

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 12, 2015

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THIS WEEK:

- **Merger; Sentencing**
- **Impeachment; Prior Convictions**
- **Loitering and Prowling; O.C.G.A. § 16-11-36**
- **Motions to Withdraw Plea; Right to Counsel**

Merger; Sentencing

Zamudio v. State, A14A1783. A14A2023 (4/13/15)

Appellants Zamudio and Ganzalez were convicted of attempted murder, aggravated assault, aggravated battery, and a violation of the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq. Zamudio contended that the trial court erred in merging his aggravated battery conviction into his attempted murder conviction, instead of merging the murder into the battery. He argued that both of these convictions were based on the same conduct, possessing and using a box cutter to cut the victim's neck. The Court agreed.

Under O.C.G.A. § 16-1-6(2), one crime is included in another if the former “differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest ... suffices to establish its commission.” The crime of battery, which prohibits the intentional infliction of bodily injury, is included in a crime such as murder, which prohibits the intentional infliction of more serious bodily injury, i.e., death, despite the distinction between these two injury elements. Similarly, the only difference between aggravated battery

and murder is that the former requires a less serious injury to the person of the victim, as the injury to a bodily member specified in the aggravated battery statute is obviously less serious than death. Therefore, convictions for both offenses established by the same conduct are prohibited by O.C.G.A. § 16-1-6(2).

Here, the trial court merged the two offenses, but it merged the conviction that required the greater injury — aggravated battery — into the conviction that required the lesser injury — attempted murder — instead of the other way around. The State conceded that under the rationale of *Hernandez v. State*, 317 Ga.App. 845, 852 (3) (2012), the attempted murder would merge into the aggravated battery because in *Hernandez* the Court determined that attempted murder requires a less serious injury to the person, as personal injury is not a required element of attempted murder. But, the State urged the Court to reconsider its holding based on O.C.G.A. § 16-1-6(2)'s direction to consider the severity of the risk of injury from the underlying offenses as well as the severity of the actual injury. The Court stated that of course, the risk of injury from the crime of attempted murder is greater than the risk of injury from the crime of aggravated battery. Nevertheless, the Court declined to revisit its holding in *Hernandez*, finding its analysis to be sound.

Accordingly, the Court vacated Zamudio's sentence for attempted murder and remand his case to the trial court for resentencing. Furthermore, although Gonzalez did not enumerate as error the merger of his aggravated battery conviction into his attempted murder conviction, a judgment of sentence is void where it imposes an illegal sentence, i.e., a

sentence that the law does not allow, and the illegality of such a judgment is not a waivable issue. Thus, the Court stated, while it is true that an appellate court has no duty to scour the record searching for merger issues, where a case challenging criminal convictions is properly brought before a court and the court realizes, on its own or based on the defendant's argument, that the record shows that certain convictions merged, to disregard that determination and allow the defendant to serve a sentence for a criminal conviction that has been identified as illegal and void would not comport with fundamental fairness and due process of law. Therefore, the Court also vacated Gonzalez's sentence in part and remand his case for resentencing.

Impeachment; Prior Convictions

Robinson v. State, A14A2206 (4/14/15)

Appellant was convicted of two counts of rape, two counts of kidnapping and one count of armed robbery. He was acquitted of one count of rape, one count of aggravated sodomy and one count of impersonating a police officer. Appellant challenged the admission of his 2001 conviction for theft by receiving motor vehicle, arguing that the trial court failed to conduct the required balancing test prior to admitting the evidence under former O.C.G.A. § 24-9-84.1. The Court agreed.

The Court stated that evidence of a defendant's felony conviction that was less than ten years old was admissible if the probative value of the evidence substantially outweighed its prejudicial effect to the defendant. There are five factors that a trial court should consider when conducting the balancing analysis: (1) the nature, i.e., impeachment value of the crime; (2) the time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime, so that admitting the prior conviction does not create an unacceptable risk that the jury will consider it as evidence that the defendant committed the crime for which he is on trial; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Further, the trial court's finding that the probative value of the prior conviction outweighed its prejudicial effect must be made on the record, but there

is no requirement in the language of former O.C.G.A. § 24-9-84.1(a)(2) that the trial court must list the specific factors it considered in ruling on the probity of convictions that are not more than ten years old.

Here, the Court found, the trial court initially ruled the conviction inadmissible at the pre-trial motion in limine hearing, but then it later ruled that the State could introduce it at trial. After the evidence was introduced, the trial court found that "based on a question asked by the defense concerning any previous complaints ... that might have been filed by the defendant against the Atlanta Police Department, that the door was opened" for an explanation, and thus, that the probative value of the conviction subsequently outweighed any prejudicial effects it might have upon the defendant. However, the Court noted, it appeared from the trial court's ruling that it believed that appellant's 2001 conviction for theft by receiving motor vehicle was related to the Atlanta Police Department. An examination of the record revealed that appellant pled guilty to that offense in the DeKalb County Superior Court and there was no indication from the exhibits or testimony at trial that the conviction was related to the Atlanta Police Department. As the lower court appeared to be mistaken in its assumption that the 2001 conviction was related to appellant's history with the Atlanta Police Department, it erred in its finding regarding its probative value. Accordingly, the Court vacated the judgment and remanded the case for the trial court to make an on-the-record finding of whether the probative value of admitting the 2001 conviction substantially outweighed its prejudicial effect.

Appellant also argued that the admission for impeachment purposes of his 1985 conviction for impersonating a police officer was in error. The trial court ruled that the 1985 conviction would be admissible for the purpose of impeachment if appellant decided to testify. The State was then allowed to question appellant about the conviction. After testimony was elicited from appellant regarding these convictions, the trial court emphasized that the probative value of these convictions outweighed any prejudicial effects because it was a "crime of moral turpitude."

The Court found that former O.C.G.A. § 24-9-84.1(b) established a presumption against the admission of evidence of a

conviction if more than ten years had elapsed since the date of the conviction or the release of the defendant from the confinement imposed for that conviction, whichever was later. The trial court must determine, in the interest of justice, that the probative value of the conviction, supported by the specific facts and circumstances, substantially outweighs its prejudicial effect. Such a consideration is mandatory when a trial court evaluates whether to admit a conviction for impeachment purposes that is more than ten years old.

Here, the Court found, a review of the record showed that the trial court failed to make express findings in determining whether the 1985 conviction for impersonating a police officer was admissible. The trial court failed to do so again in its order denying appellant's motion for new trial. Accordingly, the Court vacated appellant's convictions and remanded the case to the trial court to reconsider defendant's motion for a new trial after making on-the-record findings regarding the facts and circumstances on which it relied in determining the probative value and prejudicial effect of the defendant's 1985 conviction for impersonating a police officer.

Loitering and Prowling; O.C.G.A. § 16-11-36

El-Fatin v. State, A15A0224 (4/14/15)

Appellant was convicted of carrying a concealed weapon and loitering or prowling. The evidence showed that appellant was found wielding a sword in the breezeway of a condominium complex around 5:30 a.m. He contended that the evidence was insufficient to convict him of loitering or prowling under O.C.G.A. § 16-11-36. The Court disagreed.

O.C.G.A. § 16-11-36(a) provides that "A person commits the offense of loitering or prowling when he is in a place at a time or in a manner not usual for law-abiding individuals under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity." O.C.G.A. § 16-11-36(b) provides that "Among the circumstances which may be considered in determining whether alarm is warranted is the fact that the person takes flight upon the appearance of a law enforcement officer, refuses to identify himself, or manifestly endeavors to conceal himself

or any object. Unless flight by the person or other circumstances make it impracticable, a law enforcement officer shall, prior to any arrest for an offense under this Code section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting the person to identify himself and explain his presence and conduct. *No person shall be convicted of an offense under this Code section if the law enforcement officer failed to comply with the foregoing procedure or if it appears at trial that the explanation given by the person was true and would have dispelled the alarm or immediate concern.*” (Emphasis supplied).

The Court stated that under O.C.G.A. § 16-11-36, it was for the finder of fact to determine whether appellant’s presence at the condominium complex was at a time or in a manner not usual for law-abiding individuals under circumstances that warranted a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. Given the evidence that appellant was standing outside a residential building before dawn, wearing a bulletproof vest and armed with a handgun, a large knife, and two long swords, one of which was drawn, the jury was authorized to find that his manner and the circumstances justified an objectively reasonable immediate concern for the safety of persons or property in the vicinity. The fact that appellant did not refuse to identify himself and did not attempt to flee from the officers, standing alone, did not mean that the evidence was insufficient to support conviction.

It was also for the jury to decide whether the explanation that appellant gave the officers for his presence and conduct was true and, if true, whether it dispelled the immediate public safety concern. Given the evidence that appellant claimed he was waiting for a friend called “Happy,” who was a resident, and that he had recently lived in a unit there, and that, when the officers tried to confirm that information, they received no confirmation, the jury was authorized to find that his explanation for his presence and conduct was not true or, if true, that it was not sufficient, in light of all of the circumstances, to dispel the officers’ concern that he was a threat to persons and property in the area. Therefore, the evidence was sufficient to authorize his conviction.

Motions to Withdraw Plea; Right to Counsel

Walker v. State, A15A0777 (4/17/15)

Appellant pled guilty to trafficking in cocaine and sale of cocaine. Within the same term of court, and acting pro se, he moved to withdraw his guilty plea, arguing, among other things, that his plea was involuntary and requesting legal representation and a hearing on his motion. The transcript of the hearing on appellant’s motion showed that the trial court conducted the hearing without appointing appellant counsel, without informing him of his right to counsel, and without obtaining a valid waiver of appellant’s right to counsel. The Court stated that a proceeding to withdraw a guilty plea is a critical stage of a criminal prosecution, and that the right to counsel attaches when a defendant seeks to withdraw a guilty plea, thus entitling that defendant to assistance of counsel. The Court further held that the trial court has an obligation to provide counsel or to obtain a constitutionally valid waiver of counsel from a defendant who seeks to withdraw his guilty plea. Thus, the Court reversed and remanded this case to the trial court for a re-hearing on appellant’s motion to withdraw his guilty plea. In so holding, the Court noted, “To its credit, the state concedes that the trial court’s order should be reversed and the case remanded for a hearing.”