Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 17, 2010

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THIS WEEK:

Speedy Trial

Teasley v. State, A10A0837 (11/30/10)

Appellants, Elizabeth and Jerry Teasley, appealed from the denial of their motion for discharge and acquittal based on an alleged violation of their right to a constitutional speedy trial. They were charged with cruelty to children with the victim being their 3 year old child. At times they had separate counsel and at other times, they were jointly represented. Under the *Barker-Doggett* four factor test, the Court found that the delay of 3 1/2 years to be presumptively prejudicial. As to the reasons for the delay, the Court found that seven terms of court passed before the hearing on the motion. The State caused the delay in two terms, and the defendants caused the delay in one term by asking for a continuance. Appellants "probably should have or share blame for the delay during an additional term because they admitted they acquiesced in the State's continuance, and they may have orally requested a continuance on another occasion." Nevertheless, the protracted delay was weighted against the State.

As to the assertion of the right, the Court found that Elizabeth filed a demand for constitutionally speedy trial within 2 months of being indicted and twice again filed requests. Jerry, on the other hand, did not make such a request until the motion for discharge. This factor was weighted slightly against Elizabeth but heavily against Jerry.

The last prong is that of prejudice. Elizabeth testified at the hearing; Jerry did not. Elizabeth testified that the delay caused her significant anxiety about the well-being of her child who was removed from the home for three years, about whether the State was going to take her subsequent newborn child, about her strained family relations, and about having to live under a cloud of suspicion for so long. This factor weighed in favor of Elizabeth, and, to a slight degree, in favor of Jerry, who did not testify. The State's negligence in prolonging the separation of the family based on unproven allegations weighed heavily against the State. Given the length of delay in this case, the State's unexplained lack of persistence to prosecute a relatively straightforward case, the presumption of innocence, and the effect on Elizabeth, the Court concluded that the prejudice to Elizabeth was legally significant. Without testimony from Jerry, the Court did not find that he suffered in the same way as Elizabeth. Therefore, the prejudice to Jerry was not as significant. Accordingly, this factor was weighted against the State with regard to Elizabeth but not significantly for Jerry.

The Court then weighed the factors and found that the trial court erred in denying the motion as to Elizabeth, but affirmed as to Jerry.

Search & Seizure

Daniels v. State, A10A1249 (12/1/10)

Appellant was convicted of possession of a firearm by a convicted felon. The evidence showed that a female victim flagged down a patrol car around 1:00 a.m. and told the officers that her boyfriend had struck her, leaving a large knot on her forehead, took her car keys,

and left on foot from their hotel. The officers began looking for the perpetrator in the area, and five to ten minutes later, they saw appellant about two blocks from the scene. Without asking him to identify himself, the officers immediately handcuffed him and then patted him down and found a gun in the waistband of his pants. The officers then took appellant to the victim's location and she said he was not the man who struck her.

Appellant contended that the trial court erred in denying his motion to suppress. Specifically, he argued that the officers had no right to stop him and no right to frisk him. The Court first held that the officers had a sufficient basis for a brief initial *Terry* stop. Appellant partially fit the description given by the victim of the person who had attacked her. He had the correct skin tone, was wearing a black leather jacket, and had on dark jeans that, given the lighting, appeared black. Thus, the trial court did not err by finding that the initial stop was authorized, given the description, the time of night, and the lack of foot traffic in the area.

However, pretermitting whether the officers were authorized to handcuff appellant, the officers had no authority to conduct the pat-down that discovered the weapon on his person. The mere fact that the officers believed appellant might be the person that struck a woman with his hands, without more, did not establish that the officers had a reason to believe that appellant was carrying a weapon when they undertook to frisk him. Since the record revealed no proof of other circumstances known to the officers when they commenced the frisk that would lead a reasonable officer to conclude that he had a weapon or instrument capable of being used as a weapon on his person, the State failed to carry its burden of proving the propriety of the search. Appellant's conviction was therefore, reversed.

Dover v. State, A10A1362 (11/24/10)

Appellant was convicted of possession of methamphetamine, driving with a suspended license, operating a motor vehicle without proof of insurance, and driving without a seatbelt. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant's vehicle was stopped when the officer noticed appellant driving without a seatbelt. The officer determined that appellant's license was suspended and the vehicle was uninsured. Appellant had a passenger who was allowed to leave but the vehicle remained and was to be towed. In the course of conducting an inventory, a meth pipe was found in the center console.

Appellant argued that pipe and methamphetamine residue should have been suppressed because Officer Sowell insisted on having the car impounded, thereby necessitating an inventory search, instead of attempting to have the car moved by another means. The Court, however, found that the officer's decision to impound the vehicle instead of allowing the passenger (who was not the purported owner of the vehicle) to take possession of the vehicle, was reasonable, given the facts before the officer at the time, which included two unlicensed drivers traveling in an uninsured vehicle, which was stopped in a gravel area beside a private business, creating potential liability by leaving it unattended. Thus, the trial court was authorized to deny the motion to suppress on this basis.

Appellant also contended that the motion to suppress should have been granted because the officer conducted the search after his arrest, when he was outside the grab area of the vehicle. Pretermitting whether the search was an appropriate search incident to arrest, the Court upheld the propriety of the inventory search as subject to a reasonable impoundment in order to protect an owner's property and to protect officers from claims over lost or stolen property. Accordingly, the inventory search was proper.

Hawkins v. State, A10A1575 (12/2/10)

In this en banc decision, the Court addressed on interlocutory review the denial of appellant's motion to suppress. The facts, briefly stated, are as follows. A mother came to the police with her son's cell phone. She stated that her son was getting text messages about drug dealing. The officers took possession of the phone. Thereafter, a text came in inquiring about some pills. An officer, posing as the son, communicated back and arranged to sell the person 25 pills and arranged a meeting place. The officer set up surveillance at the meeting place and observed appellant drive into the parking lot shortly thereafter. He then observed appellant entering data into her phone, and he almost contemporaneously received another text message on the son's cell phone, in which appellant announced her arrival at the restaurant. The officer approached appellant's vehicle, identified himself, and placed her under arrest for unlawfully attempting to purchase a controlled substance. Appellant admitted to the officer that she was the person with whom he had exchanged text messages throughout the day. After she was asked for and gave her consent, and as an incident to her arrest, police searched her vehicle and found her cell phone inside her purse. The officer searched for, and found on appellant's cell phone, the text messages that he had exchanged throughout the day with her. To preserve these text messages, the officer downloaded and printed them. Police did not obtain a warrant before arresting appellant, searching her vehicle, or searching the text messages stored on her phone.

Appellant first contended that the seizure of her cell phone and the search for the electronic data contained therein was unlawful. The Court found that *Arizona v. Gant*, __U. S.__ 129 SC 1710, 173 LE2d 485 (2009) limited the search of a vehicle incident to arrest. "The most restrictive plausible interpretation of *Gant* is that such a search is limited in scope to a search of places and things in a vehicle in which one reasonably might find the specific kinds of evidence of the crime of arrest that the officer has reason to believe may be found in the vehicle." Under the facts, even with this restrictive standard, the Court found the search of electronic data to be reasonable. The officer had every reason to believe that evidence of the crime for which appellant was arrested —in the form of the text messages that she had sent to, and received from, the officer using the cell phone in her vehicle —would be found in the vehicle at the time of her arrest. Under a narrow reading of *Gant*, the officer was authorized to search for these text messages in any place in the vehicle in which the text messages reasonably might be found.

However, that did not end the inquiry. That the text messages were stored in electronic form in appellant's cell phone, rather than in plain view, did not deny the officer the right to discover them. When an officer is authorized to search in a vehicle for a specific object and, in the course of his search, comes across a container that reasonably might contain the object of his search, the officer is authorized to open the container and search within it for the object. "The pertinent question, in this case, then, is whether a cell phone is enough like a 'container'

to be treated like one in the context of a search for electronic data that might be stored on the phone." The Court stated, "We think it is."

Nevertheless, "[j]ust because an officer has the authority to make a search of the data stored on a cell phone (that is, just because he has reason to 'open' the 'container') does not mean that he has the authority to sift through all of the data stored on the phone (that is, to open and view all of the sub-containers of data stored therein). Instead, his search must be limited as much as is reasonably practicable by the object of the search. … Although it may not always be possible at the outset of a search to immediately identify the specific data that is the object of the search without examining something more, it more often than not will be possible to narrow in some meaningful way the sub-containers that might reasonably contain the object of the search. Where the object of the search is to discover certain text messages, for instance, there is no need for the officer to sift through photos or audio files or Internet browsing history data stored on the phone." Here, the Court found that the search was properly limited in scope. The arresting officer searched for and found the specific text messages that he had good reason to believe were stored on the cell phone and the record did not suggest that the officer found or looked for any other data on the cell phone.

Appellant also argued that the text messages should be suppressed because the officer's conduct was comparable to an illegal wiretap interception of a telephone conversation. The Court disagreed. The officer was a party to the text-message communications, notwithstanding that appellant did not know his true identity at the time. "For this reason, her contention that the officer violated OCGA § 16-11-62 (2) —which prohibits the use of any device to record the activities of another in a private place and out of public view without his consent —is without merit." The Court also found that appellant's argument that the officer violated the rights of the son by using his cell phone without his proper consent was without merit because she had no standing to claim a violation of the constitutional rights of the son.

DUI; Implied Consent

Fletcher v. State, A10A1374 (11/24/10)

Appellant was convicted of homicide by vehicle, DUI (less safe), and driving without a license. He argued that the trial court erred in excluding evidence that the victim's failure to wear a seatbelt was an intervening cause of his death. The Court stated that so long as the defendant's negligence proximately caused the death of another, the crime has been committed, even if there are other factors which also are proximate causes of the death. As opposed to the civil context, in which compensating deserving victims is the aim, in the criminal context it simply is not relevant that the victim was negligent, unless the defendant's conduct did not substantially contribute to the cause of death. Negligence on the part of the deceased has no bearing upon either responsibility or imputability in the determination of guilt or innocence if it was a substantial factor thereof, an act which is a direct cause of a socially harmful occurrence is always a proximate cause. Because appellant's conduct was a substantial factor in the victim's death, the trial court did not abuse its discretion in excluding the testimony regarding the victim's seatbelt.

Appellant also contended that the officer failed to properly read the implied consent law because the officer's testimony summarizing the notice shows that "he did not limit the operation of the implied consent law to a 'Georgia driver's license or privilege to drive on the highways of this state'," and that he did not mention "the right to an independent test at the Appellant's expense." The Court disagreed. The officer testified that he read appellant the implied consent warning for suspects 21 years of age or over, and he had the implied consent card he read from with him at trial. Following this testimony, the trial court allowed the State to admit the card into evidence. The officer stated further that he read the card verbatim to appellant, and he then summarized the language of the notice for the jury. Under these circumstances there was no error.

Theft by Receiving; Res Gestae

Rainly v. State, A10A1257; A10A1258; A10A1259 (11/30/10)

Appellants were convicted of various crimes related to an armed robbery of a video store. Appellant Everette argued that the evidence was insufficient to support her conviction for theft by receiving stolen property (a Glock handgun used in the commission of the armed robbery). The State presented evidence that the Glock handgun found in Everette's apartment had been reported stolen in November 2007. The State argued that it proved beyond a reasonable doubt that Everette should have known that the handgun had been stolen because, according to a co-conspirator, she had bought it for $150 or $175 from "[s]ome guy on the street." A police officer testified that he had purchased two new Glock handguns for $400 and $550 several years before trial, and that the value of such handguns decreases once they are fired. However, the Court found, no evidence was presented as to the age of the handgun purchased by Everette or whether it had been fired. There was no evidence that, at the time she bought it, the handgun was worth the amounts the officer testified he had paid for new Glock handguns, or that there was such a gross disparity between the value of the handgun and the price Everette paid for it as to excite suspicion. That Everette purchased the handgun "on the street" does not prove knowledge that it was stolen. Therefore, the Court determined, the evidence presented was insufficient to sustain a conviction for theft by receiving stolen property, and the conviction was reversed.

Appellants contended that the trial court erred in admitting evidence of a prior armed robbery at the video store. The evidence showed an armed robbery of the same store occurred a week earlier. At that time, Everette was an employee of the store. The investigating officer gave the clerk of the store a business card with the officer's name and phone no. on it at that time. When this robbery occurred a week later, the clerk's wallet was taken. Inside the wallet was that business card. When Everette's apartment was searched shortly after this robbery, items from the wallet, including the business card, were found. The Court held that testimony concerning the business card was admissible because it was relevant to the identity of the accused and was an article connected with the charged offense. Evidence relating to the first crime was not wholly unrelated to the charged crimes, nor was it so remote in time as to make it inadmissible. Therefore, the trial court did not err in allowing testimony and statements regarding the taking and recovery of the business card. Specifically, there was no error in the store clerk testifying that the police officer gave him a business card concerning a robbery of the

store the week before, that the card was taken from him during this robbery, and that the card recovered by police and introduced into evidence at trial appeared to be or was the card the officer had given him. Likewise, there was no error in admitting testimony from the officer that he gave the store clerk a business card during the investigation of the prior robbery and that such a card was recovered during a search of Everette's apartment shortly after the charged robbery occurred. Such testimony did not implicate any of the appellants in the prior robbery; instead, it identified them as being connected to the charged crimes.

To the extent the testimony and argument went beyond identifying the business card as an article taken in the December 18, 2007 robbery, however, it was not relevant and was improperly permitted. But the error did not require reversal the evidence was overwhelming. Therefore, any error in the admission of the testimony and statements was harmless.