

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 13, 2015

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THIS WEEK:

- **Juveniles; Transfer Orders to Superior Court**
- **DUI; Probable Cause to Arrest**
- **Ineffective Assistance of Counsel; Sentencing**
- **Res Judicata**
- **Sufficiency of the Evidence; Jury Charges**
- **Pleas in Bar; Statute of Limitations**
- **Search & Seizure; Protective Sweeps**
- **Void Sentences; Rule of Lenity**

Juveniles; Transfer Orders to Superior Court

In the Interest of J. M. S., A15A1624 (10/8/15)

Appellant had three delinquency petitions filed in the juvenile court against him, all relating to three pawn-shop burglaries. In the last burglary, he pointed an AK-15 at an officer and while being chased by the officer, discarded a backpack containing 15 stolen weapons. Additionally, there was evidence that appellant was a member of a known gang in the county.

Appellant argued that the juvenile court abused its discretion in transferring his case to superior court because the State failed to meet its burden of showing that he was not amenable to treatment or rehabilitation. The Court noted that its function is limited to ascertaining whether there was some evidence to support the juvenile court's determination, and absent an abuse of discretion, it will affirm the order transferring jurisdiction. And here, the Court stated, it could not say there was no evidence to support the juvenile court's determination that it was "doubtful" appellant

was amenable to treatment in the juvenile system. The Court noted that appellant had been non-compliant with a juvenile-treatment program in the past, and despite his history in the juvenile-court system, he continued to engage in criminal activity that had escalated in severity. Even if there is evidence that the child may be amenable to treatment, the juvenile court may still transfer the case if it finds that the amenability factor is outweighed by the interest of the community in treating the child as an adult. And, under former O.C.G.A. § 15-11-562 (in effect when the transfer order was made), a child's amenability to treatment was only one of ten factors to be considered by the court in determining whether the community's interest in treating the child as an adult outweighs the child's interest in treatment in the juvenile system.

Moreover, even assuming appellant was amenable to treatment, the juvenile court's determination that the community's interest in transferring his case to superior court outweighed appellant's interest in remaining in the juvenile system was supported by the evidence. Specifically, his criminal conduct escalated from a history of minor offenses, such as trespass and curfew violations, to three commercial burglaries that occurred within the span of a few days. And during the last of these burglaries, he stole sixteen firearms, aimed an AR-15 rifle at a police officer, and engaged in aggressive behavior toward the officer until he was finally subdued by a taser. There was also evidence that the last burglary was very sophisticated and well thought out. Additionally, an expert in gang activity believed that the burglaries were gang-related based in part on appellant's own admission to being a gang member and his prior association

with well-known gang members. The expert also testified in detail about the serious danger that criminal street gangs pose to the community and noted that there had been an increase in gang-related criminal violations in the county since 2012. Further, he testified that the potential danger to the community if appellant had successfully stolen such a large number of firearms was “very alarming.” Under these particular circumstances, the Court stated, the juvenile court did not abuse its discretion in determining that the community’s interest in transferring the case to the superior outweighed appellant’s interest in remaining in the juvenile-court system.

DUI; Probable Cause to Arrest

State v. Young, A15A1347 (10/14/15)

Young was charged with less-safe DUI, serious injury by vehicle, failure to obey a police officer, and failure to yield to a pedestrian in a crosswalk. The evidence, briefly stated, showed that two off-duty police officers were directing traffic in a busy intersection immediately after a football game. When the officers stopped traffic and signaled pedestrians to cross the road, a group of approximately 50 people, including the victim, who was slightly ahead of his father, began to cross the street by means of the pedestrian crosswalk. When the victim had crossed approximately half of the street, a large red SUV emerged from the stopped traffic. Although one of the officers attempted to get the SUV to stop by waving his hands over his head at the vehicle, it drove into the crosswalk, narrowly missing one of the officers, striking the father’s hand and striking the child, who flew into the air and landed on the pavement, sustaining serious injuries. The two officers flagged down on-duty Officer McElroy, who made contact with Young as he was standing by his SUV. McElroy noticed a “slight smell of alcohol” and when he asked Young if he had been drinking, Young responded, “Yes.” Young refused testing under implied consent and refused to do any field sobriety tests.

Young moved to suppress any statements he may have made to police, including any refusal to submit to field sobriety or state-administered tests, on grounds including that he was stopped, detained and arrested without probable cause and that there was insufficient evidence to authorize a prosecution for less-

safe DUI as well as the remaining charges. After a hearing on the motion, the trial court suppressed all “evidence relating to” the DUI and serious-injury-by-vehicle charges. The trial court then dismissed these two charges on the ground that police had lacked probable cause to arrest Young for DUI. The trial court also ordered the State to submit a new accusation for the two remaining misdemeanor charges “before the matter proceeds forward to a trial.”

The State appealed, arguing that probable cause to arrest Young for DUI did exist. The Court agreed and reversed. The Court noted that it must accept the facts as found by the trial court as true if there is evidence to support them. However, the Court stated, here, the trial court made a variety of findings of facts, some of them contradictory, in the course of its legal analysis. Thus, the trial court specifically held that McElroy’s account of his interaction with Young was not credible, and the court also excluded any mention of Young’s refusal to submit to field sobriety or state-administered tests from the evidence it considered on the question whether police had probable cause to arrest Young for DUI. Because the trial court disavowed or ignored the entirety of McElroy’s testimony for purposes of the motion to suppress, the Court stated that it too must also ignore his testimony that Young refused to submit to any testing.

Nevertheless, the Court concluded, McElroy had probable cause to arrest Young for less-safe DUI. It was undisputed that Young drove his SUV into a crosswalk, hitting the victim, and the trial court credited McElroy’s testimony that Young smelled of alcohol and admitted to drinking. Even if any one of these or other facts, standing alone, might be susceptible to an “innocent explanation” — as when the trial court explained away Young’s erratic driving by characterizing the hand signal of the officer in the crosswalk as “confusing” — the Court does not consider any fact or circumstance standing alone. Rather, the totality of the circumstances here authorized a reasonable officer to conclude that Young was driving under the influence. Therefore, the Court reversed the trial court’s dismissal of the DUI and serious-injury-by-vehicle charges as well as its suppression of Young’s refusal to submit to testing and remanded the case for further proceedings in which the credibility of witnesses, including Officer McElroy, will be for the jury to consider.

Ineffective Assistance of Counsel; Sentencing

Hendrix v. State, S15A1169 (11/2/15)

Appellant was convicted of malice murder, felony murder, aggravated assault, possession of a firearm during commission of a felony, and possession of a firearm by a convicted felon. The evidence showed that appellant got into a dispute with the victim at a car wash. Appellant drove off, but a short time later, came back and got out of his vehicle with a weapon. He then walked up to the victim, a struggle ensued, and the victim was shot twice. There was no evidence that the victim was armed.

Appellant contended that his trial counsel rendered ineffective assistance by pursuing a misidentification defense at trial rather than his preferred self-defense claim. The Court found that an attorney’s decision about which defense to present is a question of trial strategy and unless the choice of strategy is objectively unreasonable, such that no competent trial counsel would have pursued such a course, the courts will not second guess counsel’s decisions in this regard. Here, the Court found, its review of the evidence and the manner in which counsel presented the defense’s case supported the conclusion that counsel’s strategy, though ultimately unsuccessful, was nonetheless objectively reasonable.

Nevertheless, appellant contended, appellant also argued that his counsel was ineffective for failing to consult with him regarding this choice of defense strategies. The Court noted that it was undisputed that counsel did not consult with appellant prior to making the strategic decision to use misidentification rather than self-defense. The Court stated that attorneys have an affirmative duty to consult with their clients on such matters. But, an attorney’s failure to fulfill the duty to consult regarding trial strategy does not in and of itself constitute ineffective assistance. In the context of a failure-to-consult claim such as that alleged here, the defendant must establish that his counsel’s failure to consult was prejudicial to his defense, i.e., that there is a reasonable probability that, but for counsel’s failure to consult, the result of his trial would have been different. And, in light of the unequivocal testimony of all four eyewitnesses describing appellant as the aggressor, there was no reasonable probability

that, even if counsel had consulted with appellant and consequently decided to assert self-defense rather than misidentification, the jury's verdict would have been different. Thus, counsel's failure to consult did not constitute ineffective assistance.

The Court, apparently *sua sponte*, found error, however, in appellant's sentences. First, because there was a single victim, appellant could not be convicted and sentenced for both malice and felony murder. Thus, the felony murder count was vacated as surplusage. And, because the felony murder count should have been vacated, it was error for the trial court to merge the felon-in-possession count with the felony murder count. In addition, because the aggravated assault was based on the same act as the malice murder, the aggravated assault was a lesser included offense that should have been merged into the malice murder.

Accordingly, the Court remanded the case to the trial court to vacate the convictions and sentences for felony murder and aggravated assault and impose a proper sentence on the felon-in possession count.

Res Judicata

Beasley v. State, S15A0930 (11/2/15)

In 2004, appellant pled guilty to felony murder based on aggravated assault. In 2009, he filed an unsuccessful petition for writ of habeas corpus, which was denied in 2013. In 2014, he filed a motion to withdraw his guilty plea and then appealed the denial of that motion to the Supreme Court.

Appellant argued that 1) his trial counsel was ineffective; 2) his pleas were not voluntary because he was not informed that intent was an element of the crimes to which he pled; 3) the trial court erred in entering an order of *nolle prosequi* to the aggravated assault count, and then accepting his guilty plea in a felony murder count predicated on the act of aggravated assault; and 4) the trial court should have, *sua sponte*, inquired into his competency before accepting his pleas. The Court found that with the exception of the claim that the trial court should have *sua sponte* inquired into his competency, appellant raised these same grounds of alleged trial court error in his prior petition for a writ of habeas corpus. The habeas court denied his request for relief, which precluded consideration of all of these issues now under the doctrine of *res judicata*.

Three prerequisites must be satisfied before *res judicata* applies — (1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous adjudication on the merits by a court of competent jurisdiction. Where a convict seeks post-conviction relief based upon grounds previously litigated in a habeas proceeding, *i.e.*, were raised in a habeas proceeding and resolved by the final judgment of the habeas court, the defendant is collaterally estopped from pursuing those grounds in his effort to obtain post-conviction relief. Furthermore, the Court found, although appellant did not assert in the habeas court that the trial court failed, *sua sponte*, to inquire into his competency at his plea hearing, the doctrine of *res judicata* precludes not only re-litigation of claims that were actually adjudicated in the prior cause of action, but those which could have been adjudicated therein. In the habeas court, appellant asserted in connection with his claim of ineffective assistance of counsel that counsel should have moved for a competency hearing, and he could have also raised the issue of whether the trial court had a duty, *sua sponte*, to order such a hearing. However, he did not do so and thus, consideration of this issue was also precluded on the basis of *res judicata*. Therefore, the Court concluded, although the trial court did not cite *res judicata* in its order denying the motion, as the matters appellant raised in that motion were precluded by that doctrine, the trial court did not err in denying the motion, and the Court affirmed its judgment under the “right for any reason” rule.

Sufficiency of the Evidence; Jury Charges

Williams v. State, S15A0939 (11/2/15)

Appellant was convicted of four counts of felony murder and the underlying felonies arising out of the death of his one-year-old child. The child died after ingesting cocaine which the jury found appellant and his co-defendant, the mother of the child, possessed at their home with intent to distribute.

Appellant argued that, regardless of whether the evidence was sufficient to sustain the guilty verdict for the underlying felony of possession of cocaine with intent to distribute, the evidence was insufficient to permit a jury to find him guilty of felony murder predicated

upon this offense. This is because, appellant argued, possession with intent to distribute is not the type of felony which by its nature or by the attendant circumstances present in this case, created a foreseeable risk of death. The Court disagreed.

Here, the Court found, the evidence showed appellant possessed cocaine in his home where his five children lived, including the one year-old victim. The evidence showed it was typically hidden inside a hole in the living room sofa, which was accessible to the victim, who was able to walk and was allowed to roam the home. That the presence of cocaine within the reach of a young child creates a risk of death is highly foreseeable. Additionally, the undisputed testimony of expert witnesses confirmed the victim's ingestion of cocaine was the cause of death. Therefore, the Court held, the facts supported the unmistakable conclusion that the victim ingested the deadly dose of cocaine after finding it in the place where appellant and the co-defendant stored it to sell to others. Under the circumstances present in this case, the evidence was sufficient to support appellant's conviction for felony murder arising out of possession of cocaine with intent to distribute.

Appellant also contended that the trial court erred in its instructions to the jury regarding similar transaction evidence. The record showed that prior to the testimony of the first similar transaction witness, the trial court gave instructions regarding the limited purpose for which such testimony may be considered. Before each similar transaction witness testified, the trial judge reminded the jury of these limiting instructions with respect to their consideration of the testimony. In the final instructions to the jury, the trial court stated, in pertinent part, regarding the jury's consideration of similar transactions evidence: “The law provides that evidence of other acts or occurrences of these defendants that are sufficiently similar or connected and therefore purportedly related to the offenses for which the defendants are now on trial may be considered for the limited purpose of showing[,] if it does[,] the course of conduct, the scheme, motive or bent of mind *of the crimes charged from which—which are now on trial*. Such evidence, if any, may not be considered by you for any other purpose. (Emphasis supplied).

Citing *Dodd v. State*, 324 Ga.App. 827 (2013), and *Rivers v. State*, 236 Ga.App. 709 (1999), appellant argued that the trial court's charge substantively expanded the limited purpose for which similar transactions evidence may be used, and might have improperly led the jury to conclude that the similar transactions evidence presented could be used directly to prove the crimes charged. However, the Court found, the charge given could not be understood as incorrectly instructing the jury that the similar transactions evidence may be used to show the crimes for which appellant was on trial. In the preliminary limiting instructions given prior to the admission of any similar transactions evidence, the trial court correctly charged that such evidence could be considered for the purpose of showing bent of mind, etc., "in the crimes charged in the case now on trial." In the final instructions, the trial court essentially made the same charge but instead of using the preposition "in," used the preposition "of" in relation to the crimes charged. Jury charges are to be considered as a whole to determine whether there is error. Unlike in *Dodd* and *Rivers*, the trial court in this case did not use the word "and," thereby instructing the jury that the similar transaction evidence could be considered to prove the elements of the crimes "and," or in addition to, the crimes charged in the case on trial. Accordingly, there was no error.

Pleas in Bar; Statute of Limitations

Barghi v. State, A15A1442 (10/14/15)

Appellant was convicted of two counts of DUI and other traffic charges. The record showed that she was arrested on Nov. 5, 2011 and charged by accusation on Oct. 2, 2013 with DUI (less safe) and DUI (per se). On January 6, 2014, the State slightly amended the two DUI counts in the accusations. Specifically, in both counts, the language alleging that appellant did "drive or have control of a moving vehicle" was changed to allege more succinctly that she did "drive a moving vehicle." Approximately one month later, appellant filed a plea in bar, arguing that the State's prosecution on the DUI counts was time-barred because the amended accusations were filed after the applicable two-year statute of limitation had expired. The Court denied her motion after a hearing. The case was then bench tried. Appellant presented no evidence in her defense, but after the

State rested, she reiterated her argument that the amended accusations were filed after the statute of limitation expired and, therefore, the State's prosecution of those counts was time-barred. She further argued that, regardless of whether her plea in bar was properly denied, the State failed to present any evidence at trial that its prosecution was not barred by the statute of limitation. The trial court convicted her of the offenses.

Appellant argued that the trial court erred in denying her plea in bar. The Court disagreed. First, the Court noted, the State accused her of the offenses within two years of her arrest. Second, O.C.G.A. § 17-7-71(f) provides that "[p]rior to trial, the prosecuting attorney may amend the accusation, summons, or any citation to allege or to change the allegations regarding any offense arising out of the same conduct of the defendant which gave rise to any offense alleged or attempted to be alleged in the original accusation, summons, or citation." Furthermore, whether an amendment to an accusation or indictment after expiration of the statute of limitation broadens or substantially amends the original charge is undoubtedly an issue of law. And here, the Court found, the amended accusation gave the same date of the offenses as the original accusation, was based on the same conduct, and, indeed, made only slight changes to the wording of the allegations. Thus, the amended accusation did not commence a new prosecution, but rather, constituted a continuation of the original prosecution. Accordingly, the trial court did not err in denying appellant's plea in bar on the ground that the statute of limitation for the two amended DUI counts expired.

Nevertheless, appellant argued, the State did not actually prove compliance with the statute of limitation at the bench trial and it was improper for the trial court to consider evidence presented during the hearing on her plea in bar in support of its finding that the State's prosecution was not time-barred.. Once again, the Court disagreed. Relying on *Jenkins v. State*, 278 Ga. 598 (2004), the Court stated that while it is true that an exception to the statute of limitations must be pled in the indictment if the State is relying on one, the statute of limitations is not an element of the crime per se. Thus, the proper procedure for litigating a plea in bar based upon the statute of limitation should be analogous to a pretrial *Jackson v. Denno* hearing. Specifically

if a defendant prevails on a pretrial plea in bar on the statute of limitation, the charge should be dismissed; if the State prevails on this issue before trial, the defendant may still require the State to prove at trial that the charge is not barred by the statute of limitations.

Here, the Court found, the trial court did conduct a pretrial hearing and denied the plea in bar. And, appellant presented no evidence disputing the trial court's earlier ruling that the State's prosecution was not barred by the statute of limitation. Rather, she simply reiterated her earlier legal arguments. Furthermore, appellant elected to waive her right to a jury trial and instead proceeded to a bench trial with the same finder of fact who presided over her plea in bar and who had, therefore, already ruled upon the identical arguments less than two weeks earlier. Consequently, the Court found, given that the statute of limitation is not an element of the crime per se, it was perfectly appropriate for the trial court, as the trier of fact, to rely on evidence that was already a part of the case record. Accordingly, the trial court did not err in considering evidence presented during the plea in bar to support its finding at a bench trial that the State's prosecution was not time-barred.

Search & Seizure; Protective Sweeps

Causey v. State, A15A0831 (10/15/15)

Appellant was convicted of possession of methamphetamine. He contended that the trial court erred in denying his motion to suppress because the drugs were found as a result of an illegal protective sweep. The Court agreed and reversed.

The evidence showed that officers went to the home of appellant to execute an arrest warrant on Powell, who did not reside at that residence. The officers saw Powell sitting on a sofa and when they knocked on the door, Powell jumped up and ran to the back of the house. The officers then entered the house, a fight with Powell ensued and one of the officers required medical attention for which an ambulance was called. Appellant and another guest were handcuffed and sitting on a sofa during this time. While waiting for the ambulance to arrive, the officers conducted a protective sweep of the house. While clearing the house, an officer saw methamphetamine sitting on a bureau in a bedroom, apparently

in plain view. Rather than seize it, he went back to appellant, read him the *Miranda* rights, and obtained consent to search the house. Appellant stated the meth was his and not that of his guests.

The Court first made a point of commenting on an issue *not* raised on appeal. The Court noted that absent exigent circumstances, the Fourth Amendment prohibits police from searching an individual's home or business without a search warrant even to execute an arrest warrant for a third person. Here, the State argued that the officers at the front door had exigent circumstances to enter appellant's home, the trial court agreed that the officers had a right to enter the home, and appellant did not contest that issue on appeal.

But, citing *Maryland v. Buie*, 494 U. S. 325, 327 (1990), the Court noted that a "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. Protective sweeps force courts to balance the Fourth Amendment's protection from unreasonable search and seizure against an officer's interest in taking steps to assure that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. In striking a balance between these interests, *Buie* held that incident to an arrest in a home, officers may as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces *immediately adjoining the place of arrest* from which an attack could be immediately launched. But to search beyond the immediately adjoining spaces, there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. A mere inchoate and unparticularized suspicion or hunch that the home may harbor an individual posing a danger to the officers is insufficient to support a warrantless sweep.

The Court further noted that Georgia and Eleventh Circuit cases applying *Buie* are consistent in requiring that some facts be presented that show or raise a reasonable inference that other persons who might present a danger are present in the home, not simply uncertainty as to whether such persons are present.

Here, the State did not contend that the bedroom immediately adjoined the place where Powell was arrested. There was also no evidence to support the presence of additional dangerous individuals in the home. At best there was mere speculation that such people *might* be present based on the facts that Powell was fleeing, that one or two of the occupants had outstanding warrants, and that the occupants of the residence were known drug users. But, the Court found, none of these facts supported a rational inference that anyone other than the three men near the front door were present, let alone dangerous. Therefore, the Court concluded, the State failed to present articulable facts and rational inferences from those facts to warrant a reasonably prudent officer in believing that the remainder of appellant's home harbored any individuals who posed a danger to the officers or others.

Nevertheless, the Court noted, the trial court never addressed the issue of consent given by appellant. Consequently, the Court remanded the case to the trial court to address the question whether appellant's consent to search was voluntary and sufficiently attenuated from the illegal protective sweep to justify the introduction of the seized methamphetamine in appellant's trial.

Void Sentences; Rule of Lenity

Hudson v. State, A15A1687 (10/14/15)

Appellant contended that the trial court erred in denying his motion to correct a void sentence. The record showed that in 1996, appellant was convicted of armed robbery (O.C.G.A. § 16-8-41) and sentenced to life. In 2015, he moved to correct his void sentence arguing that O.C.G.A. § 16-8-41 is ambiguous and establishes different punishments for armed robbery and that the rule of lenity therefore required that he receive the lesser punishment. The trial court found that the sentence was not void, and it lacked jurisdiction to resentence him under O.C.G.A. § 17-10-1(f).

First, the Court found, although the trial court did lack jurisdiction to modify appellant's sentence pursuant to O.C.G.A. § 17-10-1(f) because his motion was not filed within the time allowed for such a motion, a sentencing court retains jurisdiction to correct a void sentence at any time. Therefore, the trial court erred in finding that it lacked jurisdiction.

Appellant argued that O.C.G.A. § 16-8-41(b), which provides that a person convicted of the offense of armed robbery shall be punished by "imprisonment for life or by imprisonment for not less than ten nor more than 20 years," provides different gradations of punishment for the same offense. Therefore, he contended, as a result of this ambiguity, the rule of lenity required that he be sentenced to a term of years, which, compared to life imprisonment, is the lesser punishment. However, the Court found, in *Corey v. State*, 216 Ga.App. 180 (1995) it rejected the argument that the statutory sentencing scheme of O.C.G.A. § 16-8-41(b) was unconstitutionally void for vagueness. Thus, the rule of lenity does not apply.

Nevertheless, appellant argued, the rule of lenity has been "expanded" since *Corey*, citing *McNair v. State*, 293 Ga. 282 (2013), and *McNair v. State*, 326 Ga.App. 516 (2014). The Court noted that in *McNair*, the Supreme Court of Georgia disapproved of a line of Court of Appeals cases, to the extent they held that, when a statute or set of statutes establishes different penalties for the same offense, the rule of lenity could only be applied when the punishments differed as to misdemeanor versus felony treatment. The Supreme Court emphasized that there may be situations in which the rule of lenity could apply to an ambiguity involving statutes which exact differing felony punishments for the same offense. But, the Court found, this explanation of the rule of lenity does not undermine the holding in *Corey* that O.C.G.A. § 16-8-41(b) is not unconstitutionally vague in providing a maximum sentence of life imprisonment while authorizing an alternative maximum determinate sentence of 20 years imprisonment. Therefore, because O.C.G.A. § 16-8-41(b) is not ambiguous in its provision for a maximum sentence of life imprisonment, and because appellant's sentence of life imprisonment falls within the statutory range of punishment, his sentence was not void.