Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 24, 2012

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THIS WEEK:

Insanity; Burdens of Proof

Newman v. State, A11A2261 (2/13/2012)

In 1998, appellant entered a special plea of not guilty by reason of insanity to charges of malice murder, felony murder, and four counts of aggravated assault. Appellant was ordered into the custody of the Department of Human Resources, and she has since remained committed for inpatient involuntary treatment pursuant to OCGA § 17-7-131 (e) (4). In February 2011, appellant filed a petition for release under OCGA § 17-7-131 (f), alleging that she no longer met the inpatient civil commitment criteria. Appellant challenged the trial court's decision and contended that the trial court failed to consider the credible and relevant expert testimony showing that she no longer needed inpatient involuntary treatment.

The Court found no error and affirmed, holding that after a plea of insanity has been successfully entered, a presumption of continuing insanity arises. A defendant who files an application for release has the burden of rebutting the presumption and proving by a preponderance of the evidence that inpatient involuntary treatment is no longer required. At a release hearing, appellant presented the testimony of her attending physician and her behavior specialist. The attending physician testified that he began evaluating appellant in January 2010. He stated that appellant's current diagnosis was chronic schizophrenia paranoia. Although appellant's experts expressed opinions that she no longer met inpatient civil commitment criteria and was eligible for outpatient treatment, the experts also gave inconsistent testimony that supported the trial court's findings to the contrary. Significantly, the expert testimony reflected that appellant had a physical altercation with a patient in January 2006; more recently in 2010, she relapsed and experienced an auditory hallucination after the trial court denied her prior request for release, which led to an increase in her medications; and differing opinions existed among her treating physicians as to whether she met the release criteria.

The aforementioned evidence permitted a finding that appellant failed to rebut the presumption of continuing insanity and that inpatient involuntary treatment was still required.

Theft by Taking; Venue

Gautreaux v. State, A11A2319 (2/13/2012)

Appellant was convicted of felony theft by taking. She contended that the State failed to prove venue and that the trial court erred in not allowing her to cross-examine the victim about his efforts to reduce his tax liability. Specifically, appellant argued that the State failed to establish that she received any stolen money in Troup County from June 30, 2007 through December 8, 2008.

OCGA § 16-8-2 provides that "[a] person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates

any property of another with the intention of depriving him of the property[.]" In the trial of a theft by taking case, the crime shall be considered as having been committed in any county in which the accused exercised control over the property which was the subject of the theft, OCGA § 16-8-11, and the State bears the burden of proving that the defendant exercised control over the property taken in the county where the case was prosecuted. In a prosecution for theft by taking checks in one county and depositing them into a bank account in another county, venue is proper in either county.

In this case, the company president testified that Cammon Steel was located in Troup County, and that appellant worked at the company office from 2001 until sometime in 2008, when she began working from home. The State established that appellant wrote 13 checks at the Troup County office between June 30, 2007 and January 1, 2008, in which the amount of the check cashed exceeded the amount entered into the computer register, and the total amount of the difference was more than $500. This evidence was sufficient to establish venue beyond a reasonable doubt and to sustain appellant's conviction for theft by taking.

Search & Seizure

Jones v. State, A11A2425 (2/13/2012)

Appellant was convicted of DUI-less safe, DUI-per se, and driving without a license on his person. The evidence showed that a deputy was answering a domestic disturbance call and stopped appellant from when the deputy noticed a vehicle leaving the driveway of address of the call. Appellant contended that the trial court erred in denying his motion to suppress because the police lacked articulable suspicion or probable cause to stop his vehicle because, among other things, there was no description of the suspect or vehicle, the area was densely populated and the split driveway serviced several homes, and there was no testimony about the elapsed time between the alleged crime and when his vehicle was stopped. The Court found that it was reasonable for the deputy to infer, based on his training, experience, and common sense, that upon arriving in the vicinity of the area where law enforcement was dispatched because of a domestic disturbance and shots fired, and being informed by another deputy that the vehicle was pulling out of the driveway, and seeing only appellant's vehicle pulling out of a driveway, that appellant might have been involved in criminal wrongdoing, specifically the incident under investigation. Under the totality of circumstances, the stop was neither arbitrary nor harassing, but was based on a founded suspicion of criminal activity. Appellant did not challenge the validity of the subsequent DUI investigation, which ultimately resulted in his arrest. Therefore, the trial court did not err in denying appellant's motion to suppress, and his conviction was affirmed.

Sexual Exploitation of a Child; Sentencing

Tindell v. State, A10A0945 (2/13/2012)

Appellant had entered a plea of guilty to several counts of sexual exploitation of children based on his knowing possession of digital video and digital still images of minors engaged in sexually explicit conduct. In one of the videos, the basis of Count 1 of the indictment, the child was restrained and bound during the sexual acts. Appellant entered a negotiated plea of guilty with a recommendation of fifteen years to serve five, the balance to be served on probation. The trial court ruled that the child shown bound in the video related to Count 1 was a restrained victim as contemplated by OCGA § 17-10-6.2 (c) (1) (F), and thus it could not depart from the mandatory minimum sentencing of OCGA § 17-10-6.2 (b).

In Hedden v. State, 288 Ga. 871 (2011), the Georgia Supreme Court held that the trial court erred in determining that it was without discretion to deviate from the minimum sentencing requirements of OCGA § 17-10-6.2 (b). The trial court had found that Hedden's possession of a photographic image of a victim being restrained precluded a downward departure from the mandatory minimum sentencing under OCGA § 17-10-6.2 (c) (1) (F). *Hedden*, 301 Ga. App. at 854-855. Per OCGA § 17-10-6.2 (c) (1),"the court may deviate from the mandatory minimum sentence as set forth in subsection (b) of this Code section, or any portion thereof, provided that" several factors exist, including that "the victim was not physically restrained during the commission of the offense." OCGA § 17-10-6.2 (c) (1) (F). The Georgia Supreme Court held that, despite possessing images depicting such behavior, because there was no evidence showing that "the child victims in the images were physically restrained at the same time that the appellants possessed the offending material," OCGA § 17-10-6.2 (c) (1) (F) did not exclude the trial court from having the sentencing discretion set forth in OCGA § 17-10-6.2 (c) (1). *Hedden*, 288 Ga. at 876.

Based upon the Georgia Supreme Court's recent decision in *Hedden*, the Court concluded that the trial court erroneously failed to exercise its discretion to determine whether appellant was entitled to a downward departure from the mandatory minimum sentence per OCGA § 17-10-6.2 (c) (1). Accordingly, appellant's sentence is vacated, and this case is remanded for resentencing in light of the Supreme Court's decision in *Hedden*.

Controlled Substances; Khat (Cathinone)

Mohamed v. State, (2/16/2012,) A11A2289

Appellant was convicted of possession of cathinone, a Schedule I controlled substance, in violation of the Georgia Controlled Substances Act. He challenged the sufficiency of the evidence and argued that the trial court erred by denying his motion to exclude the report and testimony of the State's expert based on the State's willful failure to comply with the Georgia Criminal Discovery Act. The Court agreed with appellant and therefore reversed.

Appellant testified that he was born in Somalia, where khat is legal and widely used, including at weddings and other parties. He further explained that khat is harvested from plants; fresh khat is green, and it turns darker within three or four days after harvesting. Appellant testified that Somalians do not ingest khat until at least two days after harvest so that the chemicals will "go out," and it won't be "too strong." He further stated that it takes three to five days for khat to arrive from Africa to the United States, and "the strong chemicals are gone" by the time it arrives in the U. S.

The State was required to prove that appellant intended to possess khat with knowledge that it contained cathinone, which was the controlled substance specified in the accusation. The State failed to do so. Appellant testified that, to his knowledge, the chemicals "[went] out" of khat after two days, and shipping from Africa to Atlanta took more than

three days. The state crime lab chemist, who was qualified as an expert in the field of drug identification, testified as follows regarding the plant material he tested in this case: The plant or the chemicals themselves start as the cathinone in a —if it comes from a natural source, it will start in that plant material as cathinone. And then once the plant has died or been cut or somehow removed the cathinone will degrade into a chemical known as cathine. When asked whether cathinone would be expected to degrade out of a khat plant within 48 hours after the plant is harvested, the expert responded that there would be cathinone starting with the fresh plant, but the cathinone would definitely be less 48 or 72 hours after. And regarding whether it totally disappears, he had no firsthand knowledge of experiencing ". . . a plant that's been freshly harvested versus one that's come in, versus a certain length of time from harvesting."

Hence, given (1) the State's expert witness's testimony that cathinone converts into cathine, another chemical that appellant was not charged with possessing, after some period of time and that cathinone is undetectable without the use of scientific testing equipment; (2) evidence that the khat in this case was harvested more than two days before its subsequent arrival in Clayton County; (3) appellant's testimony that he believed the chemical "[went] out" of the khat after two days; and (4) the lack of evidence that appellant made any attempt to conceal the nature of the package (by, for example, evading police or showing false identification), the Court concluded that the State failed to establish that appellant knowingly possessed the khat with the knowledge that it contained cathinone. Thus, the evidence was insufficient to support his convictions.