Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 26, 2015

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Chuck Olson
General Counsel

Lalaine Briones
State Prosecution Support Director

Sharla Jackson
Domestic Violence, Sexual Assault, and Crimes Against Children Resource Prosecutor

Todd Hayes
Sr. Traffic Safety Resource Prosecutor

Joseph L. Stone
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Leah Hightower
State Prosecutor

Kenneth Hutcherson
State Prosecutor

Nedal S. Shawkat
State Prosecutor

Robert W. Smith, Jr.
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

Juveniles; Modification of Commitment Orders

In the Interest of D. H., A15A0749 (4/28/15)

Appellant was adjudicated delinquent in 2012 after finding that he committed acts which, if committed by an adult, would have constituted aggravated child molestation. On July 9, 2013, the court found that he violated his parole and ordered him committed to a YDC for a period of 60 months, followed by intensive probation for 60 months. He moved for a modification of his commitment order a year later, which was denied.

First, appellant argued that he was subjected to beatings and bullying in the YDC and therefore, the purpose of rehabilitation was not being served. The Court noted that because these juvenile proceedings were commenced before the effective date of the new Juvenile Code, the provisions of the new Code are generally not applicable. However, regardless of the date of the commencement of the proceedings, the provisions of the new Juvenile Code are applicable to a motion to modify an order committing a child to DJJ and to a motion to set aside an order of the court on the basis of newly discovered evidence. OCGA § 15-11-32 (2014) provides generally that "[a]n order of the court may … be changed, modified, or vacated on the ground that changed circumstances so require in the best interests of a child," except that, after a child has been transferred to DJJ custody, "an order committing the child to DJJ may only be modified upon motion of DJJ[,]" except as otherwise provided in OCGA § 15-11-602 (2014). OCGA § 15-11-32 (b), (c) (2014). Because the record showed that the juvenile court had transferred custody of appellant to DJJ and that DJJ did not move to modify the commitment order, the juvenile court was authorized to modify that order only pursuant to OCGA § 15-11-602 (2014).

The Court then noted that where a child is committed for a class A designated felony act or a class B designated felony act, as here, OCGA § 15-11-602 (f) (2) (A) (2014) provides, in pertinent part, that such a child shall be discharged from placement in a residential facility prior to the period of time provided in the court's order only "when a motion to be discharged from placement in a secure residential facility or nonsecure residential facility is granted by the court." Notwithstanding OCGA § 15-11-32 (2014), "*any party* may file a motion with the court seeking a child's release from placement in a residential facility, an order modifying the court's order requiring placement in a residential facility, or termination of an order of disposition for a child committed for a class A designated felony act or class B designated felony act." (Emphasis supplied.) OCGA § 15-11-602 (f) (2) (A) (2014). Nevertheless, all such motions, must "be accompanied by a written recommendation for release, modification, or termination from a child's DJJ counselor or

placement supervisor, filed in the court that committed such child to DJJ, and served on the prosecuting attorney for such jurisdiction." OCGA § 15-11-602 (f) (2) (B) (2014). Thus, the Court found, because the record showed that appellant's motion was not accompanied by a written recommendation from his DJJ counselor or placement supervisor, OCGA §§ 15-11-32 (2014) and 15-11-602 (2014) barred the juvenile court from modifying the commitment order as appellant requested. The juvenile court therefore did not err in dismissing his motion to modify the commitment order on the basis that the purpose of rehabilitation was not being served.

Second, appellant argued that under OCGA § 15-11-32 (a) (3) (2014), newly discovered evidence required that the underlying adjudication of delinquency be set aside. The Court stated that contrary to the State's assertion, because such a motion is not a motion to modify a commitment order, OCGA § 15-11-32 (c) (2014) did not apply and the motion was not subject to dismissal on the basis that it was not filed by DJJ. However, appellant did not identify any authority requiring that the adjudication be set aside where the evidence would serve only to attack the credibility of a witness, in this case, the victim. Moreover, the record showed that at the adjudicatory hearing, appellant admitted the allegations of aggravated child molestation in the State's petition and the juvenile court adjudicated him delinquent on that basis. Accordingly, the Court concluded that the trial court did not err in dismissing appellant's motion to set aside the adjudications.

Search & Seizure

State v. Wells, A15A0096 (5/5/15)

Wells was charged with trafficking in cocaine and possession of marijuana. The evidence showed that Office Pitts informed Officer Price of information which Price then used to obtain a search warrant for the residence leased by Wells. The trial court found that the search warrant was based on hearsay provided to Price by Pitts and that Pitts was not present for the issuance of the warrant. The court held as a matter of law that the all of the information provided by Pitts was inadmissible hearsay and concluded that the affidavit therefore lacked probable cause to allow the magistrate to issue a warrant. Accordingly, the court granted the motion to suppress the evidence seized in the search. The State appealed and the Court reversed.

The Court stated that it has repeatedly held that one officer may present an affidavit in support of a search warrant based on statements obtained from another officer; that such hearsay is reliable under the circumstances; and that the officer communicating the information to the affiant need not personally appear before the magistrate. Because the information relayed from one officer to the officer presenting the affidavit is deemed reliable, the trial court erred by excluding the information in the search warrant affidavit on the sole basis that the averments were hearsay communicated from Pitts to Price. The Court then reviewed the affidavit and held that the facts contained therein provided a sufficient basis for the magistrate to conclude that there was a fair probability that contraband or evidence of a crime would be found in Wells' residence.

Expert Testimony; Cross-Examination

Gipson v. State, A15A0155 (5/6/15)

Appellant was convicted of aggravated assault with an offensive weapon, aggravated assault with intent to murder, aggravated battery, and battery. He argued that the trial court erred in allowing expert testimony from the executive director of the domestic violence shelter regarding the typical characteristics of domestic abuse victims and the cyclical pattern of domestic abuse. Specifically, he argued that the executive director was not qualified to offer an opinion as an expert on those topics and her testimony was irrelevant and impermissibly placed his character in issue.

The Court noted that appellant failed to object at trial to the expert qualifications of the executor director or to any of her testimony and Georgia has long followed the contemporaneous objection rule, which provides that counsel must make a proper objection on the record at the earliest possible time to preserve for review the point of error. However, because the trial in this case occurred after January 1, 2013, Georgia's new Evidence Code applies. Under the new Code, the Court may review the purportedly improper testimony for plain error under OCGA § 24-1-103 (d). To rise to the high level of plain error, the error must be one that is so clearly erroneous that it creates a likelihood of a grave miscarriage of justice or seriously affects the fairness, integrity, or public reputation of the judicial proceeding, and the appellant must show that the error caused him harm, i.e., that the error likely affected the outcome at trial.

And here, the Court found, there was no error, much less plain error, in admitting the testimony because the witness was properly qualified as an expert. Moreover, the Court found, the trial court did not err in permitting the executive director to testify about the typical characteristics of domestic abuse victims and the cycle of domestic abuse. Expert testimony is admissible to explain the behavior of a domestic violence victim who does not report abuse or leave the abuser. When cross-examining the victim in this case, defense counsel attempted to undermine her credibility by emphasizing that despite the allegations of abuse, the victim had not left appellant, had not tried to stop the abuse, and had lied to others about what had occurred rather than report the abuse. Under these circumstances, the executive director's testimony did not improperly place appellant's character in issue and was relevant because the reasons that a victim would not immediately leave after a violent event or report the abuse are beyond the ken of the average layperson.

Appellant also contended that the State improperly placed his character in issue by questioning him about a religious emblem he was wearing during cross-examination. The Court noted that here, appellant again failed to object at trial to his cross-examination by the State, and thus was required to show that the trial court committed plain error by allowing the prosecutor's questions. During cross-examination, the prosecutor pointed out that appellant was wearing a Christian cross and insinuated through a series of questions that appellant was a hypocrite in light of his abusive conduct towards the victim. The Court found that "[w]hile the prosecutor's questioning of [Appellant] was argumentative and improper," he failed to show that the questions, when viewed in the context of the trial as a whole, rose to the level of plain error.

Search & Seizure; Kazmierczak

State v. Edwards, A15A0762 (5/7/15)

Edwards was charged with trafficking in marijuana. The State appealed from the order granting Edwards' motion to suppress. The evidence showed that based on an anonymous

tip of illegal drug activity, uniformed officers went to a residence to do a "knock and talk". Edwards answered the door and the officers (who were uniformed and identified themselves as police officers) immediately smelled the strong odor of raw marijuana coming from inside the residence. As the officers stood at the open door and explained to Edwards why they were there, Edwards moved back and to the side, going behind the open door. Acting for their own safety, the officers stepped into the residence, just inside the door, and grabbed and secured Edwards. Officers found a pistol and $7,000.00 in cash on Edwards' person. Once inside the door, one of the officers could see from that position what appeared to be a large amount of raw marijuana a few feet away in clear plastic bags "pretty much everywhere in the kitchen." After a security sweep, the officers left the residence, secured the door, and waited outside while one of them applied for a warrant to search the residence.

The trial court found that the officers were not lawfully inside the house prior to issuance of any search warrant, and excluded testimony or other evidence obtained as a result of the illegal entry. But, the trial court also found that the Fourth Amendment did not prohibit admission of evidence that, prior to the illegal entry, an officer lawfully present at the door of the residence recognized the odor of marijuana coming from inside the residence. The State did not contest the trial court's ruling that the officers' initial warrantless entry violated the Fourth Amendment and thus, the suppression of evidence obtained as a result of the officers' initial entry into the residence without a warrant was affirmed.

However, the trial court also found that found that the anonymous phone call provided no basis for probable cause to issue the search warrant, and that "the smell detection of marijuana by law enforcement … is insufficient alone to sustain a finding of probable cause for the issuance of a search warrant" of the residence. The Court disagreed. Quoting its recent case in *State v. Kazmierczak*, Case No. A14A2046, ___ Ga. App. ___, (March 30, 2015), the Court stated that "[i]f the affidavit for the search warrant contains sufficient information for a magistrate to determine that the officer who detected the odor of marijuana emanating from a specified location is qualified to recognize the odor, the presence of such an odor may be the sole basis for the issuance of a search warrant." Under this standard, the Court found, the affidavit in support of the search warrant was sufficient to support the magistrate's determination that probable cause existed for issuance of the warrant. Therefore, the trial court erred by granting the motion to suppress evidence obtained pursuant to the search warrant on the basis that the warrant was invalid for lack of probable cause. Accordingly, the portion of the trial court's order suppressing evidence obtained pursuant to the search warrant was reversed.

Right to be Present; Waiver

Estrada v. State, A15A0325 (5/14/15)

Appellant was indicted for armed robbery, but convicted of the lesser-included offense of robbery. He argued that he had a right under the Georgia Constitution to be present during a particular interaction between the trial court and the jury and that the violation of this right warranted a reversal of his conviction. The record showed that after beginning deliberations, the jurors sent written questions to the court. The court, the prosecutor, and defense counsel entered the jury room to respond. The communication, however, was not transcribed.

The Court stated that a violation of a defendant's right under the Georgia Constitution to be present at critical stages of the proceedings is presumed to be prejudicial; violating this right warrants a reversal and remand for a new trial. However, a defendant may waive that right. And here, the Court found, a summary of the communication was placed on the record by the trial judge and agreed to by the prosecuting attorney and defense counsel. But there was no indication on the record that appellant objected himself or sought to have his trial counsel object on his behalf. Appellant had opportunities to discuss the jury room visit with counsel after the fact and assert any objections he had, but the record was silent in that regard. Thus, the Court concluded, any objection to the communication with the jury was waived. Consequently, appellant failed to show that he was entitled to reversal of his conviction.

Statements; Hope of Benefit

State v. Jackson, A15A0240 (5/14/15)

The State appealed from the grant of Jackson's motion to suppress evidence of a statement Jackson made during a custodial interview. The trial court found that during a Mirandized interview, Jackson's statement, made after the interrogating officer's comment that "the only way to get out of here is to be honest," was involuntary because it was induced by a hope of benefit. The Court disagreed and reversed.

Initially, the Court noted that this case was governed by the new Evidence Code. The two relevant code provisions — OCGA §§ 24-8-824 and 24-8-825 — are substantively the same as provisions in Georgia's earlier evidence code and thus, the Court gives them the same meaning as the former code provisions. And, our courts have "consistently and for many decades" interpreted the phrase "slightest hope of benefit" as used in the predecessor Code sections to OCGA § 24-8-824 to focus on promises related to reduced criminal punishment — a shorter sentence, lesser charges, or no charges at all. A promise not related to charges or sentences has been held to constitute only a "collateral benefit."

Here, the Court found, even if the officer's statement that "the only way out of here is to be honest" could be construed as a promise that if Jackson were honest he would be released, the statement, in context, did not constitute a hope of benefit because no one promised him that he would not be charged with a crime or that he would receive reduced charges, sentencing or punishment if he made incriminating statements. Accordingly, the trial court erred in holding that Jackson's custodial statement was induced by hope of benefit and therefore involuntary.

Conditional Discharge; Void Sentencing

State v. Barrow, A15A0113 (5/14/15)

Pursuant to a negotiated plea, Barrow pled guilty to manufacturing methamphetamine. Over the State's objection, the trial court deferred entry of judgment on Barrow's plea pursuant to the conditional discharge for drug possession statute under OCGA § 16-13-2 (a) and placed Barrow on probation for five years. The State then filed a motion to vacate or correct Barrow's sentence, which the trial court denied. The State appealed pursuant to OCGA § 5-7-1 (a) (6), contending that Barrow was ineligible for conditional discharge and therefore the sentence was void because it was

one that the law does not allow. The Court agreed and reversed.

The Court found that the unambiguous language of OCGA § 16-13-2 (a) limits its application to those criminal defendants who plead guilty to, or are convicted of drug possession. Limiting the application of OCGA § 16-13-2 (a) to drug possession is consistent with the legislative scheme criminalizing and punishing drug offenses. Notably, drug possession is criminalized by OCGA § 16-13-30 (a). In contrast, OCGA § 16-13-30 (b) prohibits manufacturing, delivering, distributing, dispensing, administering, selling, and possessing with intent to distribute any controlled substance. Moreover, Georgia law imposes much harsher penalties for these crimes than for mere possession.

Nevertheless, in denying the State's motion to vacate or correct Barrow's sentence, the trial court found that possession, as used in OCGA § 16-13-2 (a), was intended to be interpreted in the "generic sense," and thus encompassed trafficking and manufacturing charges as well. Specifically, the trial court found that conditional discharge is available to defendants charged with drug trafficking or manufacturing, as well as possession. However, the Court found, eligibility under the conditional discharge statute turns on the offense for which a defendant is convicted of or which he pleads guilty to, not on the charges filed against him. Thus, the rules of statutory interpretation do not permit the trial court's interpretation. "Possession" must be interpreted as referring to the crime of drug possession. Therefore, since OCGA § 16-13-2 (a) unambiguously applies only to defendants who have been found guilty of or pled guilty to drug possession, Barrow was not eligible for conditional discharge under that statute. Accordingly, the Court reversed and remanded for resentencing.

Search & Seizure; Roadblocks

Armentrout v. State, A15A0093 (5/15/15)

Appellant was convicted of DUI. The evidence showed that she was stopped at a police checkpoint. She contended that the trial court denied her motion to suppress. Specifically, she argued that the checkpoint was unlawful because the State failed to prove that the city police department's overall checkpoint program had a legitimate primary purpose. The Court agreed.

The Court noted that the requirement that the decision to implement a particular roadblock be made by "supervisory personnel" is distinct from the requirement that the roadblock program have a primary purpose other than the general interest in crime control. Thus, at a minimum, the State must show that the law enforcement agency's checkpoint program had an appropriate primary purpose other than ordinary crime control—a purpose examined at that programmatic level, rather than by trying to determine the motives of the supervisor who implemented, and the officers who conducted, the particular checkpoint at issue.

Here, the Court found, the supervising officer submitted a written proposal to his superior officer to establish a traffic task force, which would conduct several traffic-safety checkpoints during the upcoming holiday weekend. In addition to specifying the times and locations for the checkpoints, the proposal noted that the goal of the task force was to "establish safety checkpoints to enhance safe travel" through the city and that the "primary purpose of the checkpoints [was] to conduct a check of driver's licenses, and to identify drivers who are under the influence of drugs and/or alcohol." The officer's superior approved the proposal, and city police officers (including the supervising officer) began implementing the checkpoints two days later.

But, the Court also found, while the State showed that the decision to implement the roadblock was made by supervisory personnel, the State failed to meet the requirement that the checkpoint program had an appropriate primary purpose. In other words, the State presented evidence that this checkpoint had a lawful purpose, but a finding that a particular checkpoint has a primary purpose other than ordinary crime control is not enough. There must also be a policy purpose of the checkpoints, viewed at the programmatic level, to ensure that an agency's checkpoints are established primarily for a lawful and focused purpose like traffic safety rather than to detect evidence of ordinary criminal wrongdoing. And here, there was no testimony nor any written evidence admitted regarding the city police department's checkpoint policy or program as a whole. Therefore, the Court held it was "constrained to conclude that the checkpoint at which [appellant] was stopped violated the [Fourth] Amendment." Accordingly, the trial court erred by denying appellant's motion to suppress.