretionary review of the trial court's ruling, seeking a determination as to whether the phrase "intentional physical harm" as used in OCGA § 17-10-6.2 (c) (1) (D) means a specific intent to cause physical harm as opposed to an intent to commit the act that causes the physical harm. The Court granted his application for discretionary appeal.

Relying on *State v. Randle*, 331 Ga. App. 1 (2015) (physical precedent only) (hereainafter "*Randle I*"), appellant argued that under OCGA § 17-10-6.2 (c) (1) (D) the phrase "intentional physical harm" means an actual intent to cause the physical harm, rather than the intent to commit the act that causes the physical harm. However, the Court found, appellant's reliance on *Randle I* was misplaced. In *State v. Randle*, 298 Ga. 375 (2016) (hereinafter "*Randle II*"), our Supreme Court granted certiorari to resolve the issue raised in *Randle I* as to whether the phrase "intentional physical harm" encompasses all intentional physical contact or only that which is shown to have caused some physical pain or injury. The *Randle II* Court held that the phrase "intentional physical harm," as used in OCGA § 17-10-6.2 (c) (1) (D), means "intentional physical contact that causes *actual* physical damage, injury, or hurt to the victim." (Emphasis supplied.)

Thus, the Court concluded, following the interpretation of OCGA § 17-10-6.2 (c) (1) (D) set forth in *Randle II*, the phrase "intentional physical harm" as used in the statute means a specific intent to commit the act that causes the physical damage, injury, or hurt to the victim. As the record showed that appellant was convicted for an intentional act of aggravated child molestation which resulted in physical injury to the victim, the trial court did not err in denying his request to be released from the sex offender registration requirements.

Closing Arguments; *Mallory*

McKissic v. State, A18A1393 (8/29/18)

Appellant was convicted of one count of aggravated child molestation, one count of aggravated sodomy, three counts of child molestation, and three counts of furnishing alcohol to a minor. Citing *Mallory v. State,* 261 Ga. 625 (1991), overruled on other grounds as recognized in *Clark v. State*, 271 Ga. 6, 10 (1999), he argued that the trial court erred in denying his motion for a mistrial following the State's comment in closing about his "pre-arrest silence." The Court disagreed.

The record showed that during closing, the State recounted testimony that following the assault on the three victim girls, appellant left the house to go to the home of a friend. While at that friend's home, appellant was informed of the girls' outcry. The State commented in its closing that appellant "made one phone call and he left again on foot. What's that all about? And the one phone call he makes is to [his wife]. What's that all about. This is about the same time that the police and the ambulance are at the McKissic household. Where is [appellant] at? He has to know the police and the ambulance are there if he talked on the phone with [his wife] so why didn't he show up."

Noting that the Supreme Court has repeatedly declined to clarify whether *Mallory* remains binding following implementation of the new Evidence Code, the Court found that *Mallory* is distinguishable because it analyzed impeachment of a defendant by the use of a defendant's failure to contact police prior to an arrest. But here, appellant did not take the stand in his own defense, and was not, therefore, improperly confronted with his pre-arrest silence and

failure to come forward after allegedly learning of the police investigation against him. Accordingly, the Court did not find *Mallory* dispositive and "[t]hough ill-advised, the comments of the prosecutor did not jeopardize [appellant]'s right to a fair trial."