Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 4, 2010

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THIS WEEK:

Search & Seizure

Molina v. State, A10A0478

Appellant was convicted of trafficking in cocaine. He contended that the trial court erred in denying his motion to suppress. The Court agreed and reversed. The evidence showed that appellant was a passenger in a vehicle that was stopped for a broken taillight. The officer asked for consent to search. A backup officer asked appellant to step out of the car. Appellant was breathing heavy and had a pulsating carotid artery in his neck. The officer patted him down as a routine measure and found a kilo of cocaine on his person.

The Court, quoting *Arizona v. Johnson* , __U.S.__ ,129 SC 781, 784, 172 LE2d 694) (2009), stated that "to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous," and that this requirement applies to passengers in cars legally stopped. Here, the backup officer who searched appellant testified he did not think appellant posed a threat of any kind. In fact, the officer described appellant as "pretty normal," other than his heavy breathing and pounding pulse. Testimony that a passenger was breathing hard with a pounding pulse, however, does not establish a reasonable suspicion that he poses a danger to the officer's safety. The State nevertheless argued that *the situation itself* posed a sufficient danger to the officers to warrant a patdown of the driver and his passenger. But the Court said that while traffic stops are inherently risky, a pat-down must still be based on information specific to the person frisked and not to some general policy. In other words, it is not sufficient to say the situation itself poses a danger to the officer and therefore, he is justified in frisking a vehicle's occupant.

State v. Parke, A10A0089

The State appealed from the grant of Parke's motion to suppress. The evidence showed that an officer noticed Parke's vehicle traveling in the left lane on I-75 in the Atlanta metro area. The speed limit was either 65 or 55 MPH at that area. The posted minimum speed was 40 MPH. Parke's vehicle was traveling at 48 MPH and two cars passed him on the right. The officer admitted that the two passing vehicles may have been speeding. The officer initiated a traffic stop because Parke was impeding the flow of traffic. The stop resulted in the seizure of controlled substances. The trial court found that the officer lacked probable cause to stop the vehicle and granted the motion to suppress.

OCGA § 40-6-184 (a) provides: "(1) No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation. (2) On roads, streets, or highways with two or more lanes allowing for movement in the same direction, no person shall continue to operate a motor vehicle in the most left-hand lane at less than the maximum lawful speed limit once such person knows or should reasonably

know that he is being overtaken in such lane from the rear by a motor vehicle traveling at a higher rate of speed, except when such motor vehicle is preparing for a left turn." The Court held that it would not disturb the trial court's findings based upon conflicting witness testimony that at the time of the traffic stop, Parke was traveling above the posted minimum speed limit and only a few miles below the posted maximum speed limit when his vehicle was passed by two vehicles that were speeding. Therefore, the officer's belief that Parke was impeding the flow of traffic was an insufficient basis for initiating an investigative stop. Moreover, while OCGA § 40-6-184 (a) (2) prohibits traveling in the leftmost lane at less than the maximum speed limit when the driver knows or reasonably should know that he is being overtaken by another vehicle, this statutory subsection does not apply where, as here, the driver is being overtaken by another vehicle *that is exceeding the maximum speed limit.* "In such a context, the other vehicle is not overtaking the driver because the latter is impeding the flow of traffic by traveling unreasonably slow, but rather because the other vehicle is traveling unreasonably fast in violation of the traffic laws. Clearly, the legislative intent behind the statute was to prevent unsafe slow driving, not to punish drivers for failing to yield the lane to speeders, and we decline to interpret the statute in a manner that would be inconsistent with that intent and would lead to an unreasonable result."

Continuances; OCGA § 17-8-25

Brown v. State, A10A0365

Appellant was convicted of aggravated assault and possession of a firearm during the commission of a felony. He contended that the trial court erred in not granting him a longer continuance to secure the attendance of an alibi witness. The record showed that trial counsel obtained only a writ of habeas corpus ad testificandum for the witness who was in custody and did not actually subpoena the witness. Sometime between obtaining of the writ and the time the witness was to testify (three days), the witness was released from custody. The trial court offered to continue the trial until the next morning. Trial counsel declined the offer, stating that there would not be enough time to find and subpoena the witness.

The Court held that OCGA § 17-8-25 provides that in all applications for continuance upon the ground of the absence of a witness, it must be shown to the court that the witness is absent; that he has been subpoenaed; that he does not reside more than 100 miles from the place of trial; that his testimony is material; that the witness is not absent by permission of the applicant; that the applicant expects he will be able to procure the witness's testimony at the next term of court; that the application is not made for the purposes of delay; and the facts the applicant expects to be proved by the absent witness. Here, defense counsel declined the trial court's offer to continue the trial until the next day in order to secure the attendance of the alibi witness. In requesting a continuance beyond the next morning, counsel made no claim or showing that he expected to be able to procure the witness's testimony at the next term of court. Thus, the Court held, even if the other statutory terms for the granting of a continuance had been met, the requirement that the witness's testimony would be procured at the next term of court was not fulfilled. The grant or denial of a continuance is addressed to the sound legal discretion of the trial court, and the court's ruling will not be disturbed absent a clear abuse of discretion. Therefore, trial court did not abuse its discretion by denying Brown's counsel's request for an indefinite continuance.

Possession Within 1,000 Ft. of Public Housing; Mens Rea

Jones v. State, A10A1298

Appellant was convicted of numerous drug crimes, including possession with intent to distribute marijuana and methamphetamine within 1000 feet of public housing. He challenged the sufficiency of the evidence. Specifically, he contended that the State failed to prove that he knew he was within a 1000 feet of public housing. OCGA § 16-13-32.5 provides: "It shall be unlawful for any person to manufacture, distribute, dispense, or possess with intent to distribute a controlled substance or marijuana . . . in, on, or within 1,000 feet of any real property of any publicly owned or publicly operated housing project, unless the manufacture, distribution, or dispensing is otherwise allowed by law." The Court held that the proximity to a public housing project was designated by the legislature as the basis for distinguishing this crime from the crime of possession with intent to distribute. Similar to the trafficking statute, OCGA § 16-13-32.5 requires only that the State show that the accused knowingly possessed the illegal drugs with the intent to distribute them, not that he knew he was within 1,000 feet of a public housing project.

Out-Of-Time Appeals

Moore v. State, A10A1242

Appellant was charged with murder but negotiated a plea to manslaughter. Twenty years later, he filed a motion for an out-of-time appeal. The trial court denied the motion and he appealed. The Court held that an out-of-time appeal is available only when an appellant can show first, that he actually had a right to file a timely direct appeal; and second, that his right to appeal was frustrated by the ineffective assistance of counsel. A defendant who pleads guilty to a crime has no unqualified right to a direct appeal. In order to show entitlement to a direct appeal from a judgment of conviction and sentence entered on a guilty plea, a defendant must establish that his claims can be resolved solely by reference to the facts contained in the record.

Appellant was able to show the first part of the test because the record showed on its face that the trial court failed to establish a factual basis for the plea. As to the second part, appellant must show that ineffective assistance of counsel was the sole reason for the failure to file the appeal. An out-of-time appeal is not authorized if the delay was attributable to the appellant's conduct, either alone or in concert with counsel. Here, the Court found that 1) the trial court's finding that appellant's own conduct contributed to the delay was supported by the evidence; and 2) even if appellant's conduct was not an issue, defense counsel did not render ineffective assistance.

Finally, the Court stated that even if appellant could show that ineffective assistance was the sole cause for the delay, this would not end the inquiry. Appellant must also show that that a manifest injustice will result unless his guilty plea is invalidated. Here, the transcript of the hearing on appellant's motion for out-of-time appeal contained the testimony of his trial counsel, which recounted in detail

the evidence showing that appellant acted aggressively and not defensively in stabbing and killing the victim. Thus, even though this evidence was not set forth in the guilty plea hearing, its presence in the later hearing showed that the invalidation of appellant's guilty plea was not necessary to correct a manifest injustice.