

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 18, 2015

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THIS WEEK:

- Ineffective Assistance; Plea Deals
- Prosecutorial Misconduct; Expert Witnesses
- Rule of Sequestration; Investigating Officers
- Delinquency Petitions; O.C.G.A. § 15-11-521(b)
- Search & Seizure; State's Right to Appeal
- VGCSA; Sufficiency of the Evidence

Ineffective Assistance; Plea Deals

Harris v. State, A15A0834 (11/13/15)

Appellant was convicted of armed robbery. He contended that his trial counsel provided ineffective assistance by incorrectly advising him that, if he was convicted, the trial court had discretion to give him a sentence between the minimum and maximum for armed robbery, and by failing to advise him that a life sentence was mandatory if he was convicted because he was a recidivist. He further argued that he relied on this improper advice in making his decision to go to trial.

Citing *Whitehead v. State*, 211 Ga.App. 121 (1993) and *Carson v. State*, 264 Ga.App. 763 (2003), the Court found that appellant's trial counsel discussed both of the State's plea offers with him, told him that a life sentence was a possibility, and told him that it would be in his best interest to accept the State's second plea offer. Although trial counsel did not inform appellant that he faced a mandatory life sentence if convicted, appellant knew that a life sentence was possible and was therefore aware that the consequences of refusing the State's plea offer could be harsher than the consequences of accepting it. Based on these

facts, the Court concluded that appellant failed to establish ineffective assistance of counsel.

Prosecutorial Misconduct; Expert Witnesses

Newnan v. State, A15A1312 (11/12/13)

Appellant was convicted of two counts of first degree homicide by vehicle, serious injury by vehicle, DUI (less safe), DUI (per se), and reckless driving. He argued that the trial court erred by failing to rebuke the prosecutor, to give a proper limiting instruction, or to grant a mistrial when he objected to the prosecutor's statement during closing that "[n]ow[,] the defense has requested a charge of homicide by vehicle in the second degree," which appellant argued constituted injection of facts not in evidence and commented on his guilt or innocence.

The Court found that although the prosecutor should have refrained from mentioning that appellant requested the lesser included charge, there was no error in the trial court's failure to give a curative instruction or grant a mistrial based on the prosecutor's statement. The Court quoted at length from the prosecutor's closing argument and noted that the trial court declined to give a curative instruction because the court believed that "sometimes curative instructions really bring more emphasis to a particular area and the harm outweighs the benefit." The Court noted that the statement at issue was a passing reference only and still unlikely to have caused a different result in the verdict. The trial court provided valid reasons to avoid a specific instruction on the issue in its oral ruling, including potential confusion to the jury and prejudice to the defendant. Moreover, the trial court instructed the jury generally

on the requirement that the State prove every element of a crime, that the statements made by the attorneys were not evidence in the case, and that only the court itself could instruct the jury on the law. Finally, the Court noted, appellant completely denied driving recklessly during his testimony at trial, and thus, he did not assert the lesser included offense as a defense. Therefore, based on the evidence presented by the defense in support of the jury's verdict, the Court found it highly probable that any error on the part of the trial court in failing to instruct the jury further regarding the statement did not contribute to the guilty verdict.

Appellant also argued that that the trial court improperly barred him from introducing evidence that his expert witness on blood alcohol testing, James Woodford, helped end the use of the Intoximeter 3000. But, the Court agreed with the State that the toxicologist who tested appellant's blood used gas chromatography, and thus, the trial court did not abuse its discretion by preventing potentially confusing testimony regarding another testing method, which the State did not employ in this case. The trial court allowed the expert to attack the toxicologist's methodology, and he was able to provide his own opinion as to appellant's blood alcohol limit which was lower than the level testified to by the State's witnesses. According, the Court held, there was no abuse of discretion.

Rule of Sequestration; Investigating Officers

Jackson v. State, A15A0990 (11/13/15)

Appellant was convicted of rape and false imprisonment. He argued that the trial court erred by overruling his objection and allowing the investigating officer to be present in the courtroom prior to appellant's testimony. Specifically, he argued that that the trial court failed to exercise its discretion in allowing the officer to remain in the court room because the State did not present argument as to why it was necessary. The record showed that in response to appellant's invocation of the rule, the State responded, "[w]e would just request that you allow our prosecutor to sit at the table." No other explanation, however cursory, was provided by the State for needing the officer in the courtroom prior to his time to testify.

The Court found that because there was no explanation provided, it was error for the trial court to allow the officer to remain in the courtroom. However, the Court found, because the evidence against appellant was overwhelming, reversal was not required.

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

In Re D.V.H., A15A1092 (11/13/15)

The Court stated that the issue in this case was one of first impression: If the State fails to file a delinquency petition within 30 days after the filing of a complaint against a child, as required by O.C.G.A. § 15-11-521(b) (a provision of the new Juvenile Code), does the filing of a new complaint reset the time period for filing the delinquency petition? The Court concluded that a new complaint that merely reasserts the same factual circumstances as the first complaint does not reset the time period.

The record showed that in a prior proceeding, the juvenile court dismissed two delinquency petitions against D. V. H. because the State had filed the petitions more than 30 days after the filing of complaints alleging that D. V. H. had violated various criminal laws. The State moved the juvenile court to extend the 30 day period pursuant to O.C.G.A. § 15-11-521(b), which permits the juvenile court to grant such an extension upon a showing of good cause and notice to all of the parties, but the juvenile court denied the State's motion. Thereafter, new complaints were filed regarding the same factual circumstances as in the initial complaints. Within 30 days of the filing of the new complaints, the State filed the delinquency petitions at issue here. The juvenile court granted D. V. H.'s motion to dismiss the new delinquency petitions, and the State appealed.

The Court stated that Chapter 11 of the new Juvenile Code provides the necessary procedures for determining the effect of the second set of complaints filed in this case. O.C.G.A. § 15-11-521(b) both sets the time limitations for filing delinquency petitions and provides a mechanism by which the State can seek an extension of those limitations. It pertinently provides that where, as here, "a child is not in detention prior to adjudication, a petition alleging delinquency shall be filed within 30 days of the filing of the complaint alleging violation of a criminal law" and

that, "[u]pon a showing of good cause and notice to all parties, the court may grant an extension of time for filing a petition alleging delinquency." O.C.G.A. § 15-11-521(b). And O.C.G.A. § 15-11-2(14) defines the "complaint" as "the *initial* document setting out the circumstances that resulted in a child being brought before the court." (Emphasis supplied.) The Court found that, read together, these Code sections required the State to file the delinquency petition against D. V. H. within 30 days after the filing of such an initial document (here, the initial complaints against him). The subsequent complaints against D. V. H. did not reset this 30-day period, because they merely reasserted the same circumstances set forth in the initial complaints and thus were not "complaints" as defined by the Juvenile Code. Allowing the State to file new complaints to restart the clock after missing the deadline for filing the delinquency petitions and failing to convince the juvenile court to grant it an extension of that deadline would eviscerate the statutory time limitation for such petitions. Because the State did not obtain an extension and the delinquency petitions were filed more than 30 days after the filing of the complaints, as that term is defined by O.C.G.A. § 15-11-2(14), the petitions were untimely under O.C.G.A. § 15-11-521(b). Accordingly, the juvenile court did not err in dismissing the petitions.

Search & Seizure; State's Right to Appeal

State v. Holt, A15A1483 (11/17/15)

Holt was charged with DUI. The trial court granted her motion to suppress and the State appealed. The facts, briefly stated, show that a trooper responded to a call at a gas station that a vehicle side-swiped a vending machine. He was directed when he got there to Holt. The trooper noticed that Holt displayed indications of intoxication and she admitted to having a glass or two of wine. At 4:51, the officer gave her an alco-sensor test and she blew a .124. The officer then told her to "hang out here" and they would do "more testing" because she was not the driver that hit the vending machine; another driver turned out to be the person he was sent to investigate. From 4:54 to 5:06, the trooper investigated the other driver. A second alco-sensor test was given to Holt at 5:07 and she failed it too. At

5:10, the trooper called another trooper and said, "I've got two DUIs; I'll give you one of them. One alcohol, one drugs." The second trooper arrived at 5:39, conducted field evaluations on Holt and arrested her for DUI.

The trial court found that the first trooper arrested Holt at 5:10 when he stated that he had "two DUIs" but lacked probable cause at the time to do so. Alternatively, the court found, if there was probable cause for Holt's arrest at 5:10 p.m., because the implied consent warning was given 38 minutes after Holt's arrest, the results of the tests following the warning must be suppressed. And, the trial court held, following Holt's arrest at 5:10 p.m., the questioning and investigation conducted by the second trooper amounted to a custodial interrogation without a prior recitation of Holt's *Miranda* rights, requiring the suppression of the results of the second trooper's investigation. Lastly, the trial court found that the length of Holt's detention was unreasonable.

First, the Court addressed Holt's motion to dismiss the appeal. She argued that the State failed to comply with O.C.G.A. § 5-7-1(a) (5), which, if applicable, required the State to file its notice of appeal within two days of the trial court's order and to certify to the trial court that the appeal was not taken for delay and that the evidence was a substantial proof of material fact in the proceeding. However, the Court held, the State's appeal was from an order which excluded the results of tests for alcohol and was properly filed under O.C.G.A. § 5-7-1(a)(4).

The State first argued that the trial court erred in excluding evidence gathered after 5:10 p.m. on the basis that Holt was then under arrest and no probable cause for the arrest existed at that time. The Court agreed. Here, the Court found, the first trooper never told Holt that she was under arrest. Holt was not handcuffed, nor placed in the first trooper's patrol car. The conversation between the first trooper and the second trooper was not, as the trial court found, a vocalization of "what a determination of the result of an investigation would be." Thus, the Court stated, that one law enforcement officer told another, within the hearing of Holt, that he had "... two DUIs, I'll give you one of them" was ambiguous and could easily have meant, consistent with ongoing events, that the first trooper had two

ongoing DUI investigations. No intent to arrest was communicated by the first trooper to Holt. Moreover, after the officer turned to the investigation of the other driver, and she remained detained pending "more testing," Holt was not physically restrained or placed in the patrol car, and she was not told that she was going to jail. Thus, the Court concluded, a reasonable person would conclude that his or her freedom of action was only temporarily curtailed and that a final determination of his or her status was merely delayed.

Next, the Court addressed the trial court's finding that the length of Holt's detention was unreasonable, and that the investigatory detention therefore ripened into an arrest. The Court stated that accepting that the first trooper *could* have conducted both investigations to completion, and that doing so would have been faster, at least for Holt, this did not render the length of Holt's detention unreasonable. Any consideration of the totality of the circumstances must take into account that the first trooper was, without a second law enforcement officer present, faced with two suspects and two unrelated investigations. The officer elected to pursue the investigation of the other driver after Holt's second alcohol sensor test, but he did so knowing that another trooper would be conducting Holt's investigation. The first trooper's video showed that, after Holt's second alcohol sensor test, he was involved with the investigation, arrest, and post-arrest of the other driver through the arrival of the second trooper, who completed Holt's investigation in an expeditious manner. Under the circumstances, the Court found, it was reasonable for the first trooper to call in the second trooper to conduct Holt's investigation while he pursued the unrelated investigation of the other driver, and the length of Holt's detention was not so long as to be beyond the scope of a permissible investigatory detention.

VGCSA; Sufficiency of the Evidence

Holland v. State, A15A1301 (11/17/15)

Appellant was convicted of trafficking in cocaine and possession of marijuana with intent to distribute. Appellant contended that the evidence was insufficient to support his convictions. The Court agreed. The evidence showed that officers executed a search warrant at a residence in which appellant was present

along with others who were his children or friends of his children. The children were all "over the age of 17 or 18."

The Court stated that viewed in the light most favorable to the jury's guilty verdict, the only evidence that appellant had even entered the specific locations in the house where the drugs were found (the master bedroom and the attic, which could be reached from the master bedroom) was the testimony of the containment officer who saw him for twenty to thirty seconds through a window which the officer assumed to be the master bedroom. There was no evidence that appellant had ever been in the attic.

In addition to the lack of evidence connecting appellant specifically to the locations in the house where the drugs were found, the Court noted that the State did not even prove that appellant lived at that address, had keys to the house, kept personal belongings anywhere in the house, or received mail there. In fact, the State failed to adduce any evidence that appellant had been inside the house any earlier than scant moments before the search began. The evidence showed, at most, that appellant had momentary access to the master bedroom just before contraband was found there.

The Court stated that a mere occupant, as distinguished from a resident, does not necessarily have the requisite control over the premises to authorize the inference that he possesses all property found thereon. If such were the case, a person's mere presence at the scene of the discovery of illegal drugs would authorize his conviction, and that plainly is not the law. Accordingly, evidence merely showing that contraband was found in a residence occupied by the defendant is simply insufficient to support a conviction, especially where other persons had equal access to the contraband and therefore an equal opportunity to commit the offense.

Accordingly, because the State failed to show that a presumption of possession applied, and failed to adduce any evidence to connect appellant to the drugs found in the master bedroom and the attic, the evidence was insufficient to sustain his convictions for trafficking in cocaine and possession of marijuana with intent to distribute.