Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING NOVEMBER 9, 2018
Issue 45-18

THIS WEEK:

- **Cruelty to Children; Secondhand Smoke**
- **Habeas Corpus; Mootness**
- **Sentencing; Merger**
- **Ineffective Assistance of Counsel; Plea Bargaining**
- **Terroristic Threats; Cruel and Unusual Punishment**
- **Human Trafficking; Sufficiency of the Evidence**

Cruelty to Children; Secondhand Smoke

Jones v. State, S18A0775 (10/22/18)

Appellant was convicted of felony murder, five counts of cruelty to children in the second degree, and one count of possession of marijuana in connection with the drowning death of Camyria, the three year old victim. Appellant contended that the evidence was insufficient to support three of the five cruelty to children convictions. The Court agreed.

In three counts of the indictment, Appellant was accused of cruelty to Camyria, and her two siblings, N.H. (age 5), and P.J. (age 1), by "exposing [the children] to marijuana by smoking marijuana in the [children's] presence." The Court noted that to prove the crime of cruelty to children in the second degree, the State must offer evidence that establishes, beyond a reasonable doubt, that a child suffered "cruel or excessive physical or mental pain." OCGA § 16-5-70 (c). A jury may assess the circumstances of the nature of the injuries suffered to infer that pain inflicted by a defendant was cruel and excessive; expert testimony establishing that a defendant caused cruel or excessive pain is not required.

Here, the State offered some evidence that Camyria had been exposed to marijuana and that exposure to marijuana smoke is generally harmful to children. A doctor testified that Camyria's initial toxicology test was positive for cannabinoids, the active ingredient in marijuana, and the children's mother testified that, at various times, she and appellant smoked marijuana in the presence of the children, including in their apartment and in their car. And when police executed a search warrant on the apartment on the day Camyria was taken to the hospital, they found a small piece of a marijuana cigarette in an ashtray on the kitchen counter. The State also offered testimony from two doctors about the general health problems marijuana smoke can cause children; each testified that long-term exposure to marijuana smoke can cause health problems like cognitive or developmental deficits and asthma. And a GBI-certified investigator testified about the negative effects he experienced personally when exposed to marijuana smoke during his law-enforcement training.

But, the Court stated, even presuming that appellant did smoke marijuana around the children, the State presented no evidence that appellant's smoking marijuana in the presence of Camyria, N.H., and P.J. caused them physical or mental pain, much less "cruel or excessive physical or mental pain." Indeed, the record was devoid of evidence that any of the three children experienced pain from inhaling marijuana smoke, or that they suffered a physical or mental injury caused

1590 Adamson Parkway, Fourth Floor, Morrow, Georgia 30260 ▪ (770) 282-6300 ▪ www.pacga.org ▪
Facebook: https://www.facebook.com/GAProsecutingAttorneys
LinkedIn: https://www.linkedin.com/company/prosecuting-attorneys-council-georgia/

by marijuana smoke. At most, the evidence showed that smoking marijuana around the children was "not good" for them and created an increased risk of future negative health effects. However, the Court concluded, that is not enough to meet the State's burden. Thus, under these circumstances, the Court found that the evidence presented at trial was insufficient to authorize a rational trier of fact to find beyond a reasonable doubt that appellant caused the children "cruel or excessive physical or mental pain" by smoking marijuana in their presence.

Justice Nahmias (joined by three other Justices), wrote a concurring opinion in which he stated that exposure to a significant amount of marijuana smoke — or other types of smoke — could cause a child cruel or excessive physical or mental pain if, for example, the exposure caused the child to suffer serious respiratory distress. But, "[u]nder the position the State's prosecutors have taken in this case at trial and on appeal, almost every Georgian has friends or relatives who prosecutors could pursue as dangerous felons. Of course, prosecutors are unlikely to turn the weapon they claim against prominent or popular individuals. They are likely to aim the weapon only selectively against a handful of disfavored individuals like [appellant], whose murder of a three-year-old child makes him an appealing target for all imaginable prosecutorial weapons — so appealing that the prosecutors convinced a jury to find [appellant] guilty of three counts of child…cruelty, and convinced the trial court to enter convictions and sentence him for those supposed crimes, based entirely on his occasionally smoking marijuana with the children's mother in the presence of children as to whom there was no evidence whatsoever of painful effects. Our State's prosecutors should be more judicious about their views regarding the reach of the criminal statutes they enforce, rather than seeking to extend those statutes in ways that would effectively criminalize the conduct of large swaths of our State's population. The Court today properly rejects the State's assertion that the evidence it presented at trial proved that [appellant] violated OCGA § 16-5-70 (c), and in so doing, the Court prevents the State from acquiring a prosecutorial weapon of vast and unsupported scope." (Footnotes omitted).

Habeas Corpus; Mootness

Abebe v. State, S18A0894 (10/22/18)

On March 18, 2015, appellant pled guilty in municipal court to DUI and was sentenced, inter alia, to 12 months of probation. On September 11, 2015, she filed a habeas petition in the superior court, alleging that her plea was not knowingly, intelligently, and voluntarily entered. On November 21, 2016, the superior court denied habeas relief, concluding that appellant's sentence had already expired and that she had failed to make a showing of adverse collateral consequences.

Appellant argued that the habeas court erred in denying her petition. The Court stated that a habeas petitioner who has completely served her misdemeanor sentence must demonstrate that she is suffering adverse collateral consequences flowing from her conviction. This is so because if adverse collateral consequences continue to plague the affected party, the matter has not become moot. Conversely, if the petitioner is released from any confinement imposed after filing her habeas petition and there are no adverse collateral consequences flowing from her misdemeanor conviction, the matter becomes moot. Adverse collateral consequences must be demonstrated in the record. And here, the Court found, appellant did not allege that she suffers any adverse collateral consequences stemming from her misdemeanor conviction that have continued after the expiration of her sentence. Accordingly, the Court concluded that this matter was moot, and the superior court correctly determined that appellant was not entitled to habeas relief.

Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING NOVEMBER 9, 2018
Issue 45-18

Sentencing; Merger

Hinton v. State, S18A0804 (10/22/18)

Appellant was indicted for malice murder (Count 1), two counts of felony murder—one predicated on aggravated assault and the other on criminal attempt to commit armed robbery (Counts 2 and 3, respectively), aggravated assault (Count 4), criminal attempt to commit armed robbery (Count 5), and possession of a firearm during the commission of a felony (Count 6). A jury found appellant not guilty of malice murder but guilty of all the remaining counts. The trial court sentenced appellant to life imprisonment for felony murder predicated on aggravated assault (Count 2), a consecutive thirty years for criminal attempt to commit armed robbery (Count 5), and an additional consecutive five years for possession of a firearm during the commission of a felony (County 6). The court merged the aggravated assault count (Count 4) for sentencing purposes, and the felony murder count predicated on criminal attempt to commit armed robbery (Count 3) was vacated by operation of law.

Appellant contended that because his convictions arose from a single transaction, the trial court erred when it sentenced him for attempted armed robbery instead of first merging his aggravated assault count into his attempted armed robbery count, which would then merge into a single felony murder conviction. The Court disagreed.

The Court explained that in cases like this one, where a defendant is found guilty on multiple counts of felony murder against the same victim, the decision as to which of the felony murder verdicts should be deemed vacated—a decision that may affect which other verdicts merge and thus what other sentences may be imposed—is left to the discretion of the trial court. And if, in exercising that discretion, the trial court elects to sentence the defendant on a felony murder count predicated on one crime, then it must also sentence him on any remaining crime that served as a predicate to a vacated felony murder count when the other crime does not merge with the felony murder conviction on which a sentence was entered.

Here, the trial court acted within its discretion when it chose to sentence appellant on the felony murder conviction predicated on aggravated assault. It then properly merged the underlying aggravated assault count into the felony murder conviction predicated on aggravated assault and vacated the felony murder count predicated on criminal attempt to commit armed robbery. At that point, appellant's conviction for attempted armed robbery did not merge with his sentence for felony murder predicated on aggravated assault. This is so, the Court explained, because the crime of felony murder predicated on aggravated assault required proof of an element—"the death of another human being," OCGA § 16-5-1 (c)—that criminal attempt to commit armed robbery did not. And the crime of criminal attempt to commit armed robbery required proof of elements—"the intent to commit theft" and "a substantial step toward" "tak[ing] property of another," OCGA §§ 16-8-41 (a), 16-4-1—that the felony murder predicated on aggravated assault did not. Thus, the Court found, because the two crimes did not merge, the court properly sentenced appellant on the conviction for criminal attempt to commit armed robbery. Appellant's sentence for criminal attempt to commit armed robbery was therefore affirmed.

Ineffective Assistance of Counsel; Plea Bargaining

Evelyn v. State, A18A1077 (9/25/18)

1590 Adamson Parkway, Fourth Floor, Morrow, Georgia 30260 ▪ (770) 282-6300 ▪ www.pacga.org ▪
Facebook: https://www.facebook.com/GAProsecutingAttorneys
LinkedIn: https://www.linkedin.com/company/prosecuting-attorneys-council-georgia/

After being indicted for kidnapping with bodily injury, appellant entered a negotiated guilty plea to kidnapping. The trial court accepted the plea, and appellant was sentenced to 15 years, with the first 10 years to be served in confinement. Appellant subsequently moved to withdraw his guilty plea on the basis of ineffective assistance of counsel. Specifically, he contended that his "lawyer did not explain to [him] that kidnapping was a mandatory [minimum] of 10 years without parole," and that his lawyer implied that he would be eligible for parole. After an evidentiary hearing, the trial court denied the motion.

Appellant contended that that his trial counsel was ineffective for providing erroneous legal advice about parole eligibility. The Court disagreed. Pretermitting whether trial counsel's performance was deficient, the Court found that appellant failed to show prejudice. First, there was no assertion from appellant at the hearing on his motion to withdraw his guilty plea that he would not have plead guilty if he had known about his ineligibility for parole. Second, there was no contemporaneous evidence from which the Court could conclude that appellant placed particular emphasis on parole concerns or that any fact peculiar to appellant or his case caused him to place particular emphasis on parole eligibility in deciding whether to plead guilty. Thus, because appellant failed to establish the prejudice prong of the *Strickland* test for ineffective assistance of counsel, the Court affirmed the trial court's denial of appellant's motion to withdraw his plea.

Terroristic Threats; Cruel and Unusual Punishment

Christian v. State, A18A1132 (9/27/18)

Appellant was convicted of two counts of terroristic threats, one count of disorderly conduct, obstruction of a law enforcement officer, possession of marijuana, and DUI (drugs). The evidence, briefly stated, showed that appellant and his girlfriend were renting a room in the residence of a husband and wife. When the wife caught appellant smoking marijuana outside the home, she told him that he had to move out. Appellant and his girlfriend then left the home, but appellant came back during the day on a couple of occasions. On one occasion, he threatened the husband and wife. On another, he came back while the police were there and was eventually arrested for obstruction and DUI.

Appellant contended that his sentence for terroristic threats constitutes cruel and unusual punishment in violation of the United States and Georgia Constitutions because the statute, OCGA § 16-11-37 (a), was later changed to make violation a misdemeanor. The Court noted that a punishment is cruel and unusual if it (1) makes no measurable contribution to accepted goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. Whether a punishment is cruel and unusual is not a static concept, but instead changes in recognition of evolving standards of decency that mark the progress of a maturing society. Legislative enactments constitute the clearest and most objective evidence of how contemporary society views a particular punishment. As a result, the issue of punishment is generally one for the legislative branch, and legislative discretion is deferred to unless the sentence imposed shocks the conscience.

The Court found that in 2016, the General Assembly revised OCGA § 16-11-37 to provide for misdemeanor punishment of terroristic threats except under certain circumstances, including where the threat "suggested the death of the threatened individual." These changes went into effect May 3, 2016. Prior to the revision, and at the time appellant committed and was tried on the offenses, the relevant portion of the statute allowed for "imprisonment for not less than one nor more than five years[.]" Since appellant received a sentence of 5 years on each of the two counts, to be served consecutively, he

was given a sentence within the limits provided by law. Furthermore, the Court found, even under the amended statute, appellant's threats would have fallen within the same sentencing range because appellant threatened to stab the husband, gang-rape the wife, and shoot up the couple's house. Thus, the Court determined, while society's standards as expressed in our code may have theoretically "evolved" to view other terroristic threats less severely in terms of punishment (as arguably evidenced by the provision of misdemeanor offenses), the General Assembly has not elected to reduce the punishment for threats suggesting death. Accordingly, the Court concluded, the five year sentence imposed for each threat suggesting the death of the husband and wife does not "shock the conscience" so as to render the sentence unconstitutional.

Human Trafficking; Sufficiency of the Evidence

Grace v. State, A18A1255 (9/27/18)

Appellant was convicted of trafficking a person for sexual servitude, aggravated child molestation, and pandering for a person under 18 years of age. The evidence, briefly stated, showed that 15-year-old A. W. often begged for money in her neighborhood. One night, while begging for money at a gas station, a car occupied by appellant and two other men arrived. While appellant went into the station store, A. W. got in the car with the two men. Appellant returned and the four drove to a motel. Appellant got out of the car and A. W. had sexual relations with the driver. Appellant then called the driver to inform A. W. that he was in a particular room in the hotel. A. W. went to the room and appellant took her to a nearby restaurant where he bought her food and gave her money. When they returned to the hotel, A. W. asked for more money, but appellant told her "to wait." A. W. then offered oral sex for more money and appellant paid her to do so.

The State's indictment alleged that appellant "did knowingly obtain [A. W.], a person under the age of 18 years, for the purpose of sexual servitude," in violation of OCGA § 16-5-46 (c) (2015). Focusing on the indictment's use of the term "obtain," appellant argued that the State offered no evidence that he ever "obtained" A. W. The Court disagreed.

Applying the ordinary meaning of the word, the Court found that a sex trafficking offense occurs when a person knowingly, through an endeavor, planned action, or method, gains or exerts control or influence over another person for the purpose of sexual servitude. The term "sexual servitude" is statutorily defined as, among other things, "[a]ny sexually explicit conduct or performance involving sexually explicit conduct for which anything of value is directly or indirectly given, promised to, or received by any person, which conduct is . . . induced or obtained from a person under the age of 18 years[.] OCGA § 16-5-46 (a) (6) (A) (2015).

Here, the Court found, appellant initially left A. W. in the car when they arrived at the hotel, he phoned the car's driver to provide A. W. with his room number, and she went to the room. Appellant bought her food and gave her money, but she continued to beg for "more and more money." He did not refuse her pleas, instead telling her to "wait," at which point she offered to perform oral sex for payment. Given these circumstances, the Court concluded that the jury was authorized to find that, through an endeavor, planned action, or method, appellant gained or exerted influence or control over 15-year-old A. W. by giving her food and money, then leaving the prospect of more money open until she performed a sexual act for cash. The evidence, therefore, supported the jury's conclusion that appellant knowingly obtained A. W. for the purposes of sexual servitude, within the meaning of OCGA § 16-5-46 (c) (2015).