

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 7, 2012

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THIS WEEK:

- **Search & Seizure**
- **Ex Post Facto Law; Child Molestation**
- **Kidnapping; Garza**
- **DUI; Search & Seizure**
- **Statutory Rape; Lesser Included Offenses**
- **Aggravated Assault; Sufficiency of the Evidence**
- **Child Molestation; Prior Difficulties with Victim**
- **Speedy Trial; Direct Appeal**

Search & Seizure

Weems v. State, A12A1353 (11/26/2012)

Appellant was charged with trafficking cocaine and filed a motion to suppress arguing that the officer extended the scope of the traffic stop and lacked reasonable suspicion of criminal activity beyond the traffic violation. The trial court denied the motion but issued a certificate of immediate review. The evidence showed that an officer observed that there was less than a car length between appellant's car and the car in front of her. The officer testified that he was concerned that traveling that close to another vehicle could be a safety issue on the interstate. After making the stop, the officer approached the passenger side of the vehicle and talked to appellant and her passenger, who was also the purported owner of the car. The officer explained the reason for the stop, and he told appellant that he was not going to give her a citation, but would write her a

courtesy warning. The officer asked appellant to step out of the car and walk with him to his patrol car to get his warning book. The two remained near the officer's patrol car as he wrote the citation. At about five minutes into the stop, the officer appeared to finish writing the warning and walked back to the car where he spoke to the passenger about the car and appellant, and asked for his driver's license. After this conversation, the officer walked back to appellant and told her that he was going to run both drivers' licenses, but still assured her that she was only getting a warning. Almost nine minutes into the stop, the officer asked if he could search the car while he was waiting on the drivers' license information but the owner was not responsive. The officer then stated that he would conduct a free air search with his dog around the car. When he conducted the free air search of the automobile, the dog alerted to the area near the front passenger door and the officer recovered a purse from the back of the vehicle that contained \$18,000 cash and several baggies containing crack cocaine. The officer testified that he observed certain traits and behaviors from appellant and the passenger that led him to suspect criminal activity. Specifically he stated that appellant's "hands started to shake very quickly, tremendously actually." He also observed that "she kept biting her lower lip," and that she looked at the passenger "as if she was waiting for him to say something to her."

Appellant contended that the officer impermissibly extended the traffic stop. The Court agreed and found that upon reviewing the facts there was no apparent reason to justify the officer's decision to continue to detain appellant, particularly since he had already written her a warning citation before he inquired into other criminal activity. The Court noted

that once the citation was issued the officer could not continue to detain appellant without articulable suspicion. Further, the Court noted that it has held that reasonable suspicion to detain and investigate for illicit drug activity does not arise from nervousness or differing statements. Accordingly, the Court found that the officer illegally detained appellant and thus reversed with direction that appellant's motion to suppress be granted.

Search & Seizure

Evans v. State, (11/20/2012) A12A1305

Appellant was convicted of numerous counts of V.G.C.S.A. He argued that the trial court erred by denying his motion to suppress evidence following an unreasonable search and seizure. The evidence showed that an anonymous caller alerted authorities that appellant was carrying a large, gallon-sized bag of marijuana. An officer who was familiar with appellant and knew that he was on probation, notified the probation department and advised that appellant "was known to have a large amount of marijuana in his possession." The probation officer confirmed that appellant was on "active probation." The probation officer then directed officers to appellant's mother's house—which was also appellant's address. A uniformed officer and the probation officer, who was wearing his uniform and a vest marked, "probation," approached appellant's mother's house in a marked probation vehicle. As the two officers exited the vehicle, appellant exited the house and walked toward the street. When officers asked if they could speak with him, appellant turned around and ran back towards the house. Officers gave chase and instructed appellant to stop. Appellant failed to comply, however, and ran into the house and locked the door. Officers then entered the house and noticed a small amount of marijuana on the toilet seat. Appellant's mother arrived at the house, and signed a written consent to search the house after the police told her they saw marijuana residue in the bathroom. An officer attempted to collect the marijuana from the toilet, but then flushed it, at which point he saw a large chunk of marijuana come up the toilet, and the toilet began to back up. The officer then turned off the water supply, drained the water, removed the toilet, and, using a clothes hanger, retrieved a plastic bag containing marijuana from the toilet.

Appellant asserted that the evidence should be suppressed as the search and seizure was unreasonable since his probation order did not impose a limitation or waiver of his Fourth Amendment rights. The Court noted that given this absence, appellant's status as a probationer could not serve as the sole substitute for a search warrant, and therefore, the salient issue was whether the entry into his residence was otherwise reasonable under the Fourth Amendment. The Court found that that the probation officer had reasonable cause for appellant's arrest because 1) the police had advised the probation officer that appellant had been seen carrying drugs; 2) appellant's refusal to stop, and subsequent flight when approached by the police and probation officers; and 3) the probation officer's familiarity with appellant's history of drug possession. Therefore, the entry into appellant's residence for the purpose of arresting him was permissible. Once the officers entered the residence, they were authorized "to ensure their own safety and prevent the destruction of evidence by conducting a limited search of the entire house for other occupants; they were also authorized to seize any items of contraband or evidence of a crime they found in plain view during this securing of the house." Here, the probation and police officers observed the marijuana in the bathroom on the floor and toilet while they were securing the house and effectuating appellant's arrest. Thus, the trial court did not err by denying appellant's motion to suppress.

Ex Post Facto Law; Child Molestation

Ewell v. State, A12A0942 (11/28/12)

Appellant was convicted of seven counts of aggravated child molestation based upon his sexual interactions with three young boys occurring between 2004 and 2009. Following appellant's amended motion for new trial, the trial court, for sentencing purposes, merged Count 2 into Count 1, and Count 5 into Count 4, but otherwise denied the motion.

The record showed that appellant was charged in the indictment with aggravated child molestation pursuant to O.C.G.A. § 16-6-4(c) against A. L. occurring between January 7, 2004, and January 7, 2006. As such, the version of the statute in place when the charged conduct occurred provided that "[a] person convicted of the offense of aggra-

vated child molestation shall be punished by imprisonment for not less than ten nor more than 30 years." However, appellant received a life sentence pursuant to an amended version of the statute which provided in pertinent part that "a person convicted of the offense of aggravated child molestation shall be punished by imprisonment for life." As this amended version of the statute was not effective until July 1, 2006, six months after the last charged date on which the conduct took place, appellant's sentence as to Count 1 was in error.

Appellant was also charged with aggravated child molestation against A. L. occurring between January 7, 2005, and January 7, 2007. Although the date ranged in the indictment within which the crimes were committed spanned both versions of O.C.G.A. § 16-6-4(d), appellant was sentenced to life in prison pursuant to the version O.C.G.A. § 16-6-4(d) that became effective July 1, 2006. At trial, neither the evidence presented, nor A. L.'s testimony, identified a specific date or dates within the range listed in the indictment on which the crimes occurred. Also, the jury's general verdict form did not identify whether appellant was found guilty of acts that he committed before or after the amendment took effect. Thus, given the prohibition against the ex post facto application of law, and the possibility that the offense occurred prior to the 2006 amendment, the life sentence for Count 3 also was in error.

Kidnapping; Garza

Holder v. State, A12A0965 (11/27/12)

Appellant was convicted of burglary, four counts of kidnapping, four counts of armed robbery, and possession of a firearm during the commission of a felony. Appellant contended that the evidence was insufficient to support his convictions. As to the kidnapping counts, appellant contended that there was insufficient evidence of asportation to support the four kidnapping convictions. Citing *Garza v. State*, he argued that the movement of the victims did not establish asportation.

In *Garza*, the Supreme Court set out four factors that should be considered in determining whether the asportation element of kidnapping is met: (1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an

inherent part of that separate offense; and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. However, in cases where the *Garza* standard is applicable, the Supreme Court has not required the satisfaction of all four factors to establish that asportation occurred. Under *Garza*, even when the movement is of minimal duration and occurs before or during the commission of other offenses, asportation has been satisfied where the movement is not an inherent part of any other offense, and the movement creates an additional danger to the victims by enhancing the control of the perpetrators. As to the kidnapping counts concerning three of the individual victims in this case, they were removed from bedrooms of the residence and taken to the living room where they were restrained with duct tape. The Court noted that the evidence showed that the movement was not an inherent part of the crimes of burglary, armed robbery, or possession of a firearm during the commission of a felony, because moving them was not necessary to effect the completion of any of those crimes. Also, the Court noted, moving those individuals from one room to another placed them in greater danger because the assailants' control over them was enhanced.

However, in applying the *Garza* test to the kidnapping of the fourth individual victim, the Court found there was insufficient evidence to establish the asportation element because the duration of the movement was minimal. Specifically, the fourth individual was in the living room of his residence when the assailants entered and made him sit down in the living room. The Court found this movement was incidental to the burglary and armed robbery crimes. Therefore, the movement was not "in the nature of the evil the kidnapping statute was originally intended to address." Thus, appellant's conviction for kidnapping as it pertained to the fourth individual was reversed.

DUI; Search & Seizure

Clark v. State, A12A1511 (11/28/12)

Appellant was convicted of DUI. He contended that the trial court erred when it denied his motion to suppress the results of a blood test administered after he was pulled over during a roadblock that he claims was illegal.

The record showed that a sergeant with the GSP verbally authorized a roadblock. The sergeant in charge testified that he implemented the roadblock for the purpose of checking driver's licenses, insurance, and driver sobriety. Although he was not present at the event itself, the sergeant testified that the troopers under his command frequently performed road checks and that they "kn[e]w what to do . . . as far as knowing how to check license, insurance verification, [and] sobriety." The troopers executing the roadblock had undergone training and had extensive experience in field sobriety and were authorized to involve local officers in their efforts. The roadblock began shortly after 8 a.m. Both troopers testified that the purpose of the roadblock was to check for traffic and equipment violations as well as DUI. When appellant stopped at the roadblock at approximately 11 a.m. and produced his license, the trooper taking the license smelled alcohol coming from the car. Appellant admitted to consuming alcohol earlier that morning, and an alco-sensor breath test was positive. Appellant, who was under 21 years old at the time, was arrested for DUI. A blood test showed that appellant's blood-alcohol level was .074. The trial court denied appellant's motion to suppress the results of his breath and blood tests on the ground that the daylight roadblock was "well-identified as a police checkpoint for the stated and authorized purposes" of driver's license, insurance, and registration verification, seatbelt and safety compliance, and driver impairment. After a bench trial, the court found appellant guilty of less-safe DUI.

Appellant argued that the roadblock was illegal under the U.S. Supreme Court's holding in *City of Indianapolis v. Edmond*, 531 U. S. 32 (2000), that checkpoint stops aimed only at detecting evidence of ordinary criminal wrongdoing violate the Fourth Amendment. In reviewing the record, the Court of Appeals found that the officer's testimony and the report completed on the day of the checkpoint, showed that it was undertaken for proper purposes including not only DUI detection but also traffic and equipment violations, each of which "ha[s] been held to be a legitimate primary purpose." Given the officer's testimony that a primary purpose of the stop was DUI detection, the Court stated that it was in no position to contest the trial court's factual conclusion that the roadblock was legitimate.

Appellant also contended that the roadblock was not readily identifiable. The Court stated that it found "no authority for the proposition that the Fourth Amendment require[d] that roadblocks be identified with orange cones and that officers working there wear reflective hats." Furthermore, the Court noted, there was no evidence that any driver, including appellant, misunderstood the nature of the stop. Under the circumstances of the daylight search at issue, the Court held that it was in no position to contest the trial court's factual conclusion that the roadblock was sufficiently identifiable as a police checkpoint.

Statutory Rape; Lesser Included Offenses

Stuart v. State, A12A1017 (11/28/12)

Appellant was convicted of rape, aggravated child molestation, and child molestation. He argued that the trial court erred in failing to instruct the jury that statutory rape is a lesser included offense of rape.

The record showed that during the charge conference, the trial court reviewed each of appellant's requests to charge. In response to the court's recitation of the requested charge "Lesser Offense, of Statutory Rape," the State objected because the elements of proof differ for the two crimes. After the State made its argument, the trial court asked appellant, "What do you say?" Appellant responded, "I have nothing to say. I believe that's a correct statement of the law, that in statutory rape you do have to prove age. And you don't in rape." The trial court agreed with the State's analysis, holding that statutory rape "could not be a lesser included offense [of rape] [b]ecause there is one element in statutory [rape] that is not in forcible rape." The trial court stated that the jury will "either find that there was force, or they [will] find that there was not force. If they [find] there was not force, then they will find him not guilty of rape," and that it would not give the defendant's charge related to "the lesser offense of statutory rape." After the court completed its charge to the jury and asked for objections, appellant responded, "No objections, Judge."

Appellant cited *Hill v. State*, 295 Ga.App. 360 (2008) for the proposition that statutory rape is a lesser included offense of forcible rape. The Court, however, held that *Hill*, was incorrectly decided and must be overruled.

In *Hill*, the Court affirmed a statutory rape conviction after the trial court charged the jury over objection that statutory rape was a lesser-included offense of rape. The *Hill* Court held that the factual allegation that the victim was 16, which was included in the indictment in a separate child molestation count, put Hill on sufficient notice that he could be convicted of statutory rape, and further held that the actual evidence presented at trial established the offense. The Court found that this ruling was at odds with the Georgia Supreme Court's holding in *Mangrum v. State*, 285 Ga. at 676 (2009), and therefore, must be overruled.

Furthermore, the Court noted that the ruling in *Hill* also conflicted with the Georgia Supreme Court's holding in *Drinkard v. Walker*, 281 Ga. 211 (2006), in which the court disapproved the "actual evidence" test for determining when one offense is included in another under O.C.G.A. § 16-1-6 (1), and adopted the "required evidence" test. Under the "required evidence" test, the question is not whether the evidence actually presented at trial establishes the elements of the lesser crime, but whether each offense requires proof of a fact which the other does not. As the *Drinkard* Court noted, the crime of rape requires that the State prove that the defendant had carnal knowledge of the victim, forcibly and against her will. Proof of force is not required, however, to prove the offense of statutory rape. And because the crime of statutory rape requires the State to prove that a victim is under the age of 16 and not the defendant's spouse in addition to sexual intercourse, statutory rape requires proof of additional facts, not the same or less than all the facts, required to prove rape. Although decided two years after *Drinkard*, the *Hill* case incorrectly applied the actual evidence test to determine that the trial court did not err in charging the jury that it could find Hill, who had been charged with rape, guilty of the lesser-included offense of statutory rape even if the required evidence test was not met. Thus, in *Hill*, the Court improperly applied a test specifically rejected by the Supreme Court in *Drinkard* to determine whether statutory rape was a lesser included offense of the crime of rape. For this reason also, *Hill* was overruled. Accordingly, as the trial court did not err in declining to charge the jury on the statutory rape, and the Court affirmed the convictions.

Aggravated Assault; Sufficiency of the Evidence

Calhoun v. State, A12A0987

Appellant was convicted of four counts of aggravated assault and one count each of armed robbery and false imprisonment arising from an armed robbery of a Dollar General store and an attempted robbery of another store about two weeks later.

Appellant argued, and the State agreed, that because of the specific language used in Count 3 of the indictment, there was insufficient evidence to convict him of aggravated assault. The record showed that this count of the indictment charged appellant with aggravated assault because appellant "unlawfully made an assault upon the person of [the pedestrian], with a gun, a deadly weapon, by pointing a gun at [the pedestrian] in a threatening manner." The Court stated that the evidence showed that when the pedestrian drove up to the Dollar General store, he noticed the manager in a confrontation with appellant. When the pedestrian approached to check on the manager, appellant saw him and said "[t]urn around [and] I'll blow your . . . head off." Although he testified that he saw appellant holding a gun and that appellant verbally threatened him, he did not testify that the gun had been pointed at him. Because the State did not prove the act charged in Count 3, that appellant pointed a gun at the pedestrian, the Court found that the trial court erred in denying appellant's motion for a directed verdict and reversed appellant's conviction on this charge but affirmed on all other counts.

Child Molestation; Prior Difficulties with Victim

Thomas v. State, A12A1188 (11/28/12)

Appellant was convicted of two counts of child molestation and one count of enticing a child for indecent purposes. He challenged the denial of his motion for new trial, asserting that current Georgia law regarding the admission of evidence of prior difficulties between a defendant and a victim violates a defendant's constitutional rights to a fair trial and due process.

At trial, the State presented evidence of four prior occasions on which appellant acted

in a sexually inappropriate way towards the victim. On one occasion, appellant engaged in a pillow fight with the victim and her young stepsisters. Appellant was standing in a bathroom and the girls threw pillows from the adjoining bedroom at each other and at appellant and during this incident appellant exposed his penis to the victim. Additionally, the victim explained that every time appellant threw a pillow back, it had a small wet spot on it. During another incident, the victim and her stepsisters were playing on a trailer bed in the yard, using it as a kind of see-saw. Every time the victim went down on the see-saw, she would come close to appellant, who would fondle her buttocks. The remaining two incidents each involved appellant exposing his penis to the victim.

Appellant asserted that the trial court violated his constitutional rights to due process and a fair trial when, before admitting the evidence of prior difficulties between the victim and appellant, it failed to conduct an explicit balancing test to determine whether the probative value of this evidence outweighed the prejudice it would cause appellant. The Court noted that it has previously held, however, that there is no requirement that the trial judge conduct an explicit balancing test in order to conclude that the probative value of the evidence outweighs its prejudicial effect. Moreover, the Court stated, requiring trial courts to engage in an explicit balancing test before allowing the admission of prior difficulties would be superfluous. By finding that evidence is admissible as a prior difficulty, the trial judge is necessarily finding that the State seeks to introduce the evidence for an appropriate purpose as it tends to prove the defendant's motive or intent, or the state of the relationship between the victim and the defendant; there is sufficient evidence that the defendant and the victim were the parties involved in the prior difficulty; and there is a sufficient connection between the prior difficulty and the crime charged.

Appellant also contended that it was error for the trial court to admit evidence of the incident in which he fondled the victim's buttocks and the incident involving the pillow fight because these incidents were not sufficiently similar to the indicted incidents to qualify as prior difficulties. The Court

found this argument misapprehended the law regarding evidence of prior difficulties. Unlike similar transactions, prior difficulties do not implicate independent acts or occurrences, but are connected acts or occurrences arising from the relationship between the same people involved in the prosecution and are related and connected by such a nexus. Thus, the admissibility of evidence of prior difficulties does not depend upon a showing of similarity to the crime for which the accused is being tried. Accordingly, the Court held the evidence regarding both incidents was admissible, as it showed both appellant's "bent of mind towards and course of conduct with" the victim.

Sosniak's holding that in the future, any appeal from the denial of a constitutional speedy trial motion must be made pursuant to the procedures for interlocutory appeal set forth in O.C.G.A. § 5-6-34(b).

Speedy Trial; Direct Appeal

Moceri v. State, A12A0982 (11/29/12)

Appellant filed a direct appeal from the trial court's denial of his Motion for Discharge and Acquittal on constitutional speedy trial grounds. In an order dated November 18, 2011, the Court found that appellant, indeed, had a right to a direct appeal and granted his emergency motion to stay the proceedings in the trial court pending the appeal. But in an opinion dated November 19, 2012, the Supreme Court of Georgia held that no right of direct appeal lies from the denial of a constitutional speedy trial motion. *Sosniak v. State*, 292 Ga. 35 (2012). Accordingly, the Court dismissed appellant's appeal for lack of jurisdiction. However, the Court noted that the Georgia Supreme court recognized that, "given the clear, though incorrect, mandate" of prior Supreme Court precedent, an appellant with a pending speedy trial appeal "may be caught somewhat by surprise" by the *Sosniak* opinion. In an effort to ameliorate such surprise in this case, the Court noted that the trial court's order denying appellant's constitutional speedy trial motion was insufficient to allow it to determine whether the trial court abused its discretion because the trial court made no findings pursuant to *Barker v. Wingo*, 407 U. S. 514 (1972). Thus, the order was subject to vacatur and remand "for entry of an order including proper findings in accordance with *Barker v. Wingo*."

Furthermore, the Court noted that the additional evidentiary issues appellant raised in his appeal were not directly appealable standing alone. Finally, the Court emphasized