

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 31, 2010

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THIS WEEK:

- **Demurrers; Gangs**
- **Expungements**
- **Mistake of Fact**
- **Jury Charges**
- **Right to Counsel**
- **Sentencing**
- **Motion For New Trial; Newly Discovered Evidence**

Demurrers; Gangs

State v. Hood, A10A1050 (12/15/10)

The State appealed from the grant of special and general demurrers against 12 defendants charged in count 1 of an indictment under the Anti-Gang Act. The State argued that the trial court erred by requiring the indictment to allege that a criminal street gang existed prior to the commission date of any of the enumerated offenses and that it erred in requiring the indictment to allege a specific date on which the criminal street gang came into existence. Count 1 of the indictment accused the defendants of participating in criminal street gang activity “for the said accused, . . . on and between January 1, 2007 and June 18, 2008, did unlawfully, while associated with a criminal street gang, known as 30 Deep participate in such criminal street gang activity to wit: [specified enumerated offenses] as described in counts [2-16] of this indictment. . . .” The Court held that because the indictment substantially tracks the language of OCGA § 16-15-4 (a), it was sufficient to withstand a general demurrer.

The Court also held that the trial court erred in granting the special demurrer. Under *Rodriguez v. State*, 284 Ga. 803 (2009), the Anti-Gang Act requires that: 1) the defendant actively participated in an illicit street gang, which is defined in OCGA § 16-15-3 (2) as any group of three or more people associated in fact that “engages in criminal gang activity;” 2) the defendant committed at least one predicate act enumerated in OCGA § 16-15-3 (1); and 3) there is a nexus between defendant’s commission of the predicate act and an intent to further the gang activity. The Court held that the *Rodriguez* does not require an allegation that the gang existed prior to the commission of the enumerated offenses and that the indictment here, taken as a whole, and viewed in the context of the specific predicate acts alleged in Counts 2 through 16, dating from February 4, 2008 to June 18, 2008, was sufficient. The indictment sufficiently alleged that the criminal street gang was in existence and ongoing at the time of the commission of the enumerated offenses. Moreover, it was not necessary for the indictment also to contain a specific allegation that the gang existed prior to the commission of any of the enumerated offenses, or to include a specific enumerated offense that was committed prior to the commission of any of the enumerated offenses in this case.

The Court also reversed the trial court’s holding the indictment was subject to a special demurrer because the State failed to allege a specific date on which the gang came into existence and failed to show why it was not reasonably capable of narrowing the range of dates set forth in the indictment. Instead, the Court found that a date certain was provided for each of the enumerated offenses. Moreover, the indictment sufficiently alleged that the

gang was in existence and ongoing at the time the enumerated offenses were allegedly committed. Based upon these dates, the defendants had all the information they need to formulate a defense that the gang did not exist at the time of each enumerated offense.

Expungements

Grimes v. Catoosa County Sheriff's Office
A10A1647 (12/17/10)

Appellant appealed from an order of the superior court dismissing his appeal from an administrative order of the county sheriff denying appellant's petition for expungement of his criminal record. The record showed that appellant was indicted but the charge was subsequently nolle prossed. Appellant then petitioned the sheriff under O.C.G.A. § 35-3-37 to expunge his record. The district attorney objected because appellant had been indicted. The sheriff then denied the petition and appellant appealed to the superior court. The superior court dismissed the appeal on the ground that appellant had been indicted and was therefore not entitled to have his records expunged.

The Court reversed and remanded. An individual is only entitled to expungement of his or her criminal records as of right if, among other requirements, he has not been indicted. After indictment, "a record shall **not** be expunged if the prosecuting attorney shows that the charges were nolle prossed, dead docketed, or otherwise dismissed" for any of the reasons set forth in OCGA § 35-3-37 (d) (7) (A) through (G). (Emphasis supplied.) OCGA § 35-3-37 (d) (7). Additionally, OCGA § 35-3-37 (d) (6) expressly provides that in an appeal from a denial of a petition for expungement, "[a] decision of the agency [declining to expunge] shall be upheld only if it is determined by clear and convincing evidence that the individual did not meet the criteria set forth in paragraph (3) of this subsection or subparagraphs (A) through (G) of paragraph (7) of this subsection."

Thus, the Court found, the trial court erred in dismissing appellant's appeal. The record showed that he was indicted but that the charges were nolle prossed. Under OCGA § 35-3-37 (d) (9), he was, therefore, permitted to request that his records be expunged. Under that same provision, however, the sheriff's was required to deny his expungement request because the district attorney objected thereto.

Appellant's recourse was to appeal under OCGA § 35-3-37 (d) (6), but the trial court dismissed appellant's appeal without making the determination required under the clear and convincing standard of proof. The case was accordingly reversed and remanded to the trial court for that purpose.

Mistake of Fact

Phillips v. State, A10A1881 (12/13/10)

Appellant was convicted of trafficking in cocaine as the result of a reverse sting operation by law enforcement. Appellant contended that the trial court erred in refusing to give his request to charge on mistake of fact, as it was his only defense. The Court stated that as a rule, the trial court must charge the jury on an affirmative defense such as mistake of fact if the defense is raised by the evidence. The trial court is not, however, required to charge the jury on mistake of fact if the charge is not authorized by the evidence, even if mistake of fact is the sole defense. Here, appellant did not testify at trial. Instead, he relied on his out-of-court statement to police that he was at the house in connection with his legitimate flooring business as the evidentiary basis for a charge on mistake of fact. But, the Court held, "it is well-settled that self-serving statements made by the accused, either before or after the commission of the alleged offense, are inadmissible hearsay." Though admitted into evidence, appellant's self-serving statement was without probative value and could not support a charge on mistake of fact. Moreover, even if his statement was considered evidence that he had visited the house to discuss flooring, the purpose of his visit would not excuse his subsequent participation in a drug transaction. Therefore, trial court did not err in refusing to give the charge.

Jury Charges

Abercrombie v. State, A10A2280 (12/9/10)

Appellant was convicted of kidnapping, rape, aggravated assault and two counts of cruelty to children. The victim was a 15 year old girl. Appellant contended that the trial court, in charging the jury on the offense of rape, erroneously included a portion of the suggested pattern jury instructions which provided that, "[i]n cases of incapacity to consent, the element of force is automatically supplied by law." He argued that this portion of the charge created

an impermissible mandatory presumption as to the element of force.

The Court disagreed. Even assuming that the charge created such an impermissible presumption, an instruction is harmless so long as it was applied to an element of the crime that was not at issue in the trial, and if the evidence of guilt is overwhelming. Here, the element of force was not at issue in the trial. Appellant and his co-defendant did not raise a defense that the sexual intercourse was consensual, and instead asserted a defense of non-involvement in the alleged crime. Because the evidence of guilt was overwhelming and because the defense of non-involvement in the crime did not place the element of force in issue, the alleged error in the charge was harmless.

Right to Counsel

Ham v. State, A10A1695 (12/17/10)

Appellant was convicted of speeding. He contended that the trial court failed to warn him of the dangers of proceeding without an attorney. No transcript was provided to the Court on appeal. The general rule is that the appellant must show error by the record. An exception to that general rule has developed, however, based upon the Supreme Court's decision in *Jones v. Wharton*, 253 Ga. 82 (1984). In *Jones*, the our Supreme Court held that under *Argersinger v. Hamlin*, 407 U. S. 25 (1972), regardless of whether the charges are felony or misdemeanor charges, when an accused is put on trial and faces a term of imprisonment, he is constitutionally guaranteed the right to counsel. The accused may make a knowing and intelligent waiver of this right, but the Court may not presume such a waiver from a silent record. Here, the record showed that appellant represented himself pro se. The State did not show, "transcript or other extrinsic evidence," that appellant made a knowing and voluntary waiver of his right to counsel. Although the State argued that appellant waived the issue for purposes of appeal by failing to raise it before the trial court, without a transcript, what happened at the trial, and any analysis of the State's argument would be grounded on speculation. Thus, the Court concluded, in light of the limited record, the State failed to carry its burden of showing a valid waiver of appellant's constitutional rights. Accordingly, the conviction was reversed and remanded for a new trial.

Sentencing

Gioia v. State, A10A2249 (12/9/10)

Appellant was convicted of child molestation and aggravated child molestation. He argued that the trial court improperly sentenced him on the aggravated child molestation charge. OCGA § 16-6-4 (d) (1) provides in pertinent part that “a person convicted of the offense of aggravated child molestation shall be punished by imprisonment for life or by a split sentence that is a term of imprisonment for not less than 25 years and not exceeding life imprisonment, followed by probation for life[.]” Here, the trial court did not choose either of these sentencing options—life imprisonment or a split sentence of imprisonment followed by probation. Instead, the trial court improperly sentenced appellant to serve 25 years to life in prison for the aggravated child molestation count. Accordingly, the judgment of conviction as to the aggravated child molestation count was affirmed, but the improper sentence as to that count was vacated. The case was remanded for re-sentencing.

Motion For New Trial; Newly Discovered Evidence

Taylor v. State, A10A2152 (12/17/10)

Appellant was convicted of armed robbery, aggravated assault and other offenses. He contended that the trial court erred in denying his motion for new trial based on newly discovered evidence. A party seeking a new trial on the ground of newly discovered evidence bears the burden of satisfying the court:

(1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.

Here, appellant’s co-defendant testified that at trial. He identified appellant as his accomplice and stated that he and appellant drove to the crime scene together and gained entry into the residence by breaking through a glass door. At the motion for new trial, the accomplice recanted, stating that he had

proceeded to the crime scene alone and that Taylor had not known of his intent to commit a crime at the residence. The Court found that the trial court did not abuse its discretion in denying the motion. First, a new trial was not authorized because it was cumulative of other alibi evidence offered by appellant at trial. Second, his reliance on OCGA § 24-9-85 (b) was because it provides that “[i]f a witness shall willfully and knowingly swear falsely, his testimony shall be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence.” Here, there was corroboration by circumstances or other unimpeached evidence.