

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 17, 2017

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THIS WEEK:

- **Rule 701 (a); Search & Seizure**
- **Evidence of Gang Affiliation; Search & Seizure**
- **Ineffective Assistance of Counsel; Immigration Status**
- **OCGA 16-5-60; Rule 404 (b)**
- **Sentencing; Rule of Lenity**
- **Sentencing; OCGA § 17-10-6.2**
- **DUI; Extraterritorial Arrests**

Rule 701 (a); Search & Seizure

Glenn v. State, S17A0858 (10/16/17)

Appellant was convicted of malice murder. He contended that the trial court erred in denying his motion in limine to exclude testimony by lay witnesses identifying him as one of the perpetrators in the video surveillance and photographs because Georgia law prohibits lay witness identification based on photos or video. The Court disagreed.

OCGA § 24-7-701 (a) permits lay witness testimony in the form of opinions or inferences that are rationally based on the witness's perception, helpful to a clear understanding of the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge. Relying on *U. S. v. Pierce*, 136 F3d 770, 774 (11th Cir. 1998), the Court held that where there is some basis for concluding that a witness is more likely to correctly identify a defendant as the individual depicted in surveillance photographs, then lay opinion testimony identifying a defendant in surveillance photographs is admissible under Rule 701. Here, the Court found, there was no meaningful distinction between lay wit-

ness testimony identifying appellant either in photographs or in video recordings. In fact, the Court noted, in most cases, the opportunity to observe a person's mannerisms, gait, and similar characteristics depicted in video footage will increase the likelihood that a lay witness familiar with a defendant will be better equipped than jurors to identify the defendant from such images. And here, the video recording was of such poor quality that the average juror would not be able to distinguish the faces by themselves. The witnesses, who had known appellant prior to the crime, were in a better position to identify him correctly in the video than the jurors. Also, another witness's identification testimony was required to identify appellant in the video because his appearance had changed since the time of the crime. Thus, the Court concluded, the trial court did not abuse its discretion in permitting lay witnesses to give testimony identifying appellant as one of the people in the surveillance video.

Appellant next argued that trial court erred in denying his motion to suppress. The evidence showed that appellant was arrested at his sister's apartment where he had resided for approximately three weeks. The search warrant obtained for the apartment did not include a cell phone as one of the items to be seized. Nevertheless, a detective seized an LG MS395 cell phone from the floor of the apartment. At police headquarters, the detective removed the cell phone's battery and confirmed that the serial number matched the serial number on the empty box that was found in the back seat of the victim's car.

Citing *Arizona v. Hicks*, 480 U.S. 321 (107 SCt 1149, 94 LE2d 347) (1987), appellant argued that the removal of the LG cell phone's battery to discover the serial number on the

phone constituted an independent search that required a warrant. The Court again disagreed. The Court found that the cell phone was found in plain view during a lawful search and the incriminating nature of the phone was “immediately apparent.” Consequently, the detective had authority to seize the phone and remove its battery to determine the serial number.

Evidence of Gang Affiliation; Search & Seizure

Anglin v. State, S17A1153 (10/16/17)

Appellant was convicted of felony murder. The evidence showed that appellant intended to buy marijuana from the victim. During the buy, appellant shot the victim and after doing so, ran off, leaving the marijuana behind.

Appellant argued that the trial court erred in admitting evidence of his alleged membership in a gang, including evidence of his gang tattoos because there was no evidence the crime was gang-related, and the evidence of gang membership was highly prejudicial to him. The Court disagreed. Evidence regarding gang membership may be relevant to show motive and here, the testimony showed that appellant was seeking membership into the Bloods gang and thus in need of earning the gang's trust. Expert testimony also showed that the “code” of being in a gang required violent responses to being threatened. Thus, this testimony enabled the State to explain why appellant shot the victim while leaving the drugs behind at the scene. Moreover, the Court found, the evidence was not unfairly prejudicial to appellant. Accordingly, the trial court did not abuse its discretion in admitting this testimony.

Appellant also argued that the photographic evidence of his gang tattoos was inadmissible because there was no probable cause for the search warrant. The evidence showed that after appellant was arrested for murder, an officer sought a search warrant to view and photograph tattoos on appellant's body. The affidavit averred that appellant was identified as the person who shot the victim, the suspects in the case were identifying themselves as members of the Bloods gang, and that appellant had several gang tattoos on his body. The officer stated that he was requesting the ability to photograph appellant's body “to identify known gang tattoos to conduct a follow up and

possibly charge [appellant] under the Georgia Street Gang Act.”

The Court found that this information was sufficient to establish probable cause. The State can prove a violation of the Georgia Street Gang Act by showing that a defendant is a member of a “criminal street gang” and committed a violent act intended to further the interests of that gang. Although the officer may have had further work to do in order to make a case that the victim's murder was committed in furtherance of the gang's interests, his information that gang members were involved created a “fair probability” of such, and evidence of appellant's tattoos then would be relevant to establish that he was a member of the gang. Accordingly, the Court held that the trial court did not err in declining to suppress the photos based on the alleged inadequacy of the warrant.

Ineffective Assistance of Counsel; Immigration Status

Diaz v. State, A17A1333 (9/27/17)

Appellant pled guilty to DUI and VGC-SA. He later moved to withdraw his plea on grounds of ineffective assistance of counsel. Specifically, citing *Encarnacion v. State*, 295 Ga. 660(2014), he argued that his counsel's failure to properly advise him of the immigration consequences of the plea led him to plead guilty. The Court disagreed.

The Court noted that *Encarnacion* was limited to the deficient-performance prong of *Strickland*. Here, the record showed that the prosecutor correctly explained the immigration consequences of his plea to appellant. Thus, premitting whether counsel performed deficiently by failing himself to inform appellant of the immigration consequences of the plea, a defendant must show that he was unaware of the immigration risks of the plea from any other source in order to show that trial counsel's error resulted in prejudice. Accordingly, because appellant could not show prejudice under *Strickland*, there was no error in denying his motion to withdraw his plea.

OCGA 16-5-60; Rule 404 (b)

Davis v. State, A17A1008 (9/27/17)

Appellant was convicted of two counts

of reckless conduct in violation of OCGA § 16-5-60 (c). The evidence showed that he engaged in sexual intercourse with the victim after he was informed that he was HIV positive. He contended that the trial court erred by allowing evidence that he actually infected a similar transaction witness with HIV. The Court disagreed.

The Court noted that this was a case of first impression since neither it nor the Supreme Court of Georgia has previously ruled on the admission of other act evidence in an HIV reckless conduct case. Relying on *Johnson v. State*, 785 NE2d 1134, 1139 (I) (B) (Ind. Ct. App. 2003), the Court stated that evidence of the HIV status of a defendant's sexual partners, as well as his knowledge of their HIV status and his own status, was highly probative and relevant as to whether he is HIV-positive and knew that he was positive at the time he engaged in sexual relationships with the victim. As the defendant's HIV status and his knowledge of his status were two elements that the State had to establish for a conviction, the Court found that the probative value of the testimony outweighed any prejudicial effect from its admission. Thus, the Court concluded, the State established the first and second factors for admissibility under Rule 404 (b).

With regard to the third factor, other acts evidence may be admitted if the court concludes that the evidence is sufficient for the jury to find by a preponderance of the evidence that the other act was committed. The Court found that based on the other act victim's testimony about her HIV status before and after she had sexual relations with appellant, as well as medical testimony verifying her negative status, a jury could have found by a preponderance of the evidence that appellant transmitted the HIV virus to her. Accordingly, the Court found no error in the trial court's admission of other act evidence under Rule 404 (b).

Sentencing; Rule of Lenity

Mitchell v. State, A17A2012 (10/4/17)

Appellant entered a non-negotiated guilty plea to one count of family violence battery, OCGA § 16-5-23.1 (f) (2). During the plea hearing, the prosecutor tendered, without objection, a certified copy of appellant's previous family violence battery conviction against the same victim. The exhibit showed that appellant entered his plea to misdemeanor

family violence battery on May 16, 2016, for an incident that occurred during the previous year, on May 12, 2015. Appellant committed the instant crime on October 20, 2015 — after the first offense had occurred but prior to the date he was sentenced for the first offense. Appellant was indicted for the October 2015 incident on November 2, 2016; and he entered his guilty plea to that offense on January 26, 2017. Because appellant had a prior conviction for family violence battery, the trial court imposed a felony conviction pursuant to OCGA § 16-5-23.1 (f) (2) (B). That Code section provides that, “[u]pon a second or subsequent conviction of family violence battery against the same or another victim, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.”

Appellant argued that under the circumstances of this case, OCGA § 16-5-23.1(f) (2) (B) does not require the court to impose a felony sentence. He contended that, when a second offense of family violence battery is committed prior to the entry of a judgment of conviction for the first offense of family violence battery, the statute's sentencing requirements are ambiguous and therefore requires the application of the rule of lenity. Thus, he argued, applying the rule of lenity, the court should have imposed a misdemeanor sentence. The Court disagreed.

The Court stated that by its plain language, OCGA § 16-5-23.1 (f) (2) (B) provides that upon a second or subsequent conviction — not act, crime, or offense — the defendant shall be guilty of felony. It does not matter when the offenses occurred. All that matters for purposes of this sentencing provision is that the defendant have a prior conviction for family violence battery. Thus, there is no ambiguity and hence nothing to construe. Consequently, the Court held, because OCGA § 16-5-23.1 (f) (2) (B) is unambiguous, the rule of lenity did not apply and the trial court's sentence was upheld.

Sentencing; OCGA § 17-10-6.2

Wilder v. State, A17A1727 (10/4/17)

Appellant was convicted of aggravated child molestation, child molestation, statutory rape, and sexual exploitation of a child (two counts), based on acts he committed in 2003

and 2004. After the Court of Appeals remanded for resentencing in 2010, the trial court sentenced him to thirty years, to serve twenty in prison, for aggravated child molestation; five years for child molestation, consecutive; five years for statutory rape, concurrent; and five years for each count of sexual exploitation of a child, concurrent. The sentences totaled thirty-five years, to serve twenty-five years in prison.

In February of 2017, the parties informed the court that they were in agreement that appellant was entitled to be resentenced with respect to the child molestation conviction (Count 2), on the basis that OCGA § 17-10-6.2, which was enacted in 2006, requires a split sentence of at least the statutory minimum sentence of imprisonment for the offense plus at least one year of probation. At the time of the hearing, the applicable statutory range for child molestation was not less than five nor more than twenty years imprisonment. OCGA § 16-6-4 (b) (1) (2017) (“[A] person convicted of a first offense of child molestation shall be punished by imprisonment for not less than five nor more than 20 years[.]”). The trial court resentenced appellant on Count 2 to five years consecutive to Count 1 (aggravated child molestation) plus an additional year on probation, for a total of six years, to serve five, on Count 2.

Appellant contended that because OCGA § 17-10-6.2 was not enacted until after he committed the offenses in 2003 and 2004, the parties were mistaken in believing that the Code section applies. The Court agreed with appellant but still found that it does not follow that reversal was required. Under Georgia law, a sentence is void if the court imposes punishment that the law does not allow. A sentence that falls within the prescribed statutory limits, however, is legally authorized; thus, it is not subject to review by the Court. Appellant's present sentence on Count 2 of six years, to serve five, fell within the applicable statutory range of sentencing, according to the provisions of the law existing in 2003 and 2004, for a first offense of child molestation. Because the sentence was legally authorized, the Court stated it would not review it. Moreover, even if the trial court mistakenly believed that it was required, rather than merely authorized, to impose a split sentence on Count 2 of at least five years in prison plus at least one year on probation, any such sentencing error was induced by appellant and afforded no grounds

for reversal.

DUI; Extraterritorial Arrests

Suggs v. State, A17A0841 (10/4/17)

Appellant was charged with DUI. The evidence showed that after personally observing appellant commit several traffic offenses in Hall County, a Hall County deputy sheriff conducted a traffic stop in that county, but crossed the county line in order to conduct an investigation and effectuate an arrest of appellant for DUI-less safe. Appellant moved to suppress all evidence surrounding and including his arrest, contending that the deputy lacked the authority to investigate and/or arrest him outside of Hall County. Relying on the recent case of *Zilke v. State*, 299 Ga. 232 (2016), the trial court agreed that the deputy exceeded his authority when he effected an arrest across the county line, but ultimately concluded that suppression was not warranted because the evidence was not gained as the result of an unreasonable search or seizure.

The Court noted that in *Zilke*, the Supreme Court of Georgia reviewed a decision in which the Court of Appeals held that OCGA § 17-4-23 (a) authorized a POST-certified campus police officer to make an arrest for a traffic offense committed in the officer's presence but outside of the statutorily-designated territorial jurisdiction for campus police officers. The *Zilke* Court reversed, concluding that the plain language of OCGA § 17-4-23 (a) could not be reasonably construed to enlarge the territorial boundaries of a campus police officer. But, because the deputy sheriff's authority to arrest appellant was not derived from §17-4-23 (a), the outcome of appellant's motion to suppress was not controlled by the holding of *Zilke*. The trial court therefore erred to the extent that it held otherwise.

Instead, the Court stated, the power of an officer to effect a warrantless arrest outside of the territorial boundary of his or her law enforcement agency for traffic-related offenses was derived from one of two statutes, OCGA §§ 17-4-23 (a) and/or 40-13-30. But, while the *Zilke* Court disapproved of the line of cases relying on OCGA § 17-4-23 (a), it did not consider or render any opinion as to the arrest authority conferred by OCGA § 40-13-30. That statute provides as follows: “Officers of the Georgia State Patrol and any other officer

of this state or of any county or municipality thereof having authority to arrest for a criminal offense of the grade of misdemeanor shall have authority to prefer charges and bring offenders to trial under this article, provided that officers of an incorporated municipality shall have no power to make arrests beyond the corporate limits of such municipality unless such jurisdiction is given by local or other law.”

Recognizing that the statute's territorial restriction is limited to arrests made by municipal officers, by implication, certain officers (including deputy sheriffs) have arrest powers for these offenses outside their appointed territories. And here, the Court found, the deputy sheriff personally observed appellant commit several traffic offenses in Hall County and effectuated a stop of appellant in Hall County. That the deputy sheriff thereafter crossed into the adjoining county in search of a safer location to conduct a DUI investigation did not deprive him of the authority to then arrest appellant for the crimes committed in his presence. Accordingly, the Court held, the trial court erred in holding that the deputy sheriff's investigation and arrest was unlawful.