Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 15, 2017

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Kenneth Hutcherson
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

Jury Charges; Merger

Mathis v. State, A17A0858 (10/19/17)

Appellant, a former elected judge, was convicted of 52 counts related to the theft of more than $600,000.00 in a Ponzi scheme. He contended that the trial court erred by instructing the jury that it "may, if you choose, review the details of each charge" of the indictment during deliberations. Specifically, he argued, the trial court's instruction essentially told the jury it was not necessary to read the indictment, which was particularly harmful given the sheer size and technical nature of it.

The Court noted that since appellant failed to raise this objection at trial, it was waived and could only be considered under a plain error analysis. The Court stated that the trial court's statement was imprecise and should be avoided. However, the Court concluded, appellant could not show that the charge affected the outcome of the trial. Thus, the Court found, upon review of the instructions as a whole, the trial court recited the charges against appellant and properly instructed the jury on the presumption of innocence; that no conviction could result "unless and until each element of the crime is proven to you beyond a reasonable doubt;" that the State bore the burden "to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt;" and that the burden of proof never shifts to the defendant. Moreover, the trial court emphasized the importance of the indictment by stating that "if after considering the testimony and evidence presented to you together with the charge of the Court you should find and believe beyond a reasonable doubt that the defendant … did … commit the offenses *as alleged in the indictment*, you would be authorized as to each of said counts to find the defendant guilty." (Emphasis supplied.) Similarly, the verdict form set out each count of the indictment separately. Finally, the indictment was provided to the jury during deliberations, and the verdict form prepared for the jury contained only those charges included in the indictment.

Appellant also argued that the trial court erred in failing to merge his convictions for theft by conversion and theft by deception into his convictions for theft by taking because "even if [each allegation of theft] involve[s] different elements, they were convictions from taking the same money from the same victim." The Court noted that for the

solicitation of a single sum of money from each of 13 separate victims, the State indicted appellant for theft by taking, theft by conversion, and theft by deception, resulting in 13 counts of each crime. The Court stated that theft by taking proscribes certain criminal conduct generally, while theft by conversion and theft by deception are specific crimes. As a result, the Court concluded, appellant's convictions for theft by taking merged pursuant to OCGA § 16-1-7 (a) (2). Accordingly, the Court vacated his sentences for theft by taking and remanded the case to the trial court for resentencing.

Judicial Comments; OCGA § 17-8-57

Carter v. State, A17A0860 (10/23/17)

Appellant was convicted of aggravated assault and other related offenses. He contended that the trial court violated OCGA § 17-8-57 during the prosecutor's questioning of the female victim. The transcript showed that the victim testified that she was in the room when appellant's co-defendant Brooks entered the room. Twice, the prosecutor tried to have her answer what Brooks said when he entered the room and twice, the victim didn't seem to understand the question. At that point, the judge stated to the victim, ""*Ma'am, you were in the room.* What else did [Brooks] say in your presence that you know [of]?" (Emphasis supplied.) The Court found no error. The Court stated that both the trial court's restatement of what the victim had testified to — "Ma'am, you were in the room" — and its immediately following question — "What else did [Brooks] say in your presence that you know [of]?" — were designed not to express an improper opinion as to what had or had not been proved, but to elucidate the issues before the jury. The premise of the court's question was that the victim had already said that she was in the room, and so she might have heard what Brooks said while he was also there. A trial court's instruction to a defendant to give responsive answers does not indicate an opinion as to either the defendant's credibility or his guilt or innocence. Accordingly, the Court concluded, the trial court's comments were not clearly erroneous.

Shoplifting; Burglary

In re E. B., A17A0784, A17A0785, A17A0786 (10/23/17)

Appellant was adjudicated a delinquent for shoplifting and burglary when he was 13 years old. He contended that the evidence was insufficient to support the adjudications. The Court agreed. The evidence in the shoplifting case showed that appellant and his 12-year-old brother, El. B., were "playing" in the sporting goods area of a Walmart. Appellant picked up a packaged Airsoft BB gun and held onto it for several minutes. After he saw that another child in the group had concealed an unpackaged Airsoft gun in his clothing, appellant said, "he has his and I want one, too." Shortly afterward, appellant dropped an unpackaged Airsoft gun on the floor, breaking it. When the Airsoft gun broke, the children scattered. Appellant, his brother, and another child remained in the store for a few more minutes; they walked around and returned to look at the Airsoft guns before leaving. Outside the store, a loss prevention officer who had witnessed appellant drop and break the Airsoft gun stopped the three boys. The Court noted that this case presents a unique fact-pattern not found in other Georgia cases – appellant was in a self-service store in which customers pay for their purchases at check-out counters located at the front. He held the merchandise only within an area proximate to its display, and he did not take any overt action that could evince an intent to appropriate the item, such as concealing the item, attempting to conceal it, carrying it around the store, representing that he had already paid for it, or attempting to leave the store with it. Other jurisdictions have noted that in self-service stores, customers have permission to pick up, handle, move, try, replace, and carry about merchandise within the store. Consequently, those jurisdictions have held that the burden of proof in establishing the intent to steal by a defendant is more onerous upon the prosecution where the offense alleged occurred inside a self-service store. Also, the conduct from which intent could be inferred must be clearly adverse to the store's possession of the goods, such as concealing or attempting to remove the goods from the store. The Court found that this persuasive authority is consistent with the rule in Georgia that the act of removing merchandise from its immediate place of display is not shoplifting. Thus, the Court stated, the evidence here did not show that appellant acted in any way clearly adverse to the store's possession of the Airsoft gun. Instead, the evidence merely showed that appellant commented that he wanted an Airsoft gun, held an unpackaged Airsoft gun, and then dropped it, apparently accidentally, within the aisle in which it was displayed. Accordingly, the Court held, the evidence was insufficient to show that appellant possessed the Airsoft gun with the intent to appropriate it without paying for it when he held, and then dropped, the Airsoft gun. The evidence in the burglary case showed that appellant's neighbor's house was broken into and several items, were taken, including a wallet, clothing, and food. Appellant's mother allowed officers to search their house. The officer found food belonging to the victims in the washing machine and the wallet under the mattress in a bedroom. (The evidence did not indicate to whom that bedroom belonged.) The officer showed the wallet to appellant and his family. He asked them how the wallet

got under the mattress, where the rest of the victims' stolen items were, and whether they "had anything to do with it." In response, Et. B., showed the officer a suitcase belonging to the family and located under the mother's bed that contained more of the victims' belongings. Two police officers then sat in the living room with appellant and his family, and one of the officers and appellant's mother questioned appellant and his brothers. That officer testified that Et. B. said that all three boys had been in the neighbors' house and that "they went in after they went to sleep, the parents went to bed. . . . [T]hey put the younger child through a window, [El. B.], I believe, and he opened the door and they went in and took the goods[.]" Citing *Jarrett v. State*, 265 Ga. 28, 29 (1) (1995), the Court noted that under the old Evidence Code, such an adoptive admission would not be admissible. But, OCGA § 24-8-801 (d) (2) (B) reflects a change from our former Evidence Code. The old rule went further than most applications of the Federal Rule, which admits a defendant's silence, not made in the presence of the police, when under the circumstances, an innocent defendant would normally be induced to respond, and when there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement. Nevertheless, the Court stated, it need not address whether the rule in *Jarrett* still applies because, even if it construes OCGA § 24-8-801 (d) (2) (B) the way the Eleventh Circuit has construed it, and even if it assumes that OCGA § 24-8-801 (d) (2) (B) applies to silence in the presence of a law enforcement officer, Et. B.'s statement implicating E. B. was not an adoptive admission. The Eleventh Circuit has held that when a statement is offered as an adoptive admission, two criteria must be met. First, the statement must be such that an innocent defendant would normally be induced to respond. Second, there must be sufficient foundational facts from which the factfinder could infer that the defendant heard, understood, and acquiesced in the statement. Pretermitting whether the first criterion could be met where, as here, an un-Mirandized criminal defendant or juvenile adjudicant is silent in response to a statement made by another person in the presence of law enforcement, the second criterion was not met. The hearing evidence, viewed most favorably to the juvenile court's ruling, permitted the inference that appellant was present when his brother spoke to the officer. However, the evidence provided no specifics about what Et. B. said to the officer about E. B.'s involvement or how appellant reacted to his brother's statements; instead, during the hearing the testifying officer merely agreed with the prosecutor's statements that appellant was "involved in it, too" and that "all three boys were present inside the residence." It cannot be inferred from such a sparse record that appellant understood his brother to implicate him, much less that appellant acquiesced in what his brother said. To the extent the juvenile court viewed Et. B.'s statement to the officer to be a nonhearsay adoptive admission by E. B., she was not authorized to do so. Accordingly, the Court found, the officer's testimony about Et. B.'s statement must be viewed as hearsay. Nevertheless, the Court stated, because appellant did not object to the hearsay testimony, it must review the admission for plain error. And here, the Court found, whether under the *Jarrett* rule or under the Eleventh Circuit rule, the testimony clearly and obviously was inadmissible hearsay. The testimony affected the outcome of the proceeding; it was the only evidence that appellant was involved in the burglary, and appellant presented alibi evidence that he was not at home with his brothers on the night of the burglary. To adjudicate a child delinquent based solely on hearsay testimony and in the face of evidence that the child had not committed the delinquent act seriously affects the fairness and integrity of judicial proceedings. The Court therefore exercised its discretion to remedy this error by disregarding the officer's hearsay testimony regarding appellant's involvement in the burglary. Without that testimony, the evidence was insufficient to support appellant's adjudication for that act, and the adjudication for burglary was reversed.

Search & Seizure

Johnson v. State, A17A0733 (10/24/17)

Appellant was convicted of misdemeanor possession of marijuana and obstruction. He contended that the trial court erred in denying his motion to suppress. The Court agreed. The evidence showed that an officer was on foot patrol, which included a walk-through of a hotel property. As he climbed the outdoor stairway and rounded a corner, he saw a group of five men standing in the breezeway. The officer made eye contact with appellant, who then looked away and pulled up his pants. According to the officer, the fact that appellant pulled up his pants indicated that he was about to run from police. Upon seeing appellant pull up his pants, therefore, the officer yelled to him, “Don’t do it,” which the officer believed communicated to appellant that he was not free to leave. Appellant, however, ignored that command and fled on foot. The officer then pursued appellant while ordering him to stop, which appellant declined to do. Eventually, the officer caught appellant and arrested him for obstruction. A search incident to arrest revealed the marijuana. Citing *Illinois v. Wardlow*, 528 U. S. 119, 125 (120 SCt 673, 145 LE2d 570) (2000), the trial court found that appellant’s presence in a “high crime/high drug activity area with four other males,” together with his “unprovoked” flight from a “first-tier

encounter" with officers provided police with a reasonable suspicion of criminal activity. Therefore, the officer was allowed to conduct a brief investigatory detention of appellant. Thus, when appellant refused to cooperate with this detention (by continuing his flight even after police ordered him to stop), the officer had probable cause to arrest him for obstruction. However, the Court found, unlike the police in *Wardlow*, the officer did not use appellant's flight to support a second-tier investigatory detention. Instead, he executed a full blown arrest for obstruction based solely on appellant's flight from what the trial court found was an "initial . . . first-tier encounter" with police. Yet, an individual who leaves (or even flees) a first-tier encounter with police is not guilty of obstruction. Accordingly, the Court concluded that because appellant had the right to leave the first-tier encounter, his exercise of that right, even if accomplished by running, could not constitute obstruction. The Court therefore reversed appellant's convictions.

Identification; Merger

Carpenter v. State, A17A1354 (10/24/17)

Appellant was convicted of aggravated assault, criminal attempt to commit kidnaping, and two counts of possession of a firearm during a crime. The evidence, briefly stated, showed that appellant entered a store and attempted to abduct the female victim at gunpoint. The victim explained to appellant that because he had on sunglasses and a hat she would not be able to identify him and he should just leave. Appellant stopped, turned around, and left the store. Appellant contended that the trial court erred by allowing the victim to identify him during the trial. At trial, the victim explained that she tentatively identified the second photograph in the line-up she was shown as the male who came in the store the date of the incident, but was not 100 percent sure. The prosecutor then asked the victim if the person whose photograph was in the number two position was in the courtroom. The victim responded that number two in the line-up was appellant. In addition to the victim's testimony, a customer who saw appellant during the incident, the detective, and appellant himself testified that appellant's photograph was number two in the line-up. Accordingly, because it was undisputed that appellant's photograph was depicted in the number two position in the line-up, the Court found the argument to be without merit. Appellant also argued that his conviction for aggravated assault should have been merged with his conviction for criminal attempt to commit kidnaping and that his two convictions for possession of a firearm during the commission of a crime should merge. As to the attempted kidnapping and the aggravated assault, the Court disagreed because each crime was established by proof of an additional fact not at issue in the other crime. Thus, under the "required evidence" test of *Drinkard v. Walker*, 281 Ga. 211(2006), they did not merge. However, appellant's convictions for possession of a firearm during the ommission of a crime (criminal attempt to commit kidnaping) and possession of a firearm during the commission of a crime (aggravated assault) should have been merged. Where multiple crimes are committed together during the course of one continuous crime spree, a defendant may only be convicted once for possession of a firearm during the commission of a crime as to each individual victim. Accordingly, the Court remanded for resentencing.

Ineffective Assistance of Counsel; Leg Shackles

State v. Crews, A17A0672 (10/24/17)

Crews was convicted of one count of armed robbery, two counts of aggravated assault, one count of burglary and one count of terroristic threats arising from a robbery. On direct appeal, Crews alleged that the trial court erred by denying his motion for a mistrial when jurors saw him wearing leg shackles at trial. However, without ruling on the merits, the Court remanded to allow Crews to raise ineffective assistance of counsel. Crews then raised his ineffective assistance claims before the trial court and added that he was denied the right to a fair trial because he was shackled at trial, without cause. The trial court granted the motion for new trial on these two issues and the State appealed. The State argued that the trial court erred by finding Crews's counsel ineffective for failing to interview and possibly call Crews's parole officer as a defense witness. The Court agreed. The Court noted that the State's evidence against Crews was, as the trial court opined, "thin." Nevertheless, pretermitting whether trial counsel performed deficiently, the Court stated that if Crews's parole officer had testified at trial, he could have stated that a witness may have told him that he had heard that Crews robbed the victims from a third party. This could have led the jury to weigh the detective's credibility regarding whether the witness had told the detective that Crews told him that he committed the crimes, or whether the witness had told the detective that he had only heard from a third party that Crews committed the crimes. However, any benefit that Crews might have obtained from the parole officer's testimony has to be compared with the fact that the jury would have also learned that Crews was on parole at the time of the charged offenses. Through the introduction of evidence that Crews had a prior criminal history, testimony from Crews's parole officer might have been more harmful than beneficial to Crews's case. Accordingly, Crews failed to demonstrate that if the parole officer had testified, there was a reasonable probability that the outcome of the

trial would have been more favorable to him.The State also argued that the trial court did not have jurisdiction to consider the issue of whether Crews's right to a fair trial was violated due to his wearing leg shackles. The Court again agreed. When an appellate court vacates a lower court's judgment and remands for findings of fact and conclusions of law on a specific issue, this does not permit the lower court to reopen the case for other purposes. Instead, the scope of the lower court's authority to act on remand is limited to the specific purpose of making the applicable findings and conclusions. Thus, the Court held, as the remand order specified that the trial court was to hold a hearing regarding Crews's claim for ineffective assistance of counsel, the trial court lacked jurisdiction to hear Crews's claim that his rights were violated because he wore leg shackles during trial. Finally, Appellant renewed his argument from the first appeal that he was prejudiced because jurors saw him in leg shackles throughout the course of the trial. The record showed that Crews wore leg shackles from the opening statements through the close of the State's evidence. Prior to Crews walking toward the bench at the close of the State's evidence, neither party nor the trial judge noticed that Crews was in shackles. After the jurors returned their verdict, the trial judge polled each juror individually to determine if they had observed Crews in shackles and, if so, if it influenced their verdict. Only two jurors saw Crews in leg shackles. One juror testified that she saw him walking to the bathroom with leg shackles on, but stated that it did not influence her verdict, and it was not discussed in the jury room. Another juror testified that he saw Crews in shackles as he was exiting a police vehicle and entering the courthouse. That juror stated that his observation did not influence his verdict and it was not discussed in the courtroom. The Court stated that during the transportation of Crews, a prisoner, it was natural for the police to have him handcuffed for security reasons. Thus, the jury would not have been shocked to see it, Furthermore, because each of the jurors who inadvertently saw the defendant in handcuffs stated that they neither discussed the incident with any other juror nor allowed it to affect their decision, the Court held that the trial court did not abuse its discretion in denying Crews's motion for mistrial.

Grand Jury Proceedings; Police Officers

State v. Peabody, A17A1258 (10/25/17)

Former Lt. Peabody was indicted on two counts of aggravated cruelty to animals and one count of making a false statement, in connection with the hot-car death of his K-9 dog, Inka. The evidence showed that on the afternoon in question, Peabody left work in his county vehicle, with Inka in the back seat. On the way home, Peabody received a text message from his wife asking him to let out a puppy that she was boarding at their home. When Peabody arrived at his house, he parked in the driveway, turned the car engine off,and went inside the house to attend to the puppy. Peabody left Inka in the county vehicle with the doors shut and the windows closed, which ultimately resulted in Inka's death. Peabody moved to quash the indictment for the animal cruelty charges because the State allegedly violated OCGA § 17-7-52 by failing to provide him with a copy of the proposed bill of indictment, and more importantly, notice, before presenting the case to the grand jury. The trial court granted the motion and the State appealed. The State argued that because Peabody left Inka in the vehicle to attend to personal tasks, he "stepped aside" from his police-related duties and was therefore not entitled to the protections afforded by OCGA § 17-7-52. The Court noted that because the statute provides for notice only where the crime alleged occurred in the officer's performance of his or her official duties, the question is whether Peabody was acting in the performance of those duties at the time that he left Inka in the car. As charged in the indictment, the crime was leaving Inka in a car under conditions whereby there was inadequate ventilation for her to survive. The fact that Peabody left Inka in the car so that he could attend to a personal matter is not the determinative factor in this analysis; Peabody's impetus for his conduct is of no import here. Rather, the operative inquiry is whether the specific conduct that predicated the criminal charges was within the scope of Peabody's official duties.

Here, the Court noted, Peabody testified that he was responsible for Inka's daily care, which encompassed caring for her at his residence and housing her. Further, pursuant to the Department's K-9 Policy and Procedures, and as conceded by the State, Peabody's duties as Inka's K-9 handler specifically included getting her into county-owned or personal vehicles, transporting her, and then removing her from those vehicles. Thus, the Court found, insofar as Peabody was accused of leaving Inka in a vehicle in an illegal manner, thereby causing her death, the offenses at issue stem directly from his official duties as a K-9 handler. Whether Peabody's act was viewed as caring for Inka in an unlawful manner, or transporting her under circumstances which proved unlawful, Peabody was still in the performance of his duties. Accordingly, the Court concluded, as set forth in OCGA § 17-7-52 (a), Peabody was entitled to timely notice of the proceeding and a copy of the proposed indictment before the State presented its case to the grand jury. Since the State failed to comply with these statutory mandates, the trial court properly granted Peabody's motion to quash the indictment.

The State also argued that the trial court exceeded its authority by implying that

any future presentment to the grand jury alleging that Peabody committed animal cruelty in the first degree would be governed by an inapplicable statutory provision. The Court noted that although the trial court correctly cited to the 2016 version of OCGA § 17-7-52 in its discussion of notice, the trial court later commented about rights afforded under the 2015 version. The Court found that the State was correct. However, because the trial court's statements applied to any potential future indictment, it was merely advisory and thus, did not provide a basis for reversal. Should the State elect to reindict Peabody, the provisions of the 2016 version of OCGA § 17-7-52 would clearly apply.