Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING DECEMBER 11, 2015

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## THIS WEEK:



## *Restitution; Lost Wages*

*Jackson v. State, A15A1323 (11/6/15)*

Appellant appealed from a restitution order which required her to pay the victim of her crimes of financial identity fraud and residential mortgage fraud. At the restitution hearing, the victim testified that he spent $675 in attorney fees attempting to get the fraudulently-obtained loan off of his credit report and ensuring that he would not be held liable for the loan. He further testified that he took a total of 15 days off from work as a result of appellant's conduct and the subsequent prosecution: three days to speak with attorneys; four days to speak with representatives of the bank which issued the fraudulent loan, and law enforcement investigators; and eight days coming to court proceedings during the prosecution of the case. The trial court awarded an amount of $7,715.00. In calculating the amount of restitution owed, it appeared the trial court awarded the victim $440 per day for a total of 16 eight-hour workdays (the fifteen missed days the victim testified to and an additional day for his attendance at the restitution hearing), as well as the $675.00 he spent on attorney fees.

The Court noted that appellant did not challenge the evidence showing the amount of wages the victim earned in a typical work day. Nor did she dispute that the victim missed 15 days of work because of her crimes against him. Rather, she argued that the State failed to prove that the victim suffered any lost wages, given his testimony that he worked weekends to make up his lost work time during a given week. But, the Court found, her argument ignored relevant law as to the damages a tort victim may recover in a civil action. Thus, the Court stated, under Georgia law, where a victim has lost time from work as a result of the tortious conduct of another, the victim may recover lost wages even if a third party has already compensated the victim for that loss. This rule results from the fact that the courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. And if one party is going to receive a "windfall" as a result of third party payments made to the victim, it is usually considered more just that the injured person should profit, rather than let the wrongdoer be relieved of full responsibility for his wrongdoing. The Court found that this same rationale applies in restitution proceedings, which allow a victim to recover those special damages he could otherwise recover in a civil tort action. Accordingly, the trial court did not err in requiring appellant to make restitution to the victim for the work time he lost as a direct result of her criminal conduct towards him. This included the days that the victim spent away from work meeting with lawyers, the bank, and law enforcement authorities, as well as the days he spent testifying at the criminal proceedings brought against appellant.

However, the Court found, the trial court erred in requiring appellant to compensate the

victim for the day he took away from work to appear at the restitution hearing. The restitution mechanism is an attempt to avoid the necessity of a separate civil action and to determine the amount of loss caused by the criminal act in the usually earlier criminal proceedings rather than in a second and more protracted civil suit. Consequently, the amount of restitution ordered may not exceed those damages the victim could recover in a civil action. But the Court stated, "[w]e are aware of no law that would permit a civil litigant to recover for the time lost from work as a result of the litigant's prosecution of his civil lawsuit." Therefore, the Court held, the trial court erred in awarding the victim the equivalent of a day's wages for the time he spent testifying at the restitution hearing. Consequently, it vacated the trial court's order and remanded for the entry of a new restitution order.

## Sentencing; Cruel and Unusual Punishment

*Richardson v. State, A15A2113 (11/6/15)*

Appellant was convicted of aggravated child molestation and was sentenced to 20 years in prison under O.C.G.A. § 16-6-4(d)(1) (2005) (Ga. L. 1997, p.1578, § 1), the version of the statute in effect when the crime was committed. Appellant filed a timely "Motion to Correct an Illegal and/or Void Sentence" which the trial court denied.

Appellant first argued that his 20-year sentence was illegal and void because the trial court failed to take into account the punishment provisions for sexual offenses imposed by O.C.G.A. § 17-10-6.2 in sentencing him. Specifically, he contended that the trial court should have probated a portion of his sentence in accordance with O.C.G.A. § 17-10-6.2(b) and should have exercised its discretion to deviate from the mandatory minimum sentence pursuant to O.C.G.A. § 17-10-6.2(c). But, the Court found, pretermitting whether aggravated child molestation is a sexual offense to which the punishment provisions of O.C.G.A. § 17-10-6.2 apply, the trial court did not err in its sentencing of appellant. A crime must be construed and punished according to the provisions of the law existing at the time of its commission. O.C.G.A. § 17-10-6.2 was first enacted in 2006 as part of the same legislation in which the General Assembly modified the punishment provisions related to aggravated child molestation and other sexual crimes. Thus, because O.C.G.A. § 17-10-6.2 was not in effect when appellant committed the charged crime, the trial court committed no error in failing to apply its provisions when sentencing him.

Appellant also contended that that his 20-year sentence for aggravated child molestation was illegal and void because it violates the Eighth Amendment prohibition against cruel and unusual punishment. Citing *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); and *Miller v. Alabama*, __ U.S. __ (132 S.Ct.. 2455, 183 L.E.2d 407) (2012), he argued that his sentence was cruel and unusual because he was a juvenile when he committed the charged offense. The Court disagreed. The Court found that in *Roper*, *Graham*, and *Miller*, the juveniles were sentenced to the "most severe punishments" available under the law, namely, the death penalty and life imprisonment without the possibility of parole. Here, however, appellant was not subject to one of the "most severe punishments" allowed by law, but rather to a sentence of a definite term of years. Thus, his reliance on these cases was misplaced and his constitutional challenge was meritless.

## Excusals for Cause; "Day in the Life" Video

*Goulding v. State, A15A0841 (11/10/15)*

Appellant was convicted of two counts each of cruelty to children, aggravated assault, and aggravated battery after his three-month-old baby was diagnosed with injuries consistent with "shaken baby syndrome." He contended that the trial court erred in denying his motion to excuse a juror for cause. Specifically, he contended that the juror consistently and unequivocally swore she should not be a fair and impartial juror, but that the record was distorted and the trial court erroneously concluded that the juror stated only that she would find it difficult to serve on the jury. The Court noted that the juror was not questioned extensively on the record by the court or the parties. However, while the transcript established that the juror said she could not be fair because a baby was involved, it also established that she stated affirmatively that she had no bias or prejudice against appellant. For a juror in a criminal case to be excused for cause on the statutory ground that her ability to be fair and impartial is substantially impaired, it must be shown that she holds an opinion of the guilt or innocence of the defendant that is so fixed and definite that the juror will not be able to set it aside and decide the case on the evidence or the court's charge on the evidence. Accordingly, because the juror expressly stated that she held no bias against appellant, the trial court did not abuse its discretion in declining to excuse her for cause.

Appellant also argued that the trial court erred in allowing the State to play a "Day in the Life" video of the baby at age 19 months that established how profoundly damaged he was. The Court noted that the video contained, as appellant described, "gut-wrenching images." But, the Court stated, any evidence is relevant which logically tends to prove or to disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant. Thus, while appellant contended that the video was unnecessarily prejudicial because he had never contested that the baby was severely injured, having plead not guilty to the charges, the State was required to prove each element of each offense beyond a reasonable doubt. Further, the State has the authority to choose the evidence needed to prove its case and a defendant cannot undermine the credibility of the State's story by selectively admitting certain incriminating evidence to prevent the jury from receiving that evidence.

In holding that the trial court did not abuse its discretion in admitting the video, the Court distinguished *Kesterson v. Jarrett*, 307 Ga.App. 244, 252 (3) (2010), overruled on other grounds, *Kesterson v. Jarrett*, 291 Ga. 380 (2012). First, the Court noted, in *Kesterson*, it found no abuse of discretion in the trial court's decision to *exclude* the video, not a decision to include it. Further, the issues that had to be determined during the liability phase of the civil trial in *Kesterson* were more limited than those that had to be determined during the guilt-innocence phase of this criminal trial. Here, the State had to prove all of the elements of the charged crimes, which included proving cruel and excessive pain and bodily harm to support the cruelty to children and aggravated battery charges.

## Delinquency Petitions; O.C.G.A. § 15-11-521(b)

*In re M.D.H., A15A1289, A15A1908 (11/10/15)*

Appellant contended that the trial court erred by not dismissing his juvenile delinquency petition with prejudice pursuant to O.C.G.A. § 15-11-521(b). The record showed that on December 5, 2014, a complaint was filed against appellant in juvenile court. On the same day, a detention hearing was held and appellant was not detained. On Jan. 6, a petition was filed in juvenile court. Appellant moved to dismiss because the petition was not filed within 30 days as required by O.C.G.A. § 15-11-521(b) and no request for an extension of time was filed. The juvenile court dismissed the complaint *without prejudice*, which appellant appealed. The State then filed a second petition alleging terroristic threats and appellant was adjudicated and placed on probation for reckless conduct, a lesser included offense. He appealed his adjudication.

In both appeals, appellant argued that the juvenile court erred in interpreting O.C.G.A. § 15-11-521(b) as requiring it to dismiss the petition without prejudice. The Court disagreed. The Court noted that since appellant was not in detention prior to adjudication, subsection (b) of O.C.G.A. § 15-11-521 applied. Under subsection (b), the State had 30 days from the filing of the complaint to file the petition alleging delinquency, but it did not meet the deadline. Nevertheless, the Legislature did not provide explicit language providing that a juvenile would receive a dismissal with prejudice as a result of the State's failure to file a timely petition for delinquency under O.C.G.A. § 15-11-521(b). Thus, the Court stated, "we decline to hold that the Legislature intended anything in O.C.G.A. § 15-11-521(b) beyond what the plain and usual meaning of the language of the statute provides. If they intended for an untimely petition to be dismissed with prejudice, then it is within their power to amend the statute to so provide."

## Sufficiency of the Evidence

*Jackson v. State, A15A0903 (11/10/15)*

Appellant was convicted of one count each of aggravated stalking, family violence battery, and kidnapping, as well as two counts of influencing a witness. He contended that the evidence of aggravated stalking was insufficient. The Court disagreed.

Here, the indictment charged appellant with aggravated stalking for his act of contacting the victim "at her home in violation of a condition of pretrial release and without her consent for the purpose of harassing and intimidating her." The evidence showed that appellant had been arrested for hitting the victim and failing to leave her home when asked. After he bonded out of jail, appellant went to her house in violation of the terms of his conditions of pretrial release. The victim allowed him to come inside, and she provided no testimony that she ever asked him to leave the house. However, the Court found, there was also no evidence that the victim invited appellant to her home or consented to his presence prior to his arrival at her door. Thus, the jury could infer that the victim did not consent to appellant coming back to her house by the fact that she had him arrested the evening prior and immediately changed the locks once he was out of the house. The jury could also infer by his conduct both before and after he returned to the house that appellant came to the victim's house for the purpose of threatening or harassing her. Furthermore, the crime of aggravated stalking was completed when appellant arrived at the door of the victim's house, in violation of the conditions of his pretrial release, without her having invited him to do so.

Appellant also argued that there was insufficient evidence to support his conviction for kidnapping. The evidence showed that J. C. was the victim's child who was 6 years old at the time of trial. After appellant came back into the house despite the pretrial condition of his release, he and the victim began arguing. A neighbor called 911. When the responding officers arrived and knocked on the front door, appellant ordered the victim and J. C. to take the stairs on the back side of the house to the garage and to hide in the car. The three sat inside the car for about an hour. After receiving no response, the officer left. The indictment charged appellant with kidnapping for his act of "abduct[ing] [J. C.] without lawful authority . . . and [holding] him against his will when the accused forced him into the garage for the purpose of (1) concealing or isolating him, (2) to lessen the risk of detection, and (3) to avoid apprehension[.]"

The Court held that although appellant did not physically force J. C. down the stairs and into the garage, such physical force is not a necessary element of kidnapping. Here, there was evidence supporting a finding that neither J. C. nor the victim went to the garage of their own free will, but rather were forced to do so by use of appellant's intimidation, threats and prior physical violence against the victim. Further, testimony by the victim of a kidnapping concerning whether consent was given or withheld is not essential since other evidence can be utilized to establish the victim was abducted and held against his will. Here, some evidence was presented that appellant made J. C. move down the stairs into the garage against his will. J. C. had witnessed appellant hit his mother so hard the day before that she bled from her mouth, his mother testified that she was afraid of appellant, J. C. had been ordered by appellant to go to the garage, and appellant had threatened J. C.'s mother if he was arrested. Accordingly, the Court held that a rational trier of fact was authorized under the standard of *Jackson v. Virginia* to conclude beyond a reasonable doubt that appellant kidnapped J. C. against his will.

## Fatal Variance; Lesser Included Offenses

*Bennett v. State, A15A1007 (11/10/15)*

Appellant was convicted of trafficking methamphetamine in a quantity of 200 or more grams, and other offenses. He argued that a fatal variance existed between the indictment and the verdict reached by the jury with regard to the charge of trafficking in methamphetamine because the trial court charged the jury on trafficking in more than 200 grams of methamphetamine, in addition to charging them on trafficking in more than 400 grams of methamphetamine, as alleged in the indictment. The Court disagreed.

The Court noted that appellant was charged with trafficking by knowingly possessing more than 400 grams of methamphetamine under O.C.G.A. § 16-13-31(e)(3) , and the evidence at trial showed that methamphetamine was found in a co-defendant's vehicle in two places, with 175.05 grams of methamphetamine in a bag under the dash of the car and 361.31grams of methamphetamine in a black box under the hood of the car. The Court stated that Georgia does not apply an overly technical analysis to a claim of fatal variance, but rather focuses on the materiality of any discrepancy. The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been

such a variance as to affect the substantial rights of the accused. It is the underlying reasons for the rule which must be served: 1) the allegations must definitely inform the accused as to the charges against him so as to enable him to present his defense and not to be taken by surprise, and 2) the allegations must be adequate to protect the accused against another prosecution for the same offense.

The Court found that trafficking in methamphetamine in a quantity of 200 or more grams is a lesser included offense of trafficking in methamphetamine in a quantity of 400 or more grams, because proof of the former is necessarily included in the latter. An indictment not only charges the defendant with the specified crime, it also embraces all lesser included offenses of the charged offense. Therefore, the fact that the jury found him guilty of trafficking in a smaller amount of methamphetamine than the indictment alleged does not give rise to a fatal variance.