Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 26, 2017

THIS WEEK:

Search & Seizure; Roadblocks

McCoy v. State, A17A0534 (4/11/17)

Appellant was convicted of DUI (less safe). She contended that the trial court erred in denying her motion to suppress challenging her stop at a roadblock. Specifically, she argued that there was no evidence that the screening officer's training and experience was sufficient to qualify him to make the initial determination as to which motorists should be given field tests for intoxication. The trial court found that the officer's training was sufficient because the officer was POST certified.

Appellant argued that "[i]f POST Certification, without more, was sufficient to satisfy the fifth *LaFontaine* requirement that the screening officer's training and experience be sufficient to qualify him to make an initial determination as to which motorists should be given field tests for intoxication, such a requirement would be superfluous and completely unnecessary since all police officers on the streets and highways of this State must be POST Certified." The Court disagreed. The Court stated that it was evident that the trial court took judicial notice of the fact that any POST-certified police officer in Georgia has training and experience sufficient to qualify him to make an initial determination as to which motorists stopped at a roadblock should be given field tests for intoxication. Also, the Court found, it is commonly known and cannot reasonably be questioned that any police officer, to obtain certification in Georgia, has received training in law enforcement activities that concern impaired drivers. Thus, the Court concluded, given that any person may give an opinion, on the basis of personal observation of another person on a given occasion, that the other person did or did not appear to be intoxicated, and given that any POST-certified officer will have had some training in law enforcement activities that concern impaired drivers, the trial court did not err in denying appellant's motion to suppress based on its finding that the POST-certified screening officer had training and experience sufficient to enable him to make the initial determination as to which motorists should be given the field tests for intoxication.

Pleas in Bar; Prosecutorial Misconduct

Ledford v. State, A17A0594 (4/12/17)

Appellant was charged with DUI (less safe). Prior to trial, evidence of the HGN test was suppressed and a dash-cam video of her arrest, which was to be used by the State at trial, was appropriately redacted. During the officer's testimony, and outside of the presence of the jury, defense counsel reminded the court that the HGN test was suppressed and cautioned against making a mistake that could result in a mistrial. The officer's testimony then resumed. At some point, the prosecutor began laying the foundation for admitting the video into evidence. When the prosecutor asked, "Were there any additions, deletions, or alterations

to that video", the officer responded, "Yes, ma'am, for the HGN." The trial court granted appellant's motion for mistrial.

Appellant later filed a plea in bar based on double jeopardy. The trial court denied the plea in bar, finding that there was no prosecutorial misconduct. Specifically, the trial court found that "[t]he police officer is just [the State's] witness. And when asked a question, the witness is required to answer truthfully. And [the officer] was asked a question, that is a foundational question, . . . which is routine in the course of establishing the authenticity of a video. And by answering truthfully she brought that issue up that had been ruled on by the Court. But I don't find that it is such that it rises to the level of misconduct or intentional acts on behalf of the State."

The Court stated that it must uphold the trial court's findings unless clearly erroneous. And here, the Court found, the trial judge, who had the opportunity to observe the prosecutor's demeanor and the progress of the trial, accepted the prosecutor's explanation. Therefore, the Court held, the evidence did not demand a finding that the prosecutor goaded the defense into moving for a mistrial or tried to terminate the trial. Accordingly, the trial court's denial of the plea in bar was affirmed.

Prior Bad Acts; Sexual Offenses

Dixon v. State, A17A0233 (4/19/17)

Appellant was convicted of one count of aggravated child molestation and four counts of child molestation against a female victim who was around 9 or 10 years of age at the time of the incidents. The State also presented evidence that appellant had anal and oral sex with a male victim (W. T.) when the child was between the ages of six and eleven years old.

Appellant contended that the trial court erred in admitting the prior bad act evidence under O.C.G.A. § 24-4-404(b), O.C.G.A. § 24-4-413(b), and O.C.G.A. § 24-4-414(b). The Court disagreed. First, the Court noted, O.C.G.A. § 24-4-413 and O.C.G.A. § 24-4-414 supersede the provisions of O.C.G.A. § 24-4-404(b) in sexual assault and child molestation cases. and create a "rule of inclusion," with a strong presumption in favor of admissibility as each provides that such evidence "shall be admissible." Thus, the State can seek to admit evidence under these provisions for any relevant purpose, including propensity.

Nevertheless, appellant argued, W. T.'s testimony should not have been admitted because it was uncorroborated and the State did not "produce any evidence [that W. T.'s] allegations were ever reported or investigated." The Court, looking for guidance under federal law, found that corroboration, criminal charges, or a conviction are not required for the admission of other acts evidence under the Federal Rules of Evidence. Indeed, a prior acquittal of a criminal charge will not necessarily preclude admission of other act evidence under the Federal Rules of Evidence. Finally, a trial court need not make a preliminary finding that the alleged prior similar conduct in fact occurred before admitting it into evidence. Instead, a trial court's decision to admit other act evidence will be affirmed if a jury could find by a preponderance of the evidence that the defendant committed the act. Thus, because a jury could have concluded by a preponderance of the evidence that appellant committed the acts described by W. T., there was no merit to this argument.

Appellant also argued that the trial court erred by failing to conclude that the probative value of W. T.'s testimony was "substantially outweighed by its danger of unfair prejudice." The Court again disagreed. The Court noted that while it is clear that O.C.G.A. § 24-4-403 applies to evidence admitted under O.C.G.A. §§ 24-4-413 and 24-4-414, and their corresponding federal counterparts, neither Georgia courts nor the Eleventh Circuit have expressly decided whether evidence admitted under these Code provisions should be evaluated under a different type of Rule 403 balance that weighs in favor of admission. And the Court noted, over time, the federal circuit courts have developed distinct approaches to the application of the Rule 403 balancing test in determining the admissibility of prior sexual misconduct evidence under Rules 413 through 415.

However, the Court found, it did not need to address this question as the trial court did not abuse its discretion under the typical balancing test applied to evidence admitted under O.C.G.A. § 24-4-404(b). Here, the State's need for the evidence was great based upon appellant's attacks on the victim's credibility, the lack of any physical evidence, and the victim's delayed outcry. With regard to the overall similarity of appellant's acts, each involved inappropriate sexual contact between appellant and a child of similar age to whom appellant gained access through a relationship with the child's mother. While the victims were of a different gender, the sexual abuse of young children, regardless of the sex of the victims or the nomenclature or type of acts or other conduct perpetrated upon them, is of sufficient similarity to make the evidence admissible. This is because sex crimes against children require a unique bent of mind. Also, W. T.'s testimony was highly probative of appellant's motive. And, the passing of 7-13 years between appellant's molestation of W. T. and the victim in this case did not mandate the conclusion that the trial court abused its discretion in its application of the O.C.G.A. § 24-4-403 balancing test, particularly where appellant's access to the children was based upon a relationship with their mother. Finally, the trial court's limiting instruction to the jury in this case mitigated the risk of undue prejudice. Accordingly, the Court held, there was no abuse of the trial court's discretion in admitting the evidence of appellant's prior molestation of a minor victim.

Motions for Return of Property; O.C.G.A. § 17-5-54(c)

In re T. F. N., A17A0530 (4/14/17)

After his delinquency prosecution had concluded, appellant filed a motion with the juvenile court seeking the return of three cell phones that had been seized from him by the police. Following a hearing, the court concluded that appellant had failed to follow the requirements found in O.C.G.A. § 17-5-54(c)(3) for seeking return of the cell phones from the police department, and thus, could not show that the department had improperly refused to release the phones to him.

Appellant contended that O.C.G.A. § 17-5-54(c)(2) required the juvenile court to return the cell phones to him upon the conclusion of his delinquency prosecution, and the procedures found in O.C.G.A. § 17-5-54(c)(3) only apply to third party civilians such as witnesses and victims who are seeking the return of their personal property. The Court disagreed. First, the Court found that under the current version of O.C.G.A. § 17-5-54, after the conclusion of a criminal prosecution, any person claiming to be the rightful owner of personal property seized for use as evidence in that prosecution must comply with the requirements set forth in subsection (c)(3). Accordingly, any party claiming to be

the rightful owner of the property must make an application to the law enforcement entity holding the property, furnish satisfactory proof of ownership, and present evidence of his or her identity in compliance with subsection (c)(3) before the party can claim that the entity has improperly refused to return the property to him or her in violation of O.C.G.A. § 17-5-54(c)(2). Second, O.C.G.A. § 17-5-54(c)(3) broadly and unequivocally states that it applies to "any person" who claims to be the rightful owner of the personal property at issue and does not carve out an exception for criminal defendants. Therefore, appellant's argument limiting the scope of subsection (c)(3) was without merit.

Alternatively, appellant argued that if subsection (c)(3) applies to defendants like himself, he complied with its requirements. Specifically, appellant contended that he satisfied the requirements of subsection (c)(3) by filing a motion in juvenile court seeking the return of the cell phones from the police department and pointing to the undisputed evidence that the phones were taken from his person when he was booked at the detention center. However, the Court found, O.C.G.A. § 17-5-54(c)(3) requires that a party claiming to be the rightful owner file his or her application directly to the law enforcement agency with custody of the personal property rather than to a court in the first instance. And here, the uncontroverted evidence showed that appellant did not file an application directly with the police department for return of the cell phones, and thus, never afforded the department an opportunity to evaluate and make a decision regarding his claim before seeking court intervention. Therefore, the Court held, appellant failed to comply with the requirements imposed by O.C.G.A. § 17-5-54(c)(3) for obtaining return of the cell phones, and consequently, he could not successfully claim that the police department had wrongfully refused to return the phones to him in violation of O.C.G.A. § 17-5-54(c)(2). Accordingly, the juvenile court properly denied appellant's motion for the return of the phones.

Severance; Demand for Speedy Trial

Rossell v. State, A17A0049 (4/20/17)

Appellant was convicted of two counts of aggravated battery, armed robbery, possession of a firearm during the commission of a felony (armed robbery), and possession of a firearm by a convicted felon. He was acquitted of one count of aggravated battery, aggravated assault, and battery. The evidence showed that the crimes were committed on four separate dates between June 2 and July 6 of 2013. The State charged all offenses in one indictment. On September 26, 2013, appellant filed a motion to sever and a demand for speedy trial. On February 6, 2014, appellant filed a motion for discharge and acquittal. On the date of trial, the court denied both motions. The Court found that because the motion for discharge and acquittal was filed the last week of the term, it could not sever the offenses and also protect appellant's right to a speedy trial.

Appellant contended that the trial court erred in denying his motion to sever. The Court stated that where criminal offenses are joined solely on the ground that they are of the same or similar character, the defendant has a right to have the offenses severed. However, where the offenses are so similar that they show a common scheme or plan or have an identical modus operandi, severance is discretionary with the trial court. When exercising this discretion, the trial court should consider whether, in light of the number of offenses charged and the complexity of the evidence, the fact-trier will be able to distinguish the evidence and apply the law intelligently to each offense.

Here, the Court found, all of the charged offenses occurred within a five-week period and, with the exception of the aggravated battery which took place at the county detention center, the offenses took place at the same location, the Spalding Heights neighborhood. Three of the offenses shared common witnesses. The investigator with the Sheriff's Office who was "assigned most all of these cases" received multiple affidavits that appellant was not involved in the June 27th fight that he was ultimately acquitted of. One of the affidavits was from the renter of the apartment in Spalding Heights that appellant was found in after he committed the armed robbery. Another affidavit was from appellant's girlfriend who was also involved in the June 2nd aggravated battery. Additionally, with the exception of the armed robbery, all of the offenses shared the same modus operandi and the victims suffered similar injuries. In each of those offenses, appellant was alleged to have hit the victim with his fists causing, among other things, broken bones, swelling, and bruising.

The Court found that the number of offenses charged and the complexity of the evidence were not such that the jury would be unable to distinguish the evidence of each charge. And since the jury acquitted appellant of aggravated battery, aggravated assault, and battery, it was clear that the jury was able to distinguish the evidence and apply the law intelligently as to each offense. Accordingly, the Court held, based on the facts and circumstances of the case, including appellant's demand that all counts be tried in accordance with O.C.G.A. § 17-7-170, the trial court did not abuse its discretion in denying appellant's motion to sever offenses.