Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 26, 2010

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THIS WEEK:

Possession of Knife During Commission of Crime; Identification

Johnson v. State A10A0322

Appellant was convicted of one count each of criminal damage to property in the second degree, possession of a knife during the commission of a crime, carrying a concealed weapon, and misdemeanor obstruction of a law enforcement officer. He was acquitted of entering an automobile with intent to commit theft. He argued that his conviction for possession of a knife under OCGA § 16-11-106 (b) must be overturned. The Court agreed. Although entering an automobile with intent to commit a theft is a predicate act which would support a conviction for possession of a knife during the commission of a crime, appellant was acquitted of this charge. Furthermore, his possession of a knife during the commission of a crime conviction could not be based on his conviction of criminal damage to property in the second degree as that felony is not listed as a predicate crime under OCGA § 16-11-106 (b).

Appellant also contended that the trial court erred by denying his motion to suppress any eye witness identification of him, arguing that the showup identification was impermissibly suggestive. The evidence showed that the witness watched appellant try to cut into the top of a convertible with a knife. She called 911 and described the person, who then left the area. A short time later, the police brought appellant back to the scene and had the witness identify him while appellant sat in a patrol car. The Court held that such on-the-scene showup identifications, like the one here, are not impermissibly suggestive but necessary due to the practicabilities inherent in such situations. The mere fact that appellant was sitting in a patrol car does not make his identification impermissibly suggestive. Here, the witness watched appellant for a few minutes as he attempted to cut the top of the convertible, and although the incident occurred at night, she testified that the parking lot was fairly well-lit. Furthermore, she identified appellant less than 15 minutes after the incident occurred. Accordingly, the trial court did not err by denying appellant's motion to suppress.

Appellant also contended that the witness's in-court identification of him was impermissibly tainted by the fact that prior to a preliminary hearing, she saw him while he was shackled, dressed in prison garb, and being escorted into the courthouse by a sheriff's deputy. The evidence showed that a deputy allowed her to get on an elevator with the deputy and appellant as the deputy was escorting appellant to court. The Court stated

that pretermitting whether the sheriff's deputy should have taken better precautions to insure the integrity of the identification process, the in-court identification was not impermissibly tainted by this chance encounter because the identification had an independent origin.

Expert Testimony

Hughes v. State, A09A1925

Appellant was convicted of aggravated child molestation. He argued that the trial court erred in allowing certain testimony from a prosecution expert in the field of treatment of sexually abused children. During the prosecutor's examination of the witness, she was asked, "Is it unusual for children four years of age to make up allegations of sexual abuse?" Appellant's objection was overruled. The Court held that expert opinion testimony on an issue that goes beyond the ken of the average juror is admissible, even if it indirectly comments on the victim's credibility. Such testimony may include a psychologist's evidence that a person with the victim's level of intelligence would have difficulty fabricating a detailed fictional account of abuse, that a child of the victim's age would have difficulty making up a story of abuse, or that a mentally ill victim was capable of distinguishing fact from fiction. Id. On the other hand, *Patterson v. State*, 278 Ga. App. 168 (2006), forbids the admission of expert testimony bolstering a witness's credibility. Here, appellant objected only to those questions that dealt with the general "ability of children of a certain age to distinguish truth from falsity," a type of question which *Patterson* acknowledged to be proper because "the inference to be drawn from the evidence is beyond the ken of the jurors." Although the examination then strayed into the area of the personal ability of the victim herself to fabricate allegations, arguably improper under *Patterson*, appellant failed to object and failed to obtain permission from the trial court for a continuing objection.

Search & Seizure

Rowland v. State, A09A2348

Appellant was convicted of possession of cocaine. She contended that the trial court erred in denying her motion to suppress. The evidence showed that the police responded to a one car accident involving a driver and his passenger, appellant. The driver was being attended to by paramedics. The vehicle was partially blocking the road and needed to be towed. The officers conducted an inventory of the car and located cocaine in a Cross pen box that appellant admitted was hers. Appellant contended that the inventory was unnecessary and therefore illegal.

The Court held that a police seizure and inventory is not dependent for its validity upon the absolute necessity for the police to take charge of property to preserve it. They are permitted to take charge of property under broader circumstances than that. Inventory searches have two purposes: to protect the vehicle and the property in it, and to safeguard the police or other officers from claims of lost possessions. The decisive evidentiary issue in cases involving inventory searches is the existence of reasonableness rather than the existence of exigent circumstances. Here, the officers' actions were reasonable because 1) the vehicle was partially blocking the roadway; 2) the driver, who was injured and being examined by emergency personnel, advised the police that he did not prefer any particular wrecker service; 3) a check of the license plate indicated that there was no insurance on the vehicle, which did not belong to either driver or appellant; 4) neither the driver or appellant expressed a desire that appellant, who was present during the entire exchange, drive the damaged car off of the roadway; and 5) both the driver and appellant had left the scene in the ambulance by the time the wrecker service arrived, effectively leaving the car in the custody of the police.

Fatal Variance; Merger

Haynes v. State, A09A1901

Appellant was convicted of one count of child molestation and one count of sexual battery. He contended there was a fatal variance between the evidence and the charge of child molestation. The indictment alleged in part that appellant committed child molestation by touching the chest, stomach and vaginal area of the victim. Appellant argued that because the evidence showed only that appellant touched the chest and stomach of the victim, a fatal variance occurred. The Court disagreed. A variance between the allegata and the probata is not fatal unless it misinforms the defendant as to the charges against him or leaves him open to subsequent prosecutions for the same offense. Because the statute requires proof of only one act, inclusion in the indictment of more than one such act is mere surplusage. As surplusage, it is unnecessary to constitute the offense, need not be proved, and may be disregarded. Therefore, the indictment in this case put appellant on notice of the acts against which he was required to defend, and he would not be subject to a later prosecution for the same actions alleged in this indictment. Accordingly, no fatal variance occurred.

Appellant also contended that his convictions for sexual battery and child molestation should have merged. The Court, under *Drinkard v. Walker*, 281 Ga. 211, 215 (2006), held that no merger occurred. The sexual battery count charged appellant with touching the inner thigh and breasts of the victim. The Court held that the charge of child molestation was established by evidence that, with the requisite intent, appellant touched the victim's chest and also by evidence that he touched her stomach. The crime of sexual battery was established by evidence that he touched her breasts. "Even if we were to assume that the allegations of contact with the chest and the breasts referred to the same portion of the body, the State also proved child molestation by the separate act of touching the stomach." Therefore, no merger in fact occurred.

Ineffective Assistance of Counsel

Cabrera v. State, A09A1658

Appellant was convicted of trafficking in methamphetamine. At trial, the State called appellant's co-defendant as a witness. The co-defendant had pled guilty to the same charges prior to trial. The co-defendant refused to answer the leading questions of the prosecutor. The prosecutor then sought to have the plea colloquy of the co-defendant admitted as evidence. Appellant's objection successfully precluded it from going out with the jury. Appellant contended that he received ineffective assistance because 1) his lawyer failed to raise a confrontation clause objection when the State began asking leading questions after his co-defendant refused to testify; and 2) his counsel should have objected to the introduction of the plea colloquy into evidence. The Court, without addressing whether the representation received by appellant was deficient, stated that

it was "constrained to conclude that [appellant] cannot show a reasonable probability that the outcome would have been different if his trial counsel had made the proper objections to the prosecutor's questioning of [the co-defendant] and to the introduction of [his] guilty plea into evidence." Here, the trial court instructed the jury on two separate occasions that the questions posed by the attorneys should not be considered as evidence. Also, as to the plea colloquy, the record failed to show that it was published or read to the jury at the time of its admission, and defense counsel made a successful continuing witness objection that precluded the colloquy from going to the jury room after the close of evidence.

DUI; Probable Cause to Arrest

Brown v. State, A10A0526

Appellant was convicted of DUI (less safe); DUI (per se); possession of marijuana (misdemeanor); and violating the sound volume limits for devices within motor vehicles. He contended that the trial court erred in denying his motion to suppress because the officer lacked probable cause for arrest. Specifically, he argued that the officer observed no moving violations, failed to conduct field sobriety tests, and failed to ask whether he had been drinking that night. The Court disagreed. The evidence showed that the officer heard the music emanating from appellant's car before he saw the vehicle and initiated a traffic stop. The officer observed that appellant had trouble getting out of his car, that he was unsteady on his feet and almost fell, that his eyes were glassy and blood-shot, that his body and breath smelled of an alcoholic beverage, that he had marijuana (an illegal intoxicant) in his possession, and that he was driving at night while playing his music loud enough to be heard three quarters of a mile away. This was sufficient probable cause to arrest appellant for DUI.

State v. Encinas, A09A2151

The State appealed from the trial court's order suppressing evidence of Encinas' refusal to take the state administered test. The trial court found that the arresting officer lacked probable cause to arrest. The evidence showed that appellant was stopped for doing 70 in a 55 mph zone. The officer testified that Encinas had bloodshot eyes, an odor of alcohol and failed the HGN test. Encinas refused to comply with any other field sobriety tests. The trial court found this insufficient to arrest for DUI. The Court noted that except for the bloodshot eyes and the smell of alcohol, the officer acknowledged that Encinas did not exhibit other signs of being impaired; he was not unsteady on his feet, nor was his speech slurred. Further, the officer acknowledged that the HGN test was not performed by the officer according to proper procedure.

The State argued that the Court should review the facts de novo and that probable cause to arrest can be supported merely by an experienced officer's observation that a defendant exuded the odor of alcohol and had bloodshot watery eyes. The Court held that de novo review is only appropriate where the facts are stipulated or uncontested. Here, the testimony was conflicting and therefore, the facts as found by the trial court must be judged under a clearly erroneous standard of review. Here, there was no evidence that alcohol affected Encinas's ability to drive and upheld the trial court's determination that there was not probable cause to arrest even though the officer testified that the defendant exuded an odor of alcohol, had bloodshot watery eyes, and refused to take any field sobriety tests. Moreover, there was also the videotape of the stop showing no evidence or erratic driving and Encinas showing no evidence of being impaired.

Appeals; Sentencing

Frazier v. State, A10A0232

Appellant appealed from the denial of his motion to vacate a void sentence. The record showed that appellant was tried and convicted of child molestation in DeKalb County. That conviction was overturned. Before re-trial in DeKalb, he was convicted of child molestation in Fulton County. Thereafter he was convicted on re-trial in DeKalb. The DeKalb trial court took into consideration the Fulton conviction and sentenced him to a term to run consecutively to the Fulton sentence. This conviction was affirmed on appeal. Seven years later, appellant filed the motion to vacate.

Pursuant to OCGA § 17-10-1 (f), a court may correct or reduce a sentence during the year after its imposition, or within 120 days after remittitur following a direct appeal, whichever is later. Once this statutory period expires, a trial court may only modify a void sentence. A sentence is void if the court imposes punishment that the law does not allow. The Court found that the sentence appellant received was within the range allowed by law. There was no evidence of vindictiveness under *North Carolina v. Pearce*, 395 U.S. 711, 89 SC 2072, 23 LE2d 656 (1969), because the Dekalb court affirmatively revealed the court's rationale for the increased sentence and consideration of a criminal conviction obtained in the interim between an original sentencing and a sentencing after retrial is manifestly legitimate. Therefore, the Court dismissed his appeal because appellant failed to show a colorable claim that his sentence was void.

DUI; Out-of-State Witnesses

Yeary v. State, A09A1786

Appellant was convicted of DUI. Prior to trial she filed a motion which sought a ruling from the trial court that the source code for the Intoxilyzer 5000 machine on which her breath was tested was evidence relevant to her defense. The motion alleged that the source code was possessed by CMI, Inc. located in Kentucky and sought a ruling that the source code was relevant solely as a basis to facilitate court-ordered production of a digital version of the source code possessed by CMI in Kentucky.

The Court held that appellant's attempt to gain court-ordered access to evidence she alleged is located in the state of Kentucky is controlled by the Uniform Act to Secure Attendance of Witnesses from Without the State (OCGA § 24-10-90 et al.). The Uniform Act, a reciprocal act adopted by Georgia and Kentucky, sets forth a procedure by which a defendant in a criminal prosecution in this state may seek to compel an out-of-state witness to appear and testify in this state. The procedure requires the Georgia judge make certain findings under the Uniform Act, including a finding that the out-of-state witness is a material witness in the prosecution pending here. OCGA § 24-10-94. The judge's certification of the required findings is then presented to a court of record where the witness lives in the other state for consideration by that judge under the reciprocal provisions of the Act. The Uniform Act may provide access not only to testimonial evidence from

an out-of-state material witness, but also access to relevant, material documentary or like evidence in the possession of the witness. But, the Court held, the Uniform Act does not support a stand-alone request for production (or subpoena duces tecum) for out-of-state documents; rather, a request for documents and like things under the Act must be made ancillary to a request for testimony from an out-of-state witness. Here, appellant's motion sought a relevancy ruling solely to facilitate production of the source code from CMI in Kentucky. There was nothing in the record showing that appellant identified or sought to obtain testimony from a witness who should be compelled to produce the evidence. Therefore, her motion for a ruling to facilitate production of the out-of-state evidence was not in compliance with the Uniform Act, and the trial court did not err by denying the motion.

Davenport v. State, A09A1619

Appellant was convicted of DUI (per se). She contended that the trial court erred in denying her motion under the Uniform Act to Secure Attendance of Witnesses from Without the State (OCGA § 24-10-90 et al.) to issue a subpoena to CMI in Kentucky. Appellant alleged that she suffered from asthma and that the source codes were relevant to determine how and whether the Intoxilyzer 5000 adjusts its calculations for persons who suffer from asthma.

The Court held that a party requesting the presence of an out-of-state witness does not have an absolute right to obtain the witness; the Act requires presentation of sufficient facts to enable both the court in the demanding state and the court in the state to which the requisition is directed to determine whether the witness should be compelled to travel to a trial in a foreign jurisdiction. The party seeking the witness has the burden of showing that the witness sought is a necessary and material witness to the case and the decision whether to grant the process is within the trial judge's sound discretion. Here, although there was some evidence that appellant was having an asthma related episode following her arrest, the Court noted that she offered no medical testimony about the impact her asthma condition had on her breathing capacity or about the status of her condition during the time in question. She also did not show that any breathing difficulties she may have encountered before the breath test were related to her asthma condition. Thus, the trial court was authorized to find that she had not made a sufficient showing that evidence of adjustments made in the Intoxilyzer 5000 source code for asthma sufferers was material to her case. "The evidence presented could also have authorized the trial court to find that she had made a sufficient showing in this regard, but it does not demand such a finding." Therefore, "[b]ased on the particular facts of this case" the Court held that the trial court did not abuse its discretion in refusing to issue an order authorizing issuance of a subpoena to CMI for purposes of obtaining the source code.

Statements; Business Records

Rowe v. State, A09A1969

Appellant was convicted of concealing the death of another person. She argued that her pre-Miranda statements should have been suppressed. The evidence showed that police responded to a report of a dead body at an apartment complex. When the officers arrived, their attention was directed to appellant. Appellant admitted to stabbing her boyfriend in a domestic dispute, but told the officers that he ran off and he then later, he left the state. She consented to a search of her apartment and then agreed to answer more questions at the station. At the station she made another statement. While she was there, officers found the body of her boyfriend behind a dumpster at the apartment complex. Appellant was then read her Miranda rights and confessed to putting him there.

Appellant contended that she should have been informed of Miranda immediately because she was always under "police escort" from the moment the police first questioned her. Therefore, she argued, the police questioning of her from the outset was the functional equivalent of custodial interrogation. The Court disagreed. It held that even if she was a "prime suspect," she would not be entitled to Miranda warnings unless a reasonable person in her position would have believed she was in custody. Here, there was no evidence that she was under any form of restraint or that she had been placed under arrest.

Appellant also contended that the trial court erred in allowing the testimony of the State's fingerprint expert identifying the victim based on his comparison of a post-mortem fingerprint card belonging to the victim and a fingerprint card bearing the victim's known fingerprints. The Court held that a witness identifying business records under OCGA § 24-3-14 does not have to have personal knowledge of the correctness of the records or have actually made the entry himself. The witness laying the foundation for the admission of business records need only be familiar with the method of recordkeeping to testify about the record. Here, the expert testified that he was familiar with GBI's methods of recordkeeping; that the GBI maintained post-mortem fingerprint cards in the regular course of business; and that they were made contemporaneously with autopsies of dead persons conducted at the morgue. Thus, a proper foundation was laid, and the fingerprint cards were properly admitted in evidence as business records.

Search & Seizure; DUI

Stubblefield v. State, A09A2225

Appellant, a diabetic, was convicted of DUI (less safe). The evidence showed that he refused to take the state-administered test. He was taken to a hospital for his diabetic condition. The police then obtained a search warrant for his hospital records and the results of his blood test taken at the hospital were admitted at trial over his objection. Appellant contended that the trial court erred in admitting these results. First, he argued, the search warrant was overly broad. The Court disagreed, finding that the warrant was sufficiently particularized because it was drafted to seek only the hospital's medical records related to his treatment immediately after the traffic stop. Next, he argued, the return on the warrant was untimely. But, the Court held, the fact that a written return of the warrant was not made in a timely fashion, as provided in OCGA § 17-5-29, did not render the warrant invalid. Here, appellant did not contend that he did not receive a copy of the inventory of the medical records seized prior to trial, and he made no showing of prejudice as a result of the delayed filing. Under these circumstances, the delay was a technical irregularity not affecting substantial rights, and the trial court properly refused to suppress the records.

Appellant also argued that the physician who administered the blood test to him in the

hospital emergency room testified that the test result showed that he had an alcohol level of 287 milligrams per deciliter, and that this equaled .287 grams per deciliter. He contended that the trial court erroneously overruled his objection that the physician had not been qualified as an expert capable of calculating that .287 grams equals 287 milligrams. The Court found that although the State did not formally tender the physician as an expert, the trial court tacitly or impliedly accepted her as an expert after her medical qualifications were presented and the State proceeded, without objection, to ask her for expert opinion evidence. Having testified that the test result showed an alcohol level of 287 milligrams per deciliter, the physician did not have to demonstrate additional expert qualifications to make the simple mathematical calculation that 287 milligrams equals .287 grams. The Court then stated it would take judicial notice that a milligram is a unit of mass equal to one thousandth of a gram.

Evidence; Marital Privilege

Sherman v. State, A09A2187

Appellant was charged with criminal trespass, family violence battery, family violence simple battery, and cruelty to children in the third degree. The jury convicted him of only simple battery and trespass. The charges all arose out of a domestic dispute with his estranged wife. He contended that the trial court erred by compelling his wife to testify after she invoked her marital privilege. Under OCGA § 24-9-23 (b), an exception to the privilege applies "in proceedings in which the husband or wife is charged with a crime against the person of a minor child. . . ." The issue was whether cruelty to children in the third degree (OCGA § 16-5-70 (d) qualifies as a "crime against the person of a minor child." Appellant argued that only crimes against children that have a physical component qualify. The Court disagreed. It noted that OCGA § 16-5-70 is found in Title 16, Chapter 5 of the Criminal Code which is entitled "Crimes Against the Person." Also, OCGA § 16-5-70 specifically includes "mental pain" in its felony provisions. Finally, under appellant's flawed reasoning, simple assault under OCGA § 16-5-20 (a) (2) ("an act which places another in reasonable apprehension of immediately receiving a violent injury") would not qualify but is certainly a crime against a person despite the lack of physical contact. Therefore, the Court concluded, a charge of cruelty to children in the third degree under OCGA § 16-5-70 (d) triggers the exception to the marital privilege for a "crime against the person of a minor child."

Appellant also argued under OCGA § 24-9-27 (a) that the trial court erred in compelling his son to testify against him. The section provides that "[n]o party or witness shall be required to testify as to any matter which may criminate or tend to criminate himself or which shall tend to bring infamy, disgrace, or public contempt upon himself or any member of his family." The Court held that the rule does not apply if the proposed evidence is material to the issues in the case as opposed to where the proposed answer has no effect on the case except to impair the credibility of the witness. Here, the son's testimony was material to the issues in that he knew his father had broken the window of his mother's apartment and he gave a statement to the police that he had overheard his parents fighting. The trial court did not, therefore, abuse its discretion in compelling the child's testimony.