

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 17, 2014

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THIS WEEK:

- **Photographic Lineups; Simultaneous Lineups**
- **Guilty Pleas**

Photographic Lineups; Simultaneous Lineups

McCowan v. State, A13A2143 (1/9/14)

Appellant was convicted of armed robbery, aggravated assault, burglary, and false imprisonment. He contended that the trial court erred in denying his motion to suppress his pre-trial photographic lineup identification. The record showed that appellant and a co-defendant broke into a hotel room occupied by the two victims.

The Court stated that testimony concerning a pre-trial identification of a defendant should be suppressed if the identification procedure was impermissibly suggestive and, under the totality of the circumstances, the suggestiveness gave rise to a substantial likelihood of misidentification. The taint which renders an identification procedure impermissibly suggestive must come from the method used in the identification procedure. An identification procedure is impermissibly suggestive when it leads the witness to an all but inevitable identification of the defendant as the perpetrator, or is the equivalent of the authorities telling the witness, "this is our suspect."

Appellant argued that the lineup was impermissibly suggestive because the officer who conducted it utilized a simultaneous photo array rather than a sequential photo array. The Court disagreed. Here, the Court

found, the officer who presented the lineup of appellant prepared it using photographs of suspects from the same location with the same background wearing similar white shirts. The officer also used photographs of similarly built individuals who had similar features. He did not indicate to the victims that they should be looking for either suspect, and he even told them that the suspect may not be in the array and that they should not identify someone as a suspect unless they were 100 percent sure of their identification. The mere fact that one victim was unable to identify appellant's co-defendant did not mean that appellant's lineup was impermissibly suggestive, and the Court stated, "[W]e decline to hold that a simultaneous lineup is impermissibly suggestive as a matter of law." Based on the testimony of the officer who prepared and presented the lineup to the victims, the Court held that the trial court did not err by denying the motion to suppress the victims' respective out-of-court identifications of appellant.

Guilty Pleas

Garza v. State, A13A1901 (1/8/14)

Appellant appealed from the denial of his motion to withdraw his plea of guilty to a violation of the Georgia Street Gang Terrorism and Prevention Act and to the offense of aggravated assault. The record showed that appellant was sentenced in 2010, but did not move to withdraw his plea for almost 3 years. The Court stated that when the term of court has expired in which a defendant was sentenced pursuant to a guilty plea, the trial court lacks jurisdiction to allow the withdrawal of the plea. A trial court, however, may grant a motion for withdrawal filed outside the term of court in which sentence is imposed, where

that sentence is void and the motion was filed prior to resentencing.

Appellant argued that his sentence was void because the indictment underlying his conviction was void due to the participation of an ineligible grand juror. The Court found that the grand juror in question, who served as the foreperson, was ineligible to serve under O.C.G.A. § 15-12-60(b) because he was an elected city councilman at the time of his service. Thus, the Court agreed, this rendered the indictment void.

However, the Court stated, the fact that appellant's convictions arose from a void indictment did not render his sentence void. A sentence is void if the court imposes punishment that the law does not allow. Whether a sentence amounts to "punishment that the law does not allow" depends not upon the existence or validity of the factual or adjudicative predicates for the sentence, but whether the sentence is one that legally follows from a finding of such factual or adjudicative predicates. A lawful sentence can be imposed only upon the adjudicative predicate of a lawful conviction. Nevertheless, a defendant cannot assert a claim that his conviction was unlawful in an untimely motion to vacate his sentence simply by dressing it up as a claim that his sentence was void. Instead, a claim that a conviction was unlawful must be asserted by a motion for new trial, direct appeal from the judgment of conviction, extraordinary motion for new trial, motion in arrest of judgment, or petition for the writ of habeas corpus.

Here, the Court found, appellant's ten-year sentence fell within the range of permitted sentences for his convictions for violating the Georgia Street Gang Terrorism and Prevention Act and for aggravated assault. Moreover, appellant's challenge to his conviction based on the service of an ineligible person on the grand jury is a claim that can be waived. Consequently, appellant's sentence was not void because it did not amount to punishment that the law does not allow. Accordingly, the trial court lacked jurisdiction to allow appellant to withdraw his plea.