Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 22, 2015

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THIS WEEK:

Similar Transactions; Intent

Logan-Goodlaw v. State, A14A2082 (3/27/15)

Appellant was convicted of armed robbery. He argued that the trial court erred in admitting a prior armed robbery under O.C.G.A. § 24-4-404(b). For evidence of other crimes or acts to be admissible pursuant to O.C.G.A. § 24-4-404(b), 1) it must be relevant to an issue other than defendant's character; (2) there must be sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the acts in question; and (3) the probative value of the evidence cannot be substantially outweighed by undue prejudice. Appellant contended that the trial court erred in finding the evidence was relevant to demonstrate intent and knowledge and in finding that the probative value in admitting the similar transaction substantially outweighed any prejudice to him. The Court disagreed.

Regarding the first prong, the Court found that a defendant who enters a not-guilty plea makes intent a material issue which imposes a substantial burden on the government to prove intent, which it may prove by Rule 404 (b) evidence absent affirmative steps by the defendant to remove intent as an issue. Here, appellant's defense theory, which was that he was present during the underlying armed robbery, but had not participated in robbing the victim, squarely challenged the element of intent. Thus, the Court found, the trial court did not err in finding that the first prong of the similar-transaction test was satisfied because the evidence at issue was admissible for a purpose other than appellant's character. And since the Court found that the evidence was admissible to prove intent, it did not address the issue of knowledge.

As to the prejudice prong, the trial court found that the prior armed robbery was factually similar to the current armed robbery and, although the current crime had occurred two years before the similar transaction, it was only six months after appellant was released from incarceration. The trial court further determined that the probative value outweighed any undue prejudice because intent was contested, in that appellant had admitted to being present but denied participating in the armed robbery. Given these circumstances, the Court found that the trial court did not abuse its discretion in balancing these factors and finding that the probative value of the similar transaction evidence was not substantially outweighed by its prejudicial effect.

DUI; Implied Consent

State v. Barnes, A14A1915 (3/27/15)

Barnes was charged with DUI. The State appealed after the trial court found that Barnes had refused to take a state-administered breath test and had not voluntarily rescinded the refusal by taking the test. The evidence showed an officer attempted to administer

a portable breath test at the scene but was unable to obtain a reading. Nevertheless, based on her investigation, the officer arrested Barnes for DUI. Upon being read the implied consent notice the first time, Barnes stated that she did not understand. The second time the officer read the notice and asked her if she would consent to the chemical testing, Barnes said "No, I thought I already did that." After a second officer explained the difference between the two breath test, Barnes only responded, "Oh, okay." Later at the police station, prior to administering the Intoxilyzer 5000, the officer told Barnes that, "This is the card that I was reading to you, this is the state administered test that you agreed to take." Barnes then took the breath test.

The Court stated that even if a person has declined to submit to a state administered test, officers are allowed to use "fair and reasonable" methods of persuasion to get them to rescind the refusal. While the trial court concluded that the statement "oh, okay," was not a rescission of a prior refusal as a matter of fact, it neglected to analyze whether the officer may have reasonably interpreted the "oh okay" statement as a rescission and, whether the officer's statement at the station that, "this is the state administered test that you agreed to take," was reasonable and fair under the circumstances. In considering whether a defendant has rescinded a refusal to submit to state-administered testing, the trial court must evaluate the officer's actions to determine if the officer acted reasonably in the situation and whether the procedure was applied in a fair manner. The proper inquiry in this case is whether the officer informed Barnes of her rights in a timely fashion, and whether the officer's conduct in securing Barnes' consent after her initial equivocation was fair and reasonable. Accordingly, because it did not appear that, in considering whether Barnes rescinded her refusal, the trial court evaluated whether the officer's actions were reasonable and fair under the totality of circumstances, the Court remanded the case for further proceedings consistent with its opinion.

Business Records; Cruel and Unusual Punishment

Thompson v. State, A14A2161 (3/30/15)

Appellant was convicted of felony shoplifting, aggravated assault, and possession of methamphetamine. Based on the drug possession conviction and its determination that appellant was a recidivist, the trial court sentenced appellant to 30 years, with the first 10 years in confinement without the possibility of parole and the remainder on probation. The evidence showed that a Costco loss prevention officer observed appellant hiding a camera and game console in his clothing. The officer did not testify at trial. Instead, a business record of the officer's report was admitted at trial.

Appellant contended that the trial court erred in admitting this report under O.C.G.A. § 24-8-803(6). Specifically, appellant argued that the loss prevention report did not qualify under the business records exception because it was prepared in anticipation of prosecution, and it did not have the degree of trustworthiness associated with business records. A divided en banc Court disagreed.

The Court stated that it is true that a record prepared in anticipation of prosecution is not made in the regular course of business. But the type of report created by Costco cannot be used by Costco to anticipate prosecution, because the parties to the prosecution are the State and the shoplifting suspect. While Costco may have an interest in seeing that a shoplifting suspect is prosecuted and incarcerated and thus no longer able to shoplift from its store, it simply is not a party to any potential prosecution and cannot anticipate what action the State may take, as not all shoplifters are apprehended and not all apprehended shoplifters are prosecuted. Moreover, even without considering Costco's non-party status, Costco did not make the report at the request of the State. In fact, the Court noted, the police officer on the scene testified that he was not sure that Costco was "familiar with what we needed for that criminal case." Thus, since Costco prepares a loss prevention report in every instance of shoplifting, concerns about reliability and trustworthiness are minimized. Therefore, under the facts of this case, Costco's report was not made in anticipation of prosecution and was therefore admissible.

In so holding, the Court distinguished Milich's proposition that "[i]ncident reports prepared by a business after an accident or other event likely to lead to litigation are *normally* inadmissible as business records, even if the business routinely prepares such records in such circumstances." (Emphasis supplied.) As noted by Milich, the rule generally prohibiting the admission of an incident report is not absolute. Certainly the day-to-day operations of a retail business include preventing the loss of the merchandise it sells and keeping a record of that merchandise, as the title of the report suggests. The inclusion of other information, such as the identity of any witnesses to a shoplifting incident and whether police were called to the scene, does not alter the analysis. Thus, the Court noted that Milich also states "[t]he more routine the type of record involved, the more likely the business has developed, through repetition and experience, a reliable system for creating the records…[I]f the report is routinely prepared in a response to an event that normally would not lead to litigation, but in this instance subsequently does, the report may be admissible under the business record exception." Accordingly, the Court found, the routinely prepared report here meets these criteria.

Finally, quoting the Carlsons, the Court concluded that because the foundational elements of O.C.G.A. § 24-8-803(6) were satisfied here, "a rebuttable presumption of trustworthiness of the evidence is created." And, as the opponent to the admission of the evidence, appellant was required to rebut this presumption, which he failed to do. The trial court therefore did not err in allowing the admission of the loss prevention report under the business record exception to the hearsay rule.

Appellant also contended that the trial court's decision to sentence him to 30 years for possession of methamphetamine, with the first 10 years served in confinement without the possibility of parole and the remaining 20 years on probation, constituted cruel and unusual punishment under the Eighth Amendment. He conceded that his sentence fell within the statutory range for possession of methamphetamine under the sentencing provision applicable to a second drug possession conviction that was in effect at the time he committed the current offense (O.C.G.A. § 16-13-30(c) (2010)) But, he argued, his sentence nevertheless was grossly disproportionate to the offense, given that the General Assembly subsequently amended O.C.G.A. § 16-13-30 to reduce the sentence to one-to-three years for the amount of methamphetamine he possessed in this case

(O.C.G.A. § 16-13-30(c)(1) (2014)). In support of his argument, he cited *Humphrey v. Wilson*, 282 Ga. 520, 528 (3) (c).

The Court stated that "[w]hile we are sympathetic to [appellant]'s argument here, we are constrained to uphold the sentence existing at the time of his offense." The Court noted that in *Bradshaw v. State*, 284 Ga. 675, 678 (2) (a) (2008), our Supreme Court rejected an expansive reading of *Humphrey* and declined to engraft onto every statutory change enacted by the General Assembly an interpretation that the legislature is making a pronouncement of constitutional magnitude. Thus, when read together, *Humphrey* and *Bradshaw* make clear that a statutory amendment by the legislature is one factor to consider as part of a court's analysis into gross disproportionality, but it is not dispositive; courts still must examine the gravity of the offense and the severity of the sentence to determine whether a threshold inference of gross disproportionality has been raised.

Applying these principles here, the Court concluded that appellant failed to show that this is one of those rare cases that raises a threshold inference of gross disproportionality, even though the General Assembly amended O.C.G.A. § 16-13-30 to reduce the range of punishment for possession of methamphetamine. Notably, while the statute was amended to reduce the range of punishment, the General Assembly included a savings clause (Ga. L. 2012, p. 899, § 9-1(b)/HB 1176) making clear its intention to maintain the sentencing structure for crimes committed prior to the effective date of any amendment. Therefore, the General Assembly itself made clear that it did not intend for the changes to O.C.G.A. § 16-13-30 reducing the range of punishment to serve as "a pronouncement of constitutional magnitude" or "to preclude or in any manner limit" the Court's evaluation of a defendant's sentence under the old version of the statute to determine whether it comports with the constitutional prohibition against cruel and unusual punishment. Here, given the fact that appellant faced a potential sentence of 30 years in prison, his sentence of 10 years in confinement followed by 20 years on probation did not raise a threshold inference of gross disproportionality. Accordingly, appellant failed to demonstrate that his sentence constitutes cruel and unusual punishment under the Eighth Amendment.

Search & Seizure; Indictments

Thomas v. State, A14A2052, A14A2053, A14A2054, A14A2055 (3/27/15)

Appellant was convicted of multiple crimes arising out of two incidents in which he accosted female victims at gunpoint. At trial and on appeal, he represented himself. He contended that the trial court erred by denying his motion to "quash his arrest" and suppress evidence on the ground that he was arrested illegally. The evidence showed that an officer was dispatched on a suspicious vehicle call. Dispatch reported that the car had been parked in an apartment complex off and on for a week with a person in the car, that it had been parked on this occasion for over an hour with a person inside, and that either that car or another had broken out windows. There also had been recent reports of crime in the apartment complex, including "thefts on vehicles" and "theft from vehicles." The officer had personal knowledge of these thefts and had personally responded to one of the prior suspicious vehicle calls. Dispatch gave the officer a description of the car, and the officer found a car that matched the description at the location given. When the driver pulled out to leave, seemingly in response to seeing the police car, the officer pulled behind the car, activated his blue lights, and stopped the car. The officer then ran the license tag through dispatch and learned that the car was stolen. Only then did the officer approach and ask appellant for his driver's license, which appellant provided. The officer testified that appellant was still in the car and not in custody at that time. The officer ran appellant's license but found no outstanding warrants. The officer then arrested appellant for theft by receiving a stolen vehicle.

The Court stated although an officer may conduct a brief investigative stop of a vehicle, such a stop must be justified by specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. In addressing this issue, a court must examine the totality of the circumstances and determine whether the detaining officer had a particularized and objective basis for suspecting the particular person stopped of criminal activity. This suspicion need not meet the standard of probable cause, but must be more than mere caprice or a hunch or an inclination.

Here, the Court found that under the totality of the circumstances, the officer had a particularized and objective basis for suspecting that appellant might be about to engage in criminal activity in the apartment complex. The officer then performed a brief stop during which he ran the license tag, which showed that the car had been stolen, thereby justifying the arrest for theft by receiving. Accordingly, the trial court did not err by denying appellant's motion to quash the arrest or suppress evidence.

Appellant also contended the court erred by denying his plea in abatement regarding one of the indictments against him. Appellant asserted that the indictment was returned without any legal evidence being presented and that "a vote was merely taken and a true bill returned." Appellant argued that although he had received the State's case file, it only included unsigned statements of two officers, which statements were purportedly provided to the grand jury.

The Court stated that generally, with regard to the efficacy of an indictment, no inquiry into the sufficiency or legality of the evidence is indulged. Under appropriate circumstances, however, an indictment will be quashed where it is returned on wholly illegal evidence. Here, although appellant pointed to two unsigned statements, he did not show that these statements were the only evidence presented to the grand jury or that the three witnesses identified in the indictment did not provide sworn testimony at the grand jury proceedings. A plea in abatement on this topic fails when the defendant fails to show that the indictment was returned solely based on unsworn statements. Moreover, there was no transcript of the grand jury proceedings themselves, and grand jury proceedings are confidential and thus, appellant was not entitled to a transcript of those proceedings. Accordingly, appellant failed to show reversible error.

Jury Charges; Lesser Included Offenses

Patterson v. State, A14A2208 (3/30/15)

Appellant was convicted of aggravated assault. The record showed that appellant was indicted for "aggravated assault with an object" in that "he did commit an act which placed another person, to wit: Nathaniel

Lane Silvers, in reasonable apprehension of immediately receiving a violent injury, said assault having been committed with an object which when used offensively against a person, is likely to and actually does result in serious bodily injury, by driving a motor vehicle in the direction of Nathaniel Silvers, striking Mr. Silvers with said vehicle, and pinning him up against a mobile home with said vehicle." The evidence showed Silvers required a multi-day stay in the hospital as a result of the injuries sustained in the aggravated assault.

Appellant first contended that the trial court erred by not giving his requested lesser included offense jury charge on simple assault. The Court disagreed. Simple assault is necessarily a lesser included offense of the greater crime of aggravated assault and is an essential part thereof. Thus, any defendant who has committed the greater offense of aggravated assault has necessarily committed the lesser offense of simple assault. But this does not mean that the trial court should authorize the jury to enter a verdict for the lesser crime in every case. Rather, where a person is charged with a reasonable-apprehension-of-injury assault and the indictment charges and the undisputed evidence shows that the assault was committed with the second aggravating factor listed in O.C.G.A. § 16-5-21(b), a charge on simple assault is not required. Thus, even if there was an issue of fact regarding whether Silvers was in reasonable apprehension of immediately receiving a violent injury, it was undisputed that appellant hit Silvers while driving his van toward Silvers from only 20 or so feet away after revving his engine and that his action resulted in serious bodily injury to Silvers. Accordingly, appellant was either guilty of the greater crime of aggravated assault or not guilty at all. Thus, the evidence did not support an instruction on simple assault as a lesser included offense of aggravated assault.

Nevertheless, appellant argued, the evidence could show that he lacked the general intent to cause an injury even though he intentionally drove in a manner that placed Silvers in reasonable apprehension of injury. But, the Court stated, the State was not required to show intent to injure, but only that appellant's driving placed Silvers in reasonable apprehension of injury. Thus, appellant either committed the crime as charged or committed no charged crime.

Appellant also argued that he was entitled to a charge on simple assault because the evidence could have shown that he drove recklessly but never intended to cause any injury and that the law allows conviction of reasonable-apprehension-of-injury assault based on reckless conduct, The Court found this argument flawed because the State is only required to prove that appellant intended to drive the van, not that he acted with intent to injure. In this case, therefore, reckless conduct would not show a less culpable mental state than that which was required to establish the commission of the crime as charged.

Appellant next argued that there was evidence upon which the jury could conclude that the van was not used in a way likely to cause serious bodily injury. But here, the Court found, there was no such dispute over the object (the van), which in fact caused serious injuries; injuries requiring a multi-day hospital stay are obviously serious. Thus, there was no evidence, however slight, to suggest that the van was not intentionally used as an object, which when used offensively against a person, is likely to or actually does result in serious bodily injury. Therefore, the Court concluded, the trial court did not err by refusing to charge the jury on simple assault as a lesser included offense.

Appellant also argued that the trial court erred in failing to give his requested jury charge on reckless conduct. He argued that he was entitled to the charge because the evidence showed a less culpable mental state than required to establish the aggravated assault as charged. But, the Court stated, as with the simple assault, because the State charged appellant with aggravated assault by placing another in reasonable apprehension of immediately receiving a violent injury, a charge on reckless conduct was not warranted. Here, the undisputed facts showed that appellant drove his van and struck and injured Silvers. Thus, under the aggravated assault, as charged, if Silvers reasonably feared an immediate violent injury from appellant driving the van, the crime of aggravated assault occurred, not reckless conduct. Accordingly, a charge on reckless conduct was not warranted.

Finally, appellant also contended that the trial court erred in denying his requested jury charge on reckless driving. The Court again disagreed. The same analysis applicable to reckless conduct applied to appellant's contention that the trial court erred by failing to give a charge on reckless driving because the evidence showed a less culpable mental state. Like reckless conduct, reckless driving requires an act of criminal negligence, rather than an intentional act. But the aggravated assault, as charged, only required the State to prove that appellant had the general intent to drive the van. Therefore, reckless driving would not show a less culpable mental state than that which was required to establish the commission of the crime as charged.

Negotiated Pleas; State's Right to Withdraw

Kelly v. State, A14A1682 (3/30/15)

Appellant was indicted along with three others and charged with felony murder and other crimes for his alleged participation in an armed robbery attempt that resulted in the death of a fifth participant. The State and appellant reached a negotiated plea which called for appellant to testify truthfully against his co-defendants, that appellant would plead to a lesser included charge of voluntary manslaughter and a twenty year sentence and first offender status at the court's discretion. The trial court, after hearing from defense witnesses, indicated it would accept the terms of the negotiated plea, but sentence appellant to 10 to 5 years and as a first offender. The State objected and after sentencing, filed a "Motion to Set Aside an Illegal Judgment." The trial court then granted the State's motion, agreeing with the State that when it rejected the negotiated plea, it had no authority to sentence appellant to a lesser offense not charged in the indictment, and therefore the judgment was illegal.

The Court reversed. Citing *State v. Harper*, 279 Ga.App. 620, 620-621 (2), overruled in part on other grounds, *State v. King*, 325 Ga.App. 445 (2013), the Court stated that contrary to the State's arguments, the trial court's rejection of a recommended sentence pursuant to a negotiated plea agreement does not give the State the right of withdrawal from the plea agreement. Additionally, the Court noted, like in *Harper*, appellant entered a guilty plea to a lesser offense not charged in the indictment. Because the State was bound by the portion of the plea agreement accepted by the trial court with no right of withdrawal, the Court found that it could not conclude

that the negotiated plea was converted into a nonnegotiated plea. The court's acceptance of the plea agreement in part and the judgment of conviction and sentence imposed thereon were therefore not illegal. Thus, because the trial court mistakenly believed that it imposed an illegal judgment, the trial court's grant of the State's motion to vacate was reversed and the case and remanded with direction for the trial court to re-enter the original judgment of conviction and sentence.

In so holding, the Court stated, "[w]e are bound by our caselaw and constrained by the absence of statutory authority or Uniform Superior Court Rule giving the State a right to withdraw an offer in this or in any other circumstance. The remedy the State seeks must be addressed, if it is to be addressed at all, by the legislature and not the judiciary."