Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 1, 2013

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THIS WEEK:

Aggravated Stalking; Family Violence Protective Orders

Edgecomb v. State, A12A1823, (2/20/13)

Appellant was convicted of violating a family violence protective order as a lesser included offense of the indicted offense of aggravated stalking. He argued that the trial court erred by instructing the jury on the lesser included offense. The Court agreed and reversed.

The evidence showed that appellant and the victim were divorced when the victim obtained a "Stalking Twelve Month Protective Order," pursuant to O.C.G.A. § 16-5-94 which enjoined appellant from approaching within 500 yards of the victim or her residence. A person commits the offense of violating a family violence order when the person knowingly and in a nonviolent manner violates the terms of a family violence temporary restraining order, temporary protective order, permanent restraining order, or permanent protective order *issued against that person pursuant to Article 1 of Chapter 13 of Title 19*, which [order restricts certain behavior of such person]. (Emphasis supplied) The Court stated that because this is part of the criminal Code, it is to be strictly construed. Accordingly, the entire list of protective and restraining orders is modified by the language "issued against that person pursuant to Article 1 of Chapter 13 of Title 19," which refers to the Code sections dealing with family violence orders, i.e., O.C.G.A. §§ 19-13-3 and 19-13-4, but not stalking protective orders. Thus, the offense of violating a family violence order can only be committed by violating an order issued pursuant to that portion of the Code.

By contrast, the order violated here was issued pursuant to O.C.G.A. § 16-5-94, which authorizes protective orders when a person alleges stalking by another person. O.C.G.A. § 16-5-94 requires an allegation of additional conduct defined as stalking, i.e., that the conduct is done "for the purpose of harassing and intimidating the other person." Thus, "reading these two code sections together, and strictly construing them, violation of an order issued pursuant to O.C.G.A. § 16-5-94 (stalking protective order) is not equivalent to violation of an order issued pursuant to O.C.G.A. § 19-13-4 (family violence protective order)."

Therefore, the trial court erred by instructing the jury that it could convict appellant of violating a family violence protective order, especially in light of the fact that the trial court defined such orders as essentially any protective order. Appellant was never subject to a family violence protective order, and the trial court's overbroad definition in its jury charge misled the jury to believe it could find him guilty of a lesser offense unrelated to his indicted offense. In so holding, the Court rejected the State's

argument that under the language in O.C.G.A. § 16-5-95(c) (pertaining to the violation of a family violence order), a family violence order violation is, as a matter of law, a lesser offense included in aggravated stalking. The Court held, "In a different case, with different facts involving a family violence order, this might be correct." But here, it was undisputed that there was no family violence order issued against appellant, and he was not accused of violating one, so the jury was not authorized to convict him of such a charge.

Aggravated Battery; Correctional Officers

Taylor v. State, A12A2366 (2/21/13)

Appellant was convicted to aggravated assault on a correctional officer and felony obstruction of a correctional officer. The evidence showed that appellant, an inmate, struck a correctional officer twice in the face, breaking his jaw. He contended that the trial court erred by denying his motion for a directed verdict of acquittal as to the charge of aggravated battery on a correctional officer because the State failed to establish proof that the victim was "certified by the Georgia Peace Officer Standards and Training Council pursuant to Chapter 8 of Title 35" as required under O.C.G.A. § 16-5-24(e)(1). The Court agreed, and reversed his conviction.

In 1985, the Georgia Legislature passed an act "[t]o amend [the Code] relating to crimes of battery, so as to define the crime of . . . aggravated battery upon a correctional officer [and] to define the term 'correctional officer.'" O.C.G.A. § 16-5-24(e)(2) states that "[a] person who knowingly commits the offense of aggravated battery upon a correctional officer . . . engaged in . . . his duties" is subject to an increased term of imprisonment for the offense. The Code section defines "correctional officer" as "… guards, and correctional officers of state, county, and municipal penal institutions who are certified by the Georgia Peace Officer Standards and Training Council pursuant to Chapter 8 of Title 35… The term 'correctional officer' shall also include county jail officers who are certified or registered by the Georgia Peace Officer Standards and Training Council pursuant to Chapter 8 of Title 35."

The Court stated that this language indicates that the Georgia Legislature intended to create a "separate and distinct crime" from aggravated battery rather than a separate, enhanced penalty based on the victim's status at the time of the battery. Thus, because aggravated battery of a correctional officer is a distinct crime, it requires proof of the essential element of knowledge on the part of the defendant that the individual was a correctional officer at the time of the battery. Therefore, since the State failed to prove that the victim was so certified, the conviction must be reversed.

In so holding, the Court distinguished *Cornwell v. State*, 193 Ga.App. 561, 561-562(1)) (1989). In *Cornwell*, the Court addressed the issue of whether the State was required to present evidence that a victim was certified as a peace officer "by the Georgia Peace Officers Standards & Training Council" in order to establish the crime of aggravated assault of a police officer pursuant to O.C.G.A. § 16-5-21(c). The Court determined that specific evidence of certification was not necessary in order to present sufficient evidence that the victim was a police officer in order to fulfill the statutory elements. Subsections (c) of the aggravated battery and aggravated assault sections, however, do not contain the same language of subsection (e)(1) of those statutes. The Legislature, when it amended both the aggravated assault and aggravated battery code sections, chose to include within the description of correctional officers a requirement that they be "certified by the Georgia Peace Officer Standards and Training Council pursuant to Chapter 8 of Title 35" even though the subsections defining aggravated assault and aggravated battery of a police officer, which were already in existence at that time, did not include such language. And although the Legislature later amended Subsection (e)(1) to include county jail officers, it still chose to include within the description of such individuals the requirement that they be "certified by the Georgia Peace Officer Standards and Training Council pursuant to Chapter 8 of Title 35." Accordingly, *Cornwell* did not control in this instance, and the trial court erred by denying appellant's motion for directed verdict and motion for new trial as to the aggravated battery count. Nevertheless, the Court found, there was sufficient evidence to support a conviction for the lesser-included charge of battery, so the Court remanded in order for a re-trial or re-sentencing as to the lesser-included charge.

Search & Seizure

Rodriguez v. State, A12A2397 (2/19/13)

Appellant was indicted for possession of marijuana with intent to distribute. The Court of Appeals accepted this interlocutory appeal after the trial court denied her motion to suppress. The evidence, briefly stated, showed that an officer was on duty in a marked police cruiser monitoring automobile traffic with an automatic license plate scanning system. The plate recognition system alerted the officer that a vehicle had passed which was associated with Enrique Sanchez, who was subject to a failure to appear warrant. The alert identified the license plate, make, model, and color of the vehicle. The officer pulled over the identified vehicle and made contact with appellant and her female passenger. The officer requested appellant's driver's license, which she provided, and explained that he had stopped the vehicle because it was associated with Sanchez, who was subject to an active warrant. Appellant explained that Sanchez was her son, and he had failed to appear to answer a traffic citation because he had been imprisoned before the hearing. The officer also asked appellant who her passenger was, and appellant identified her as a friend, from whom the officer then asked for identification and was identified as Ereka Williams. Williams was flagged by GCIC as having an outstanding warrant in Florida. A backup officer arrived and while waiting for word on whether Florida was willing to extradite, the officers continued talking with the women. Consent was given to search the vehicle and the marijuana was discovered.

Appellant first argued that the license plate recognition system used by the officer did not provide an adequate basis for the vehicle stop. Specifically, that the arresting officer gave a general description as to how the system works, including that it checks license plates against a GBI database that is updated daily, but the State offered no evidence as to the specifics of how warrants are entered into the system, how they are removed, and how the database accuracy is verified. Therefore, she argued, the State failed to provide the proper foundation as to its reliability under *Harper v. State*, 249 Ga. 519 (1982).

The Court disagreed. *Harper* established the test for the admissibility at trial of expert testimony regarding novel scientific evidence as

to innocence or guilt. By contrast, the database evidence here was not offered as evidence of guilt. Instead, it was offered at the suppression hearing to demonstrate specific and articulable facts that provided a reasonable suspicion that the individual being stopped was engaged in criminal activity or that the driver or vehicle was otherwise subject to seizure for violation of the law. In that context, Georgia courts have not required the foundational protocols of *Harper* to verify each data point of facts articulated to provide a reasonable suspicion. Moreover, although the information here was automatically relayed to the officer by a computer, the Court declined to impose an additional burden on the State to demonstrate in a particularized way the reliability of the database and alert protocol used. Thus, the State provided the particularized factual basis for suspicion: The GCIC had returned information linking Sanchez, a person who was the subject of an active arrest warrant, to appellant's vehicle. Knowing that fact, the officer had a reasonable suspicion that Sanchez could be found driving or riding in the vehicle, and consequently, the officer was authorized to initiate a stop of the vehicle.

Probation Revocation; O.C.G.A. § 42-8-34.1

Sheppard v. State, A12A2084 (2/20/13)

Appellant was granted discretionary review to appeal his probation revocation. The record showed that in 2009, he pled guilty to VGCSA and two misdemeanors. He was sentenced to 5 years of probation on the VGCSA and concurrent sentences on the misdemeanors. In October 2010, the State petitioned to revoke appellant's probation based on allegations that he had committed misdemeanor DUI, misdemeanor battery, and driving with a suspended license and for failing to report, pay fees, and receive drug and alcohol evaluations. Following a hearing, the trial court revoked the balance of his probation (3 years, 8 months, and 11 days) based on the technical violations and findings that he committed a DUI and drove with a suspended license.

Under O.C.G.A. § 42-8-34.1, revocation of up to two years of probation is permitted for the violation of any general provision; revocation of the balance of probation is permitted if the defendant is shown to have committed a felony; and revocation of the balance is permitted if the defendant is shown to have violated a special condition. Here, the Court noted, the State did not present evidence that appellant committed a subsequent felony, so for the revocation to be lawful, the State must have established a violation of a special condition. A "special condition" is defined by O.C.G.A. § 42-8-34.1(a) as "a condition of a probated or suspended sentence[,] which: (1) [i]s expressly imposed as part of the sentence in addition to general conditions of probation and court ordered fines and fees; and (2) [i]s identified in writing in the sentence as a condition the violation of which authorizes the court to revoke the probation or suspension and require the defendant to serve up to the balance of the sentence in confinement." Thus the substantive or essential requirements of O.C.G.A. § 42-8-34.1(a) are that the trial court warn of the consequences of violating a special condition; that the warning be in writing; and that the warning be in the court's sentence.

After reviewing the written sentence given appellant in 2009, the Court found that the sentencing form did not demonstrate substantial compliance with the essential requirements of O.C.G.A. § 42-8-34.1(a). The form failed to distinguish between general and special conditions of probation and failed to specify that a possible consequence of violating a special condition was the revocation of a probationer's entire probation. Accordingly, the trial court erred when it revoked the entirety of appellant's probation. Revocation of more than two years of probation was prohibited, and therefore, the Court remanded the case for resentencing in accord with statutory authority. In so holding, the Court noted that the trial court's oral explanation at the sentencing hearing of what it believed were the special conditions did not require a different result because an oral advisement does not amount to substantial compliance with a statute that requires something to be identified in writing in the sentence.

Search & Seizure; Inevitable Discovery

Schweitzer v. State, A12A2222 (2/21/13)

Appellant was charged with VGCSA. She was granted an interlocutory appeal after the trial court denied her motion to suppress. The evidence showed she was a passenger in a vehicle which was stopped when an officer checked and determined that the license plate was issued to another vehicle. As the officer spoke with the driver, appellant spoke up and stated that the vehicle was her boyfriend's and that he had problems registering it. Appellant at first gave the officer a false name, but when the officer became suspicious and accused appellant of lying, she stated her real name and that she believed there was a warrant outstanding for her. At that point, the officer asked appellant to step out of the vehicle and placed her under arrest, handcuffing her hands behind her back. As a backup officer arrived, the officer retrieved appellant's purse from the truck and placed it on the hood of the truck. Over appellant's objection, the officer looked inside the purse and initially pulled out her wallet with her identification in it, which confirmed her name. After pulling out the wallet and identification, the officer pulled out a small change purse and opened it, discovering what appeared to be methamphetamine.

Under the inevitable discovery doctrine, if the State can prove by a preponderance of the evidence that evidence derived from police error or illegality would have been ultimately or inevitably discovered by lawful means, then the evidence is not suppressed as fruit of an impermissible search or seizure. In other words, there must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the illegal conduct. The Court noted that the initial traffic stop was lawful because the officer had reason to believe that the truck displayed a license plate issued to another vehicle in violation of the law. The officer's conversation with appellant, who professed knowledge of the registration status of the vehicle, was a permissible part of his investigation of the improperly displayed license plate. Since appellant quickly identified herself as the subject of a warrant, the officer had authority to confirm that information and arrest her. Upon her arrest, appellant was subject to being transported to jail for booking, and the officer, who was familiar with and testified about the jail policy of searching an inmate's personal effects, elected to search her purse because he expected them to be inventoried as part of the booking process at the jail. This demonstrated a valid reason to send appellant's purse to the jail with her, and the officer testified as to the jail's inventory policy. Therefore, the Court

discerned no error in the trial court's ruling that the contents of appellant's purse would have been inevitably discovered as part of the booking process associated with her valid arrest.

Child Molestation; Fatal Variance

Hernandez v. State, A12A2007 (2/22/13)

Appellant was convicted of two counts of aggravated child molestation and three counts of child molestation. He argued that the trial court erred in denying his motion for a directed verdict of acquittal as to the aggravated child molestation offenses since there was a fatal variance between the allegations in the indictment and the evidence presented at trial. The Court disagreed.

Our courts have departed from an overly technical application of the fatal variance rule, focusing instead on materiality. The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the accused. It is the underlying reasons for the rule which must be served: 1) the allegations must definitely inform the accused as to the charges against him so as to enable him to present his defense and not to be taken by surprise, and 2) the allegations must be adequate to protect the accused against another prosecution for the same offense. Only if the allegations fail to meet these tests is the variance "fatal." Thus, for example, if the indictment correctly states whose sex organ and whose mouth are involved in the sodomy, there will generally be no fatal variance.

Here, the Court found, the aggravated child molestation allegations of the indictment sufficiently apprised appellant of the charges against him, did not mislead him as to the criminal acts with which he was charged, and adequately set forth the allegations in a manner to protect him against subsequent prosecutions for the offense charged. Moreover, the trial evidence was consistent with the allegations of the indictment and was sufficient to sustain his convictions.

Recidivist Sentencing; Boykin Rights

Foster v. State, A12A2355 (2/20/13)

Appellant was convicted of felony shoplifting and sentenced as a recidivist under O.C.G.A. § 17-10-7(c). He contended that one of the prior felony convictions should not have been considered because he was not specifically advised of one of the *Boykin* rights - the right to a jury trial - during the plea proceeding on the prior offense. Specifically, he argued that the information given him in the plea colloquy was insufficient because the phrase "right to a jury trial" was not used, except in the limited context of withdrawing his plea after sentencing.

However, the Court stated, nothing in *Boykin* requires the use of any precisely-defined language or "magic words" during a guilty plea proceeding. As long as the trial court, in explaining the three constitutional rights an accused must waive in order to enter a valid guilty plea, makes sure the accused has a full understanding of the concepts involved, the appellate courts will not invalidate a guilty plea for failure to use the precise language of those three rights as set forth in *Boykin*. Here, the statements by the court and prosecutor during the plea colloquy, taken as a whole, conveyed the core principle that if appellant did not enter a plea he could have a jury trial. Because the transcript of the plea proceeding in the earlier case reflected that appellant was sufficiently informed of his right to a jury trial, the trial court was authorized to consider evidence of that prior conviction over his objection in sentencing.

Appellant also contended that he was not informed of his right to counsel or to the presumption of innocence during the plea proceeding. But, the Court found, he was represented by counsel and cited no authority supporting his position that a guilty plea is invalid if matters other than the *Boykin* rights are not specifically explained. Accordingly, his conviction and sentence was affirmed.

Search & Seizure

State v. Rogers, A12A1733 (2/21/13)

Appellant was charged with various counts of VGCSA. He filed a motion to suppress which the trial court granted in part. The State appealed, contending that the trial court erred by granting in part appellant's motion to suppress on the basis that the seizure of items including papers, receipts, photographs, and a camera, was overly broad based on the language of the search warrant. The Court agreed and reversed. The record showed that using a CI, law enforcement made two controlled buys of ecstasy and marijuana from appellant's residence. Based on these two buys, law enforcement obtained a search warrant for the residence.

The Court stated that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. The scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible. Evidence may not be introduced if it was discovered by means of a search and seizure which were not reasonably related in scope to the justification for their initiation. A lawful search is limited to that which is described in the warrant. The warrant must particularly describe the things to be seized and the search must be limited to that matter described.

Here, the trial court erred by suppressing evidence, including photographs, receipts, and a camera based on its determination that these "personal items" seized were "outside the scope of the search warrant." The search warrant contained a residual clause allowing officers to search and seize "[e]vidence of the crime of possession and/or the sale/distribution of marijuana and its proceeds, and fruits of the crime," which sufficiently limited the searching officers' discretion to seize only those items (namely, photographs of him within the home, documents bearing his name, and a camera, which could contain photographic evidence of possession of the narcotics) that linked appellant to the marijuana and other contraband discovered in the home. Accordingly, the trial court's order was reversed to the extent that it suppressed these items.

Jury Communications

Reid v. State, A12A1959 (2/19/13)

Appellant was convicted of child molestation and sexual battery. The State's witnesses at trial included the victim's mother and her school counselor, both of whom testified as to the victim's outcry. During the course of its deliberations, the jury sent out a written question wanting to know appellant's response to the officer who took him into custody. The trial court responded in writing: "You must recall the evidence as a group. We cannot answer fact questions nor reopen evidence." The record did not show that the trial court informed either appellant or the State of either the jury's communication or the court's written response.

The jury then found appellant guilty of two of the child molestation counts and both sexual battery counts. He contended that the trial court erred when it failed to notify him of the jury's request to rehear testimony concerning his response to the arresting officer and thus deprived him of the opportunity to provide input on the court's response to that request.

Citing *Burtts v. State*, 269 Ga. 402, 403 (3) (1998) the Court stated that a trial court commits error when it communicates with a jury in the absence of the defendant or his counsel because a defendant on trial must be present when the court takes any action materially affecting his case. There should be no communication which would tend in any manner to prejudice the accused (for instance, to hasten a verdict against him, or to induce jurors who might be for him to yield their convictions); and unless the character of the communication clearly shows that it could not have been prejudicial to the accused, the presumption of law would be that it was prejudicial, and the accused would be entitled to another trial. However, it is within the discretion of the trial court to decide whether to allow a jury to rehear evidence, and here, the Court found, there was nothing in the record to suggest that the trial court abused its discretion in denying the jury's request to rehear testimony. Therefore, even if the trial court erred when it communicated with the jury outside the presence of appellant and his counsel, the error was harmless because appellant had not shown that the trial court's response hastened the verdict or caused a juror to yield his or her convictions.

Mistrials; Manifest Necessity

Julian v. State, A12A2027 (2/20/13)

Appellant appealed from the denial of his motion for discharge and acquittal following the grant of a mistrial at the request of the State. The record, briefly stated, showed that appellant was charged with seven counts of theft by taking. The jury was seated and sworn on December 5, 2011. On December 6, 2011, before the trial commenced, defense counsel stated that the prosecutor had told him the previous night that one of its witnesses, Paul Ho, was not going to appear for trial, and defense counsel moved to exclude any hearsay testimony regarding Ho's statements. Ho's testimony was to be that he had a working relationship with appellant and he was going to testify about prior difficulties. Ho lived in California and the State had allegedly subpoenaed him, but had hoped to have him appear via Skype after Ho did not want to come to Georgia because of the cost. Although defense counsel initially agreed to the use of Skype, he changed his mind after conferring with appellant. He objected to the use of Skype on confrontation grounds.

The next day, the State moved for a mistrial. The trial court noted on the record that "there is a rule regarding giving notice" before introducing testimony via live video-conferencing, and therefore it would not be possible for Ho to testify via Skype. The prosecutor stated that on November 23, 2011, Ho was sent a copy of the subpoena via email and facsimile, but the State failed to actually serve him. After Ho received the fax, he advised the State that he needed to consult with his attorney before committing to coming to Georgia. The week before trial, Ho's attorney told the prosecutor that Ho would not testify at trial because he was worried about possibly incriminating himself and that the State's subsequent offer of immunity did not change Ho's position. So, instead of "go[ing] through the whole procedure in getting him here and asking for a continuance," the State proceeded to trial on Monday and then, that afternoon, offered to allow Ho to testify via Skype; Ho agreed on the condition that the State grant him immunity. The prosecutor argued that it relied on defense counsel's assurances that he would not object to Ho's testimony via Skype and that the State intended to introduce evidence that it could not "link up" without Ho, thereby prejudicing the State. Defense counsel objected to the mistrial, explaining that his agreement to allow Ho to testify via Skype was conditional and that he would not have agreed if the State had disclosed Ho's refusal to testify live and concerns about self-incrimination. The trial court granted the State's motion based on the State's proffer that Ho was "a witness that [was] important to their presentation."

The Court stated that once a defendant's jury is impaneled and sworn, jeopardy attaches and he is entitled to be acquitted or convicted by that jury. If a mistrial is declared without a defendant's consent or over his objection, the defendant may be retried only if there was a "manifest necessity" for the mistrial. A manifest necessity to declare a mistrial may exist under urgent circumstances. Because of the severe consequences of ordering a mistrial without the accused's consent, a trial court should give careful, deliberate, and studious consideration to whether the circumstances demand a mistrial, with a keen eye toward other, less drastic, alternatives, including calling for a recess if necessary and feasible to guard against hasty mistakes. Although appellate courts give "great deference" to a trial court's judgment about whether there was manifest necessity to grant a mistrial, manifest necessity cannot be found where, as here, the mistrial results from the State's decision to proceed to trial without taking the necessary steps to secure the availability of its witnesses. Accordingly, when a prosecutor begins a case without sufficient evidence to convict, and the court grants a mistrial over the defendant's objection, a defendant's plea of former jeopardy should be sustained, even absent bad faith by the prosecutor.

Here, the Court found, the prosecutor preceded to trial and allowed the jury to be sworn and impaneled despite having failed to subpoena Ho properly and despite knowing that Ho had refused to come to Georgia to testify live. The State's argument that it relied on defense counsel's agreement to allow Ho to testify via video conference was not found to be persuasive. The prosecutor admitted that he did not even consider having Ho testify via Skype until the evening after the jury was sworn, at which time he approached defense counsel about that possibility, without first advising counsel that Ho was unwilling to testify live. Defense counsel explained to the trial court that he would not have agreed to Ho testifying via Skype if he known that Ho was otherwise unwilling to testify. Moreover, the State took a calculated risk by impaneling the jury without properly subpoenaing Ho and by mentioning the prior difficulty evidence to the jury before researching the implications of allowing the witness to testify via video-conferencing. Therefore, the Court concluded, as a matter of law, that the mistrial in this case, declared over appellant's objection, did not result from manifest necessity and the trial court erred by denying appellant's motion for discharge and acquittal.