

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 11, 2011

Legal Services Staff Attorneys

Stan Gunter
Deputy Executive Director

Chuck Olson
General Counsel

Joe Burford
Trial Services Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Coordinator

Gary Bergman
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

THIS WEEK:

- **Out-Of-Time Appeal; *Garza***
- **Merger**
- **Inconsistent Verdicts**
- **Ineffective Assistance of Counsel; Merger**
- **Jury Instructions; Character Evidence**
- **Ineffective Assistance of Counsel**
- **Restitution**

Out-Of-Time Appeal; *Garza*

Shelton v. State, A10A2191 (1/24/11)

Appellant pleaded guilty to aggravated assault with intent to rape and kidnapping. He contended that the trial court erred in denying his motion for an out-of-time appeal based on ineffectiveness of counsel. In order for an out-of-time appeal to be available to a defendant on the basis of alleged ineffective assistance of counsel, the defendant must have had the right to file a direct appeal. Following the entry of a guilty plea, a direct appeal will lie only if the issue on appeal is capable of resolution by reference to facts on the record. But here, appellant argued that his counsel was ineffective in his representation and provided misinformation to induce his guilty plea. Under these circumstances, his claims could not be resolved by reference to facts contained in the record and had to be developed in a post-plea hearing. Consequently, the trial court did not err in denying the motion for an out-of-time appeal; appellant's remedy had to be pursued in a habeas corpus action.

Appellant also argued that his kidnapping charge was void in light of *Garza v. State*, 284 Ga. 696 (2008). He argued that his case was

pending in the "pipeline" at the time of the *Garza* decision, and thus, the new test should have been applied in his case. Under the "pipeline" approach, "a new rule of criminal procedure will be applied to all cases then on direct review or not yet final." Appellant's case, however, had been finalized and was not pending on direct review when the *Garza* decision was rendered and thus, his case was not in the "pipeline." Moreover, pretermitted whether the holding in *Garza* was otherwise subject to retroactive application in a collateral appeal, the Court also found that applying the *Garza* test in this case would not have resulted in the reversal of appellant's conviction.

Merger

Muckle v. State, A10A2292 (1/26/11)

Appellant was convicted of voluntary manslaughter and aggravated assault. Count 1 of the indictment averred that appellant committed voluntary manslaughter in that during the commission of an "aggravated assault, [she] cause[d] the death of the [victim], by stabbing him with a knife while acting solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person." Count 2 of the indictment averred that appellant committed aggravated assault in that she did "unlawfully commit an assault upon the [victim] by stabbing him with a knife, an object which when used offensively against a person is likely to result in serious bodily injury." Appellant contended that the two charges should have merged. The Court agreed and reversed for resentencing.

Georgia law bars conviction and punishment of all crimes which arise from the same criminal conduct and are as a matter of law or

a matter of fact included in the major crime for which the defendant has been convicted. Here, a separate judgment of conviction and sentence for aggravated assault would be authorized only if the indictment averred, and the State proved, that appellant committed an aggravated assault independent of the act which caused the victim's death. But, appellant was charged in the indictment with voluntary manslaughter and aggravated assault for the stabbing of the victim, and the undisputed evidence at trial showed that the victim was stabbed one time in the chest, causing the victim's death. Therefore, appellant's conviction for aggravated assault merged as a matter of fact into her conviction for voluntary manslaughter.

Inconsistent Verdicts

Konecny v. State, A11A0184 (1/26/11)

Appellant was convicted of arson, concealing the death of another, tampering with evidence and possession of a firearm during the commission of a felony. He was acquitted on six charges, including aggravated assault. Appellant contended that his conviction on the possession of a firearm during the commission of a felony should be reversed because the felony was aggravated assault and he was acquitted of that charge. The Court disagreed. A defendant's acquittal on a predicate offense does not authorize the reversal of a conviction for possession of a firearm during the commission of that offense because an appellate court cannot know and should not speculate why a jury acquitted on the predicate offense and convicted on the compound offense. Therefore, the trial court did not err when it convicted appellant of possession of a firearm during the commission of an aggravated assault even though he was acquitted of the aggravated assault.

Ineffective Assistance of Counsel; Merger

Murray v. State, A10A1731 (1/26/11)

Appellant pleaded guilty to one count of robbery, two counts of armed robbery, and two counts of aggravated assault with a deadly weapon. He contended that his plea counsel performed deficiently in failing to argue for the merger of his armed robbery and aggravated assault convictions and sentences, arguing that the offense of armed robbery included

the offense of aggravated assault as a matter of fact. Here, the armed robbery counts in the indictment provided that appellant "unlawfully with intent to commit theft, did take property, to-wit: U.S. currency, from the person of [victim], by use of an offensive weapon, to-wit: a steel rod" Similarly, the aggravated assault counts provided that appellant did "unlawfully make an assault upon the person of [victim] with a steel rod, a deadly weapon, an object, which, when used offensively against a person, is likely to or actually does result in serious bodily injury, by beating the said [victim] about the head and face with said steel rod. . . ." The Court also examined the statement of facts given by the prosecutor during the plea colloquy. The Court found that given these underlying facts, as described in the indictment and during the initial guilty plea hearing, the aggravated assault with a deadly weapon charges did not require proof of a fact that the armed robbery charges did not likewise require, and thus, appellant's aggravated assault convictions merged into his armed robbery convictions. Accordingly, the aggravated assault convictions and the sentences entered for them were vacated, and the case remanded to the trial court for resentencing.

Jury Instructions; Character Evidence

Ware v. State, A10A1998 (1/26/11)

Appellant was convicted of the sale of cocaine. He argued that the trial court erred in its answer to a question by the jury during deliberations. The record showed that the trial court instructed the jury that "the offense charged in this accusation is sale of cocaine, which provides that it is unlawful for any person to sell any quantity of cocaine, which is a controlled substance. Sale means to transfer property, actually or constructively, for consideration either in money or its equivalent. The term sale is generally given a broader definition in the drug context than in other fields of law, so as to include not only the exchange of goods for valuable consideration, but also barter and gift and often the offer or agreement to sell, exchange, give or otherwise transfer the drugs to another." The jury was given a written set of jury instructions as well. Thereafter, the jury sent out a note, stating, "Can we have the specific definition of 'SALE'"

from OCGA [§] 16-13-30? Or is that what we have, word for word." After discussing the matter with the parties, and over appellant's objection, the trial court referred the jury back to the instructions it gave on the definition of sale in the written instructions.

The Court stated that when the jury requests the court to recharge it on any point, it is the court's duty to do so. Such further instruction must be in plain, clear language calculated to enlighten rather than confuse the jury. Appellant contended that the court's recharge was reversible error because it failed to answer the jury's specific question of whether the charge contained a word-for-word definition of "sale" and therefore, it left the jury with the impression that it did. He also argued that the recharge was confusing and may have had the effect of depriving him of his sole defense that his conduct amounted to purchasing, not selling, cocaine. The Court found that the original charge given by the court was correct and appropriate for the case. And, given that there is no definition of "sale" in the relevant Code sections, the court was faced with the possibility of confusing the jury about whether such a definition must be in the statute as opposed to case law. Therefore, the trial court acted within its discretion by simply referring the jury back to the correct charge rather than giving a lengthy explanation of the absence of a word-for-word definition in the Code. Furthermore, given that the charge was correct as given initially, the charge did not deprive appellant of any legitimate defense to his actions.

Appellant also contended that the trial court erred by ruling the State was not required to redact from a recording allegedly irrelevant and prejudicial statements he made during the course of the offense. He argues the recordings put his character in issue even though he had not opened the door to such testimony. The evidence showed that appellant drove with an undercover officer posing as a person looking to buy cocaine. During their drive, appellant bragged about having the ability to get drugs and to avoid serving jail time because he had other people—"mules"—who "took all the heat, but tried to pin it on him." The Court found that evidence of statements made by the defendant during the commission of the offense were admissible as part of the *res gestae* of the crime even if it put the defendant's character in evidence.

Ineffective Assistance of Counsel

Long v. State, A11A0227 (1/27/11)

Appellant was convicted of burglary. He contended that his counsel rendered ineffective assistance when counsel appeared for the second day of trial while under the influence of alcohol. In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that counsel's performance was deficient and that the deficient performance so prejudiced the client that there is a reasonable likelihood that, but for counsel's errors, the outcome of the trial would have been different.

The record showed that, on the second day of trial, defense counsel was cross-examining an investigator when, outside the presence of the jury, the investigator told the trial judge that counsel's "breath reek[ed] of alcohol." Counsel responded to this by admitting that he had had a drink before going to bed the previous evening but stated that he was clear-headed and sober that morning and that his judgment was not impaired. Appellant also volunteered that he wanted his attorney to continue to represent him. The trial judge evaluated counsel's performance that morning and found that there were no deficiencies in how he was cross-examining the investigator. The trial judge then adjourned the trial until the following day.

The Court found that appellant failed to show that his trial counsel was actually intoxicated on the second morning of the trial. Also, nothing in the record showed that the trial court erred in finding that there were no deficiencies in counsel's performance that morning. Furthermore, appellant failed to show that his counsel's performance after consuming alcohol affected the outcome of his trial, and therefore, he failed to satisfy his burden of showing prejudice.

Restitution

Mayfield v. State, A10A1862 (1/26/11)

Appellant was convicted of first degree arson. She contended that the trial court erred in ordering her to pay \$28,299.38 to Kanche, the owner of the property. Specifically, she argued that there was no reliable evidence of the amount of damages, that Kanche failed to

prove fair market value of the house before and after the damage, and that Kanche lacked sufficient knowledge to opine regarding damages.

Under the restitution statute, a victim of property damage is entitled to "all special damages which a victim could recover against an offender in a civil action. . . based on the same act or acts for which the offender is sentenced. . . ." OCGA § 17-14-2 (2). The general rule for the measure of damages involving real property is the diminution of the fair market value of the property and/or the cost of repair or restoration. Repair or restoration costs can be used even though they exceed the diminution in value of the property, but they are limited where restoration to the condition at the time of destruction would be an absurd undertaking. Here, Kanache, who was also a contractor, testified that the house was worth "about \$170,000." Kanache testified that he repaired houses himself and that, in his own estimation as a contractor, the total cost of the repairs—labor plus materials—was \$41,925. Thus, the Court found, evidence was presented to show the cost of repairs and its relation to the value of the house prior to the fire, in accordance with the law of damages to real property and that the repairs were not an absurd undertaking under the circumstance.

The Court also held that the fair market value of the home prior to and after the fire was not a necessary element of the claim and that appellant's claim that the estimated repair cost was "mere conjecture" was without merit. Here, Kanche testified that he was a real estate investor, that he repaired houses, and that he has done contracting work. He analyzed the different items that needed to be repaired, such as gutters, roof, plumbing, etc. He obtained an estimate from a contractor regarding the repairs but chose to prepare an estimate himself. The Court stated that one need not be an expert or dealer in the article, but may testify as to value if he has had an opportunity for forming a correct opinion. Moreover, the owner of property is considered to be qualified to state his opinion as to value. Therefore, evidence of Kanche's background provided some evidence to show that he had knowledge, experience or familiarity with the cost of repairs, the value of real estate, and the extent of the damages to his property.

Finally, the Court rejected appellant's claim that the trial court erred by failing to make written findings of fact. A trial court or

other ordering authority is no longer required to make written findings when ordering an offender to make restitution.

