Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 22, 2016

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THIS WEEK:

Definition of Firearms; Disassembled Rifle

Mantooth v. State, 335 Ga.App. 734 (2/18/16)

Appellant was convicted of VGCSA and possession of a firearm by a convicted felon. He contended that the evidence was insufficient to prove his conviction under O.C.G.A. § 16-11-131. Specifically, he contended that the disassembled rifle found in his possession could not meet the definition of a firearm under O.C.G.A. § 16-11-131(a)(2) because it did not possess what he termed the "essential characteristics of a firearm," and the State failed to demonstrate that he could have rendered the weapon capable of firing a projectile. He further argued that this was a case of first impression.

The Court disagreed. Citing *Senior v. State*, 277 Ga.App. 197, 197-198 (2006) and *Bryant v. State*, 169 Ga.App. 764, 764 (1) (1984), the Court noted that it has previously declined to interpret O.C.G.A. § 16-11-131 as requiring proof that a weapon possessed by a convicted felon is actually functional when it is one enumerated within the statutory definition of firearm. And the Court stated, "Today, we likewise decline to interpret O.C.G.A. § 16-11-131 as requiring proof that a weapon possesses the 'essential characteristics of a firearm' when the law does not include such a standard and it is a weapon that is specifically enumerated within the statutory definition of firearm, i.e., a handgun, rifle, or shotgun." Therefore, the Court concluded, because a convicted felon may not possess one of these enumerated firearms, regardless of its state of assembly, the jury was authorized to find that the disassembled rifle was a firearm within the statutory definition.

Criminal Attempt to Commit Aggravated Assault

State v. Harlacher, A15A1856 (3/2/16)

The State charged Harlacher with one count of criminal attempt to commit aggravated assault with a deadly weapon. The evidence showed that Harlacher and the victim got into a physical fight at a bar. After the fight was over, the victim turned and walked away. Harlacher drew a handgun and pointed it at the victim's head but did not fire. The victim never saw Harlacher's gun, continued walking away, and the incident ended without any further violence. The State charged Harlacher with criminal attempt to commit aggravated assault by alleging that he attempted to place the victim in apprehension of receiving a violent injury with a pistol. Harlacher filed a general demurrer, arguing that it is impossible to attempt to commit an aggravated assault, and thus, the indictment failed to allege any criminal offense under the laws of the State of Georgia. The trial court granted Harlacher's demurrer, and the State appealed.

The Court noted that under former O.C.G.A. § 16-5-21(b)(2), "[a] person commits

the offense of aggravated assault when he or she assaults . . . [w]ith a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury . . . ." And under O.C.G.A. § 16-4-1, "[a] person commits the offense of criminal attempt when, with intent to commit a specific crime, he performs any act which constitutes a substantial step toward the commission of that crime." With regard to assault, O.C.G.A. § 16-5-20(a)(1) provides that "[a] person commits the offense of simple assault when he or she . . . [a]ttempts to commit a violent injury to the person of another . . . ." Thus, the Court stated, under the plain language of this statutory provision, simple assault is, in essence, an attempted battery with the focus on the intention of the perpetrator to injure the victim. Therefore, as Harlacher argued and the State conceded, "[w]e know of no law authorizing the conviction for an attempt to commit a crime which itself is a particular type of attempt to commit a crime."

Nevertheless, the Court stated, in stark contrast, O.C.G.A. § 16-5-20(a)(2) provides that "[a] person commits the offense of simple assault when he or she . . . [c]ommits an act which places another in reasonable apprehension of immediately receiving a violent injury . . . ." Accordingly, the focus of a reasonable apprehension of harm type of simple assault, under O.C.G.A. § 16-5-20(a)(2), is on the apprehension of the victim. Given these differences in the elements of the respective offenses, and more specifically the fact that unlike O.C.G.A. § 16-5-20(a)(1), the plain meaning of O.C.G.A. § 16-5-20(a)(2) does not include "attempt" as an element of the offense, it appears feasible to convict an accused of attempting a reasonable-apprehension-of-harm type of assault. However, the Court added, as the State also conceded, the fact that the victim was unaware that Harlacher aimed a handgun at him precludes a conviction of a completed aggravated assault under O.C.G.A. §§ 16-5-21(b)(2) and 16-5-20(a)(2). And although the Court found persuasive the State's logic (as dictated by the plain meaning of the relevant text) that a victim's lack of awareness of a reasonable-apprehension-of-harm type of assault should not preclude a conviction of an attempt to do so when, as here, Harlacher took substantial steps toward committing such a crime, the Court nonetheless stated that it was constrained by precedent that seemingly dictates otherwise. Specifically, *Rhodes v. State*, 257 Ga. 368, 370 (5) (1987) in which the Supreme Court explained that if a "victim is not placed in reasonable apprehension of immediate violent injury by the pointing of [a] firearm, *only* the misdemeanor of pointing a firearm . . . has been committed." (emphasis supplied) Thus, the Court stated, "regardless of the merits of the State's position, our Supreme Court — by implication at the very least — appears to have foreclosed the argument that the victim's lack of a reasonable apprehension of immediately receiving a violent injury can nevertheless result in a conviction for attempted aggravated assault. Accordingly, until such time as the Supreme Court of Georgia clarifies the extent of its holding in *Rhodes*, we are obliged to rule that the trial court did not err in granting Harlacher's general demurrer."

Voir Dire; Juror Dismissals

Jackson v. State, A15A1237 (3/3/16)

Appellant was convicted of four counts of armed robbery, one count of burglary, and one count of possession of a firearm during the commission of a crime. During trial, the trial court dismissed a juror over appellant's objection and replaced the juror with an alternate. The trial court did so after learning that the juror failed to reveal in response to voir dire questioning that he knew appellant's father and after receiving evidence that, during a break in the trial proceedings, the juror had been seen speaking with appellant's father in a parking lot. Appellant argued that the trial court abused his discretion in dismissing the juror. The Court disagreed.

The Court noted that the record showed that after the State brought the issue regarding the juror to the trial court's attention, the trial court inquired into the situation, receiving testimony from the juror and two witnesses to the juror's conversation with appellant's father, and obtaining representations from the prosecutor about the juror's voir dire responses. This provided sufficient grounds for the trial court, in his discretion, to dismiss the juror for legal cause. Furthermore, the Court stated, it could not agree with appellant's assertion that "[n]o evidence was entered into the record showing that [the juror] denied knowing [appellant's] family during voir dire." Instead, the Court found, the prosecutor made representations to that effect to the trial court and attorneys are officers of the court, and an attorney's statement to the court in his place is prima facie true and needs no further verification unless the same is required by the court or the opposite party. At trial, the prosecutor stated to the trial court that he asked specifically about appellant's father, and there was no response at all of any knowledge or friendship or anything by that juror, and appellant sought no further verification. Moreover, without a transcript of the voir dire setting forth the questions asked of the jurors and their responses thereto, the Court stated it could not say that the trial court erred in finding that the juror at issue failed to respond affirmatively when asked if he knew any members of appellant's family. Accordingly, the trial court did not abuse its discretion in replacing the juror.

Miranda; Custodial Statements

Mays v. State, A15A2337 (3/4/16)

Appellant appealed from the trial court's order denying her motion to suppress inculpatory statements she made to a GBI agent without receiving warnings pursuant to *Miranda*. The facts, briefly stated, showed that appellant was on probation and the terms of her probation included that she complete 100 hours of community service by Dec. 7, 2013. On Dec. 6, she was confined for a positive alcohol test, a violation of her probation. The same day, the State filed a probation revocation alleging as grounds the failed alcohol test and the incompletion of her community service. Prior to being taken into custody, appellant submitted a letter dated Nov. 30 from the reverend of a specific church stating that she completed 41 hours of community service. After her arrest and between Dec. 10 and 15, two more letters were received signed by the reverend showing that she completed all 100 hours at his church. Probation found suspicious the composition and timing of these letters. The GBI was called in to conduct an investigation. Eventually, appellant and another were indicted on one count of RICO and three counts of making false statements in relation to the letters.

At issue in this case was the December 13, 2013 interview conducted by the GBI of appellant while appellant was in jail awaiting her revocation hearing. The evidence, which included an audio recording and transcript,

showed that the GBI agent provided no *Miranda* warnings, and she did not state to appellant that she was free to leave or to decline to answer the questions until over half-way through the interview. The questions dealt largely with appellant's community service probation requirement, whether there was a required date by which she had to complete the requirement, and when appellant had completed the requirement. Many of appellant's answers were non-responsive or dealt with ancillary personal matters, and she declined to discuss the individual who had recommended that she complete her community service at the church.

Appellant argued that the trial court erred by finding that the statements she made to the agent about the community service letters and her purported completion of the hours while she was in jail on the probation revocation charge were made during a custodial interrogation subject to the *Miranda* warning requirement as applied in *Howes v. Field* ___ U. S. ___ (132 S.Ct. 1181, 182 L.E.2d 17) (2012). The Court agreed. The Court stated that there is no bright-line rule that after a defendant has been remanded to jail or prison that she is always in custody for purposes of *Miranda*. The question is whether the circumstances of the interview are thought generally to present a serious danger of coercion. In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. And in order to determine how a suspect would have gauged his freedom of movement, courts must examine all of the circumstances surrounding the interrogation. Relevant factors include the location of the questioning, statements made during the interview, the presence or absence of physical restraints during the questioning, the release of the interviewee at the end of the questioning, and whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.

Here, the Court found, appellant had been in jail for one week after violating terms of her probation, including her failure to complete community service, which was the main focus of the agent's questions, and appellant was scheduled to appear before the court on the matter less than one week after the questioning. In *Howes*, the Supreme Court explained that compared to a prisoner sentenced to a term of years, "a person [who] is arrested and taken to a station house [and] questioned may be pressured to speak by the hope that, after doing so, he will be allowed to leave and go home." Appellant's situation was similar to that of an arrestee — she had not been sentenced and was awaiting a hearing on the State's petition to revoke her probation, and therefore, the risk of coercive pressure was greater than that of a prisoner. Furthermore, although the encounter with the agent was brief, and it was not clear whether appellant was shackled, handcuffed, or restrained, the agent failed to tell appellant she was free to leave until over 15 minutes of the 23-minute questioning. And the Court stated, unambiguously advising a defendant that she is free to leave and is not in custody is a powerful factor in the determination of custody for *Miranda* purposes. Accordingly, under the circumstances, the Court found that appellant was in custody and therefore any statements made without the benefit of *Miranda* warnings should have been suppressed.

Recordings of Inmates; Authentication

Andemical v. State, A15A2362 (3/8/16)

Appellant was convicted of kidnapping with bodily injury, aggravated assault, and false imprisonment. He contended that the trial court erred in admitting into evidence a recording of a jail conversation he had with his sister. Specifically, he argued that the State did not lay a proper foundation for admission of the recording and did not present evidence of his implied consent to the recording. The Court disagreed.

The Court noted that the State presented the recording and a transcript of that recording of a telephone conversation between appellant, his sister, and the victim that was recorded while he was incarcerated in the county jail. The victim authenticated the recording as that of the telephone conversation she had with appellant. The Court stated that the State may lay a proper foundation for admission of a recorded telephone conversation of an inmate by showing that the recording device was working properly and that the recording was accurately made; the manner in which it was preserved; that no alterations have been made to the recording; the identity of the speakers; and that the inmate was aware that the conversation was subject to being recorded. However, as was done in this case, an audiotape may also be authenticated by the testimony of one who was a party to the events recorded on the tapes. Therefore, the recording was properly authenticated.

As to appellant's contention that the State did not demonstrate his implied consent to be recorded, the Court noted that O.C.G.A. § 16-11-62(4) prohibits any person from intentionally and secretly intercepting a telephone call by use of any device, instrument or apparatus. However, O.C.G.A. § 16-11-66(a) provides an exception to this rule where one of the parties to the communication has given prior consent. Such consent can be either express or implied. Implied consent to the recording of a phone call may be found when an inmate is told at the beginning of the telephone conversation that the call is subject to being monitored or recorded. And here, the Court found, it is undisputed that appellant was told during his phone call that the calls could be recorded or monitored. This was sufficient to establish appellant's implied consent regarding the recording of his phone conversations.

Moreover, the Court noted, O.C.G.A. § 16-11-62(2)(A) provides, in pertinent part, "it shall not be unlawful … [t]o use any device to observe, photograph, or record the activities of persons incarcerated in any jail, correctional institution, or other facility in which persons who are charged with or who have been convicted of the commission of a crime are incarcerated, provided that such equipment shall not be used while the prisoner is discussing his or her case with his or her attorney." Thus, under the facts of this case, the trial court did not err in admitting into evidence the recorded conversation between appellant, his sister, and the victim.

Search & Seizure; Statements

State v. Williams, A15A1858 (3/9/16)

The State appealed the trial court's decision granting Williams's motion to suppress the admission of a statement he provided after his arrest for obstruction. The evidence showed that an officer investigated a burglary at a metal shop. The owner of the metal shop told the officer that someone told him that Williams had property that was

stolen from the shop. Although the officer stated that he spoke to the source of the shop owner's information, no other information about the source was made. The officer went to speak with Williams. Williams became "very agitated and fidgety," and as the conversation continued, Williams suddenly "took off running." The officer chased him and arrested him. Thereafter, Williams made Mirandized statements incriminating himself. The trial court found that Williams fled a first-tier encounter, something he was permitted to do under Georgia law, and thus, his subsequent arrest for obstruction was illegal and without probable cause, thereby making any statement made after his arrest inadmissible.

The Court found that the testimony supported the trial court's conclusions that 1) the officer did not have enough information to make an initial second tier stop of Williams; and 2) that Williams fled a first tier encounter with the officer. However, the Court stated, flight in connection with other circumstances may be sufficient probable cause to uphold a warrantless arrest or search, and also sufficient to give rise to articulable suspicion that the person fleeing has been engaged in a criminal act sufficient to perform a brief investigatory stop. Although the suspect's actions could be ambiguous and susceptible of an innocent explanation, officers are authorized to detain the individuals to resolve the ambiguity.

Here, the Court found, "other circumstances" than flight existed. The officer had just told Williams about the stolen property and stated that Williams was a suspect when Williams took off in headlong flight. The officer was therefore authorized to briefly detain Williams for an investigative stop. As Williams admitted, the officer then ordered Williams to halt, thereby attempting to perform a second tier stop, but Williams continued to flee thereby obstructing the officer's proper request. Because Williams failed to stop in response to the officer's order, the officer then had probable cause to arrest Williams for obstruction. Thus, the trial court's conclusion that the officer lacked probable cause to arrest Williams was erroneous as a matter of law and was reversed.