Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 25, 2010

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THIS WEEK:

Ineffective Assistance of Counsel

Fedak v. State, A10A0926

Appellant was convicted of violating Georgia's peeping Tom statute, OCGA § 16-11-61. He contended that his trial counsel rendered ineffective assistance by failing to prepare or present any evidence in support of his sole defense, that he lacked the requisite intent to spy upon the victim. The evidence showed that the victim, a 16 year old girl, lived across the street from appellant. She was watching television late one night with the curtain (actually a sheet across the window) drawn. She noticed a face at the window, but when she turned back to it, it was gone. The police were called and appellant was found hiding under a dump truck a couple of doors down the street. Appellant seemed confused and testimony showed that his behavior was "odd."

To prevail on a claim of ineffective assistance of trial counsel, a defendant bears the burden of showing both that his trial counsel was deficient and that he was prejudiced by the deficiency. At the motion for new trial, evidence was presented that appellant suffers from multiple sclerosis ("MS"). The symptoms of the disease can include short-term memory loss and impeded judgment. MS patients can have trouble discerning the time of day and can become confused as to time, location, and people, similar to those suffering from Alzheimer's Disease. Both fatigue and stress can make these symptoms worse, and they would also affect an MS patient's verbal and emotional responses to situations and questions. Appellant and his wife told his trial counsel of his condition and gave him the name of his treating neurologist, but trial counsel never spoke to him and actually discouraged the idea of calling him to the stand because he thought the doctor would make appellant look "stupid."

The Court held that to convict appellant of being a peeping Tom, the State was required to prove that he was peeping through his neighbors' window "for the purpose of spying upon or invading the privacy of the [victim]." OCGA § 16-11-61 (b). The neurologist's testimony, if credited by the jury, could have created a reasonable doubt as to whether appellant was in his neighbors' yard to spy on the victim. The Court held that trial counsel's testimony reflected that his decisions and actions were not the result of strategic decisions or trial tactics. Rather, they resulted from trial counsel's failure to investigate what facts and evidence might be available to assist him in mounting a defense for his client and from his failure to prepare adequately for the trial. Thus, his failure to investigate appellant's sole defense rendered his performance deficient and based on the evidence, appellant was prejudiced by the deficiency.

Search & Seizure

Humphreys v. State, A10A0763

Appellant was convicted of driving with a suspended license and VGCSA. He contended

that the trial court erred in denying his motion to suppress. The evidence showed that an officer randomly ran the tag of the vehicle that appellant was driving on GCIC and NCIC. He discovered that the owner of the vehicle was male and had a suspended driver's license. He observed that the driver of the vehicle was male, and assuming that it was the vehicle's owner, stopped the car. He asked the driver for license and registration. The driver, appellant, produced a Georgia identification card. The officer checked the status of appellant's driver's license and determined that it had been revoked and he was listed as a habitual violator. He arrested appellant and a search of the vehicle revealed the controlled substance.

Appellant contended that the officer lacked a reasonable articulable suspicion to stop the vehicle. The Court disagreed. Relying on *Self v. State*, 245 Ga. App. 270 (2000) and *Thompson v. State*, 289 Ga. App 661 (2007), the Court held that the particularized and objective basis for the initial stop was the information from GCIC —in this case, that the male owner of the registered vehicle appellant was operating had a suspended driver's license. Moreover, once the stop was made and it was ascertained that appellant was not the owner of the car, the officer had a duty to further investigate only because appellant could not produce a driver's license. Thus, as the officer was authorized to stop the vehicle because of the perceived traffic violation, and continue his investigation because appellant did not have a driver's license, the trial court did not err in denying the motion to suppress.

Terroristic Threats; Obstruction

Sidner v. State, A10A1052

Appellant was convicted of terroristic threats and obstruction of an officer. He contended that the evidence was insufficient to support his convictions. The Court agreed and reversed. The evidence showed that appellant called 911 after he heard fireworks being lit at a neighbor's home. Appellant told the 911 operator, "It's the second time in a month I've called on people shooting fireworks at this time of night. I'm giving you guys ten minutes to get here, or else I'm going to take products [sic] into my own hand. I'm going to go shoot those motherfuckers right now. I'm at [address]. If you don't get here[,] I'm going to go out and kick somebody's fucking ass." When the police responded to appellant's home, appellant told the officers he knew the only way to get the police to respond was to threaten someone. When the officers told him it was just fireworks, appellant stated, "[D]o I have to take a baseball bat and hit someone before you guys will do anything?" In the struggle that ensued, appellant pushed one officer against the house, and another officer suffered an injury to his right knee.

The Court held that the crime of terroristic threat focuses solely on the conduct of the accused and is completed when the threat is communicated to the victim with the intent to terrorize. That the message was not directly communicated to the victim would not alone preclude a conviction where the threat is submitted in such a way as to support the inference that the speaker intended or expected it to be conveyed to the victim. Here, there was no evidence to support an inference that appellant's threats were directed at the 911 operator or police, that appellant had any particular victim in mind when he communicated his threats to them, or that he intended or expected that his threat would be conveyed to anyone besides them. "The clear and oft-repeated purpose of [appellant]'s threats was not to terrorize his neighbors, but rather to obtain a police response to disturbances on his block." Therefore, the Court concluded, his conviction for terroristic threats must be reversed.

The Court also reversed his conviction for obstruction. Since no evidence authorized an inference that the arresting officers had reasonable or probable cause to believe that appellant intended to communicate his threats to a victim, appellant had the right to resist the arrest with all force necessary for that purpose.

Search & Seizure; Search Warrants

Glass v. State, A10A1244

Appellant was convicted of VGCSA. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant rented a suite at a hotel. A man called the front desk and asked for housekeeping services and agreed to leave the room while the room was cleaned. The housekeeper went into the room and noticed what she believed to be marijuana and other controlled substances lying openly in the room. She called her supervisor, who then went into the room and also saw the alleged contraband. The police were called and a warrant was obtained based on the information supplied by the housekeeper.

Appellant contended that the attesting officer failed to give the magistrate any information regarding the informant's veracity, truthfulness, reputation, and reliability and, therefore, that the search warrant was invalid. The Court disagreed. The affidavit showed that the witness was identified by name and while the affidavit did not state specific facts to demonstrate the veracity of the witness, the absence of significant information regarding reliability is not necessarily fatal to an affidavit offered in support of an application for a search warrant. Furthermore, a concerned citizen informant has "preferred status" insofar as testing the credibility of the informant's information. Therefore, under the totality of the circumstances presented, including the likelihood that the housekeeper risked loss of employment and criminal prosecution if her report was false, the Court determined that the magistrate was authorized to make a pragmatic, commonsense judgment that there was a fair probability that a search of the suite would produce evidence that the suite's occupants were in possession of drugs.

Similar Transactions; Impeachment

Woods v. State, A10A1198

Appellant was convicted of multiple counts of aggravated child molestation, aggravated sexual battery and child molestation. He contended that the trial court erred in admitting two similar transactions. The evidence showed that the victim was 9 years old. The similar transaction evidence concerned two teenagers. Appellant argued that each prior transaction involved a single act of forceful, non-consensual vaginal intercourse (i.e., rape) with an adult woman, while here, the State charged him with repeatedly committing "unforced" anal sodomy and several other offenses over a period of months with a nine-year-old girl, but it did not charge him with having vaginal intercourse with the victim or committing any offense involving force. The Court held that generally, the sexual molestation of young children or teenagers, regardless of the type of act, is sufficiently similar to be admissible as similar transaction evidence. Moreover,

no Georgia case holds that the difference in age of the victims is alone determinative of similarity. The trial court noted that appellant was about thirty-five years old when he attacked each of the similar transaction witnesses, who were seventeen or eighteen years old —just eight or nine years older than the victim in this case, but significantly younger than appellant. The trial court also noted that both of the similar transactions involved some type of "sexual deviancy," as did the instant case, and assured defense counsel that they would have the opportunity to thoroughly cross-examine the witnesses at trial. Based on these findings, the Court held that the trial court did not err in concluding that the similar transactions were sufficiently similar to be admissible.

Appellant also contended that the trial court erred in failing to allow him to impeach a witness with his prior convictions for burglary in 1980, forgery in 1982, and forgery in 1994. The witness was a motel clerk who testified that he remembered appellant checking into the motel with a young girl because he told appellant he could not park his truck behind the motel. Under OCGA § 24-9-84.1 (b), evidence of a conviction for a felony or a crime involving dishonesty is not admissible for the purpose of impeaching a witness "if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness . . . from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." The Court held that given the jury's opportunity to consider the accuracy of the night clerk's memory in light of the 17 month gap between the incident and the trial, as well as the trial court's determination that the evidence of the prior convictions was more prejudicial than probative, there was no abuse of discretion in the trial court's ruling on this issue.

Merger; Drinkard

Taylor v. State, A10A0303

Appellant was convicted of aggravated assault (OCGA § 16-5-21 (a) (2)) and armed robbery (OCGA § 16-8-41). He argued that the trial court erred in failing to merge the aggravated assault and armed robbery counts. The indictment specifically charged appellant with the offense of aggravated assault by making "an assault upon the person of [the victim] with. . . a baseball bat . . .by striking [the victim] in the head. . . ." The armed robbery count of the indictment alleged that appellant "did . . . with intent to commit theft, take a wallet, the property of [the victim], from the person of [the victim], by use of an offensive weapon, to wit: a baseball bat." Under *Drinkard v. Walker*, 281 Ga. 211, 214 (2006), the applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. The Court noted that while the armed robbery statute, OCGA § 16-8-41 (a), requires proof of facts not required to establish aggravated assault with intent to rob under OCGA § 16-5-21 (a) (1), namely, the taking of property from the person or presence of another, there is no element of aggravated assault with intent to rob that is not contained in the offense of armed robbery. The Court then held that while armed robbery requires proof of additional facts, aggravated assault under OCGA § 16-5-21 (a) (2), like aggravated assault with intent to rob, does not require proof of a fact not required to establish armed robbery. Therefore, based on the testimony presented, the aggravated assault and armed robbery counts should have merged.