Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 12, 2013

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THIS WEEK:

Escape; Fatal Variance

Juhan v. State, A13A0300 (7/2/13)

Following a bench trial, appellant was convicted of felony escape after he failed to return to the work release program to which he had been assigned. He argued that his conviction should be reversed because the State failed to prove that he was serving a lawful sentence for theft by taking at the time of his escape as alleged in the indictment. The indictment alleged that on September 19, 2008, appellant "did then and there unlawfully after having been convicted of theft by taking, a felony, intentionally escape from the lawful custody of [the County] Correctional Complex, contrary to the laws of said State, the peace, good order, and dignity thereof." At trial, the inmate active records supervisor for the Sheriff's Department testified that appellant completed his sentence for his 2007 conviction for theft by taking on March 20, 2008, and when appellant escaped the work release program on September 18, 2008, he was serving a different sentence for a 2003 conviction and a 2008 conviction.

O.C.G.A. § 16-10-52(a)(1) provides: "[a] person commits the offense of escape when he . . . , having been convicted of a felony or misdemeanor or of the violation of a municipal ordinance, intentionally escapes from lawful custody or from any place of lawful confinement." The lawful confinement of the accused at the time of his escape was a necessary element of that offense. The Court explained that the gravamen of the offense of escape, under the common law and under the statute, is the intentional departure from lawful confinement or custody. Here, the Court held that the only purpose of the allegation in the indictment was to show lawful confinement, which was both alleged and proved without regard to the allegation, which was merely surplusage. Accordingly, there was no fatal variance between the indictment and the proof at trial.

Speeding; Merger

Frasard v. State, A13A0629 (6/27/13)

Appellant was convicted of two counts of speeding. He argued that because the speeding citation failed to specify whether the incident occurred on a two-lane road, the citation was void. The Court stated that under O.C.G.A. § 40-6-187(a), the citation "shall specify the speed at which the defendant is alleged to have driven, the maximum speed applicable . . . , and whether the violation occurred on a two-lane road or highway." First, the Court noted, appellant did not file any motion or demurrer attacking the citation or the indictment on this ground before trial. Moreover, in construing O.C.G.A. § 40-6-187 or its predecessor, the Court has previously held that even if the statute directed the State to specify details including a defendant's speed, an indictment

provided sufficiently specific notice when it alleged that the defendant was traveling "in excess of" a certain speed. Here, the citation indicated that appellant was speeding on Peachtree Road. When the officer left the box indicating "2-lane road" blank, he was complying with O.C.G.A. § 40-6-187 by showing that the road consisted of more than two lanes at the location at issue. Thus, the citation was not defective, and the indictment based on it was sufficiently specific to put appellant on notice of the charges against him.

Next, the Court considered whether the counts merged for sentencing purposes even though appellant failed to raise the claim in the trial court or challenge the sentence on appeal. The Court stated that since one may not be convicted legally of a crime which is included as a matter of law or fact in another crime for which the defendant stands convicted, the conviction and sentence for the included crime must be vacated by the appellate court, even if not enumerated as error. Here, the evidence showed that the officer noticed appellant's excessive speed and then used his laser detection device to derive an exact speed. The Court noted that either the arresting officer's testimony as to his initial observation of appellant's excessive speed or the results of the laser detection device used immediately after that initial observation would have been sufficient to sustain his conviction for speeding. However, the two sources of evidence cannot sustain a conviction on two separate counts of speeding because there is no evidence in the text of O.C.G.A. § 40-6-181 that the legislature intended multiple punishments for "a single course of conduct" spanning less than a minute. Moreover, without evidence of a legislative intent to allow multiple punishments for the same course of conduct, acts that constitute a continuing criminal course of conduct are not punishable separately. Thus, the Court held, the trial court erred when it failed to merge the two speeding counts for sentencing purposes, vacated the trial court's judgment of conviction and remanded for further proceedings consistent with the opinion.

Giving a False Name; Jury Charges

Smith v. State, A13A0722 (6/26/13)

Appellant was convicted of two counts of identity fraud (O.C.G.A. § 16-9-121(a)(1)) (2010), four counts of forgery in the second degree (O.C.G.A. § 16-9-2(a)) (2010), and one count of giving a false name to law enforcement (O.C.G.A. § 16-10-25). The charges stemmed from evidence obtained after appellant and two co-defendants attempted to purchase an item from a retail store with a fraudulent check and subsequently fled when employees of the store became suspicious. When appellant was arrested by officers, he was in possession of a valid Georgia driver's license in the name of "Jack Spade." When officers ran Smith's fingerprints through the FBI database, however, the fingerprints were associated with the name William Carmichael Smith.

Appellant contended that the evidence was insufficient to sustain the false name count. Under O.C.G.A. § 16-10-25, "[a] person who gives a false name, address, or date of birth to a law enforcement officer in the lawful discharge of his official duties with the intent of misleading the officer as to his identity or birthdate is guilty of a misdemeanor." A conviction for violating O.C.G.A. § 16-10-25 must be supported by some evidence that the name given in the subject incident was false. Generally this is established by some proof of the defendant's real name. Here, the Court noted, appellant was charged with violating O.C.G.A. § 16-10-25 by giving the name "Jack Spade" to the initial responding officer who stopped appellant and his co-defendants when they tried to leave the retail parking lot. The evidence showed that at the time of his arrest, appellant was in possession of a valid Georgia driver's license in the name of "Jack Spade." Moreover, similar transaction evidence at trial showed that appellant was previously arrested and convicted under the name of "Jack Spade a/k/a William Carmichael Smith" for passing counterfeit checks in South Carolina. Although appellant's fingerprints were associated with the name "William Carmichael Smith" when run through the FBI database, no evidence showed that appellant gave either name "Jack Spade" or "William Smith" to the initial responding officer, and no evidence showed which of these names was appellant's true name and which name was false. Therefore, the Court held, the evidence was insufficient to support appellant's conviction for giving a false name.

Appellant also argued that the trial court erred in giving a sua sponte charge on the lesser included offense of second degree forgery with regard to Counts 1 and 2 in response to a jury question. The Court disagreed. The record showed that during jury deliberations, the trial court received a note from the jury stating that most of the jurors believed that appellant was a party to the crimes and asking whether they could change the first degree forgery charges (Counts 1 and 2) to second degree forgery. Over defense counsel's objection, the trial court recharged the jury on first and second degree forgery and parties to a crime, and the trial court prepared new verdict forms giving the jury the option on Counts 1 and 2 of finding appellant guilty or not guilty of either first degree forgery or the lesser included offense of second degree forgery.

The Court found that second degree forgery is necessarily a lesser included offense of first degree forgery. The distinction between the two offenses is that first degree forgery requires proof that the defendant uttered or delivered the forged writing, whereas second degree forgery does not. Here, the indictment charged appellant with two counts of first degree forgery which includes the elements required to prove the lesser crime of second degree forgery. Accordingly, the indictment afforded appellant with sufficient notice of the conduct which he had to defend at trial. Moreover, some evidence supported a finding that appellant committed the lesser included offense of second degree forgery when he and his co-defendants presented a forged check and fake Alabama identification card in an attempt to purchase nearly $500 in merchandise, including an iPod, at a Best Buy store. Accordingly, the trial court did not abuse its discretion in adding a sua sponte charge on the lesser included offense when recharging the jury in response to their question.

Presumption of Ownership; Mere Presence

Reyes v. State, A13A0174 (6/28/13)

Appellant was convicted of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e). The evidence, briefly stated, showed that an officer was attempting to serve an arrest warrant on appellant when it appeared to him that appellant had broken into the car and was sitting in the driver's seat. When the officer arrested him, he discovered weapons, a large amount of cash, and a bag containing 33.50 grams of methamphetamine.

At trial, appellant testified that his father was the landlord at the residence; that he was there to "fix some pipes" and to collect the rent; and that the cash on his person was the collected rent money. Appellant said that the car "wasn't moveable"; that it belonged to "[t]he guy that lives there"; and that he had been in the car for about ten minutes before the officer arrived because "the guy there" asked him to fix the car's radio. Appellant said that nothing in the car belonged to him, and that he had no knowledge that any methamphetamine was in the car.

First, appellant argued that the trial court erred by failing to give his orally requested jury instruction on "mere presence" because this was his "sole defense." The Court disagreed. A trial court is required to instruct the jury sua sponte on a defendant's "sole defense" if supported by some evidence. But the rule that "mere presence" at the scene of a crime is insufficient to convict was not appellant's "sole defense" because "mere presence" is not recognized as a separate and discrete defense to a criminal charge. Rather, the "mere presence" rule is really a corollary to the requirement that the State prove each element of the offense charged. The trial court correctly instructed the jury on the State's duty to prove each element of the charged offense beyond a reasonable doubt, and fully instructed the jury on the law of circumstantial evidence. Under these circumstances, the Court held, the trial court did not err by failing to charge on "mere presence."

Appellant also argued that the trial court erred by failing to sua sponte give a jury instruction on the rebuttable presumption that methamphetamine found hidden in the car was in the exclusive possession of the car's owner. Citing *Walden v. State*, 196 Ga.App. 844 (1990), appellant claimed that he was entitled to this instruction as part of his "sole defense" that he was not the owner or driver of the car; that he was "merely present" in the car to fix the radio for the owner; and that he had no knowledge that methamphetamine was in the car. The Court noted that in *Walden*, a car passenger was charged with constructive possession of cocaine found in a car also occupied by the driver/owner and another passenger. All three occupants were jointly charged with cocaine trafficking based on possession of the cocaine found in the car. *Walden* found that the passenger's "sole defense" was that he was a "mere passenger in the car" without actual or constructive possession of the cocaine, and that to adequately present this defense to the jury, the defendant-passenger was entitled to jury instructions: (1) that a rebuttable presumption existed that the driver/owner had exclusive possession of the cocaine in the car; and (2) that evidence showing that a person or persons other than the driver/owner had equal access to the cocaine in the car may or will, depending on the strength of the evidence, overcome the presumption that the cocaine was in the exclusive possession of the driver/owner.

But, the Court stated, "We find that *Walden* wrongly decided that the accused passenger was entitled to jury instructions on the 'rebuttable presumption' and the 'equal access' rule as part of the passenger's 'sole defense' of 'mere presence.'" Where an owner or driver of an automobile has exclusive possession of the automobile, the inference is that the owner or driver has exclusive possession of contraband found in the automobile. This inference has been referred to as a rebuttable presumption. The presumption is rebuttable and does not apply where evidence shows that a person or persons other than the owner or driver had equal access to the automobile and thus equal opportunity to possess the contraband. The owner/driver and the two passengers in *Walden* were charged with joint constructive possession of the cocaine based on equal access to the car. Accordingly, there was no evidentiary basis in *Walden* for a presumption that the owner/driver had exclusive possession of the cocaine, and the trial court gave no instruction on the presumption. Because no presumption arose in *Walden* that the owner/driver had exclusive possession of the cocaine, there was no basis for jury instructions on "equal access" which is merely a defense available to the accused to whom a presumption of possession flows. Moreover, the Court added, because no presumption arose that the owner/driver in *Walden* had exclusive possession of cocaine found in the automobile, the passenger in the automobile had no right to jury instructions raising the rebuttable presumption (or equal access) to support a defense that he was merely present and did not have possession of the contraband. And, the Court stated, jury instructions on "rebuttable presumption" and "equal access" were not otherwise required in *Walden* as the passenger's "sole defense" was that he was "merely present" in the car. Thus, the Court concluded, "For all these reasons, the decision in *Walden*….is overruled."

Accordingly, the Court determined, based on the facts here, the State did not rely on a presumption that appellant, the sole occupant of the car, had exclusive possession of the methamphetamine found in the car, and the trial court gave no such jury instruction. Under these circumstances, appellant had no right to jury instructions raising the rebuttable presumption to support his "sole defense" that he was "merely present" in the car and did not have possession of the contraband. The trial court, therefore, did not err by failing to instruct the jury on a rebuttable presumption that the methamphetamine found hidden in a car was in the exclusive possession of the car's owner.

Jury Charges; Plain Error

Hernandez-Garcia v. State, A13A0194 (6/27/13)

Appellant was convicted of trafficking cocaine as a result of a joint state and federal law enforcement investigation of the Atlanta area. He contended that that the trial court erred in charging the jury on the definition of trafficking, because the charge allowed the jury to convict him of the offense of trafficking by a method not alleged in the indictment. The Court noted, and appellant acknowledged, that he did not object to the jury charge at trial. Thus, the charge could provide a ground for reversal only if it constituted plain error. To demonstrate plain error with respect to a jury charge, it must be shown that the instruction was erroneous, that the error was obvious, and that there is a reasonable probability that the erroneous instruction affected the outcome of trial.

The record showed that the indictment charged appellant with trafficking in cocaine by knowingly possessing 400 grams or more of a mixture containing at least 10% cocaine. In defining the offense of trafficking for the jury, however, the court charged the trafficking statute, O.C.G.A. § 16-13-31(a), in its entirety and instructing the jury that "[t]he offense charged in Count 1 . . . is a violation of the Georgia Controlled Substances Act, trafficking in cocaine, which provides that any person who knowingly *sells, delivers, or brings into this state, or who is knowingly in possession* of 400 grams or more of cocaine, or . . . any mixture with a purity of 10 percent or more of

cocaine[,] commits the offense of trafficking in cocaine" (emphasis supplied) . The Court stated that as a general rule, a trial court does not err when it charges a code section in its entirety, even though some part of that section may be inapplicable to the allegations of the indictment and the evidence presented at trial. In such circumstances, error will be found only where it appears that the inapplicable part of the charged statute either misled the jury or erroneously affected the verdict. For the jury charge at issue to constitute reversible error, therefore, there had to be a reasonable possibility that, as a result of the charge, the jury convicted appellant of the offense of trafficking in cocaine in a manner not alleged in the indictment. The Court noted that at trial, there was no evidence suggesting that appellant brought the cocaine into the state, that he sold it, or that he delivered it to anyone. Rather, the evidence showed only that he was in knowing possession of the cocaine for a brief period of time. Given these circumstances, the Court found no reasonable possibility that the jury convicted appellant of trafficking in a manner not charged in the indictment, and therefore, found no plain error in the jury charge.

Business Records; Discovery

Raymond v. State, A13A0014 (6/26/13)

Appellant was convicted of 21 counts of theft by taking. The evidence showed that appellant was an incorporator and president of a small convenience store licensed to service Western Union and MoneyGram customers and to provide wire transfer of monies. During a span of several years, appellant would use the two wiring systems to intercept and steal money being sent to the food store location.

First, appellant contended that the trial court erred in allowing into evidence as business records State's Exhibit One—a spreadsheet of 140 fraud reports received by Western Union regarding the food store and State's Exhibit 44—a MoneyGram spreadsheet of 445 received transactions at the food store. Pursuant to former O.C.G.A. § 24-3-14(b) and (c), "[a]ny writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible in evidence in proof of the act, transaction, occurrence, or event, if the trial judge shall find that it was made in the regular course of any business and that it was the regular course of such business to make the memorandum or record at the time of the act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight; but they shall not affect its admissibility." A Western Union representative testified that Exhibit One was a document created in the regular course of Western Union's business; that it was part of the ordinary course of Western Union's business to create such a document; and that she was familiar with the document. Upon its tender into evidence, appellant's counsel stated "I object. He hasn't laid the proper foundation. *I could be more specific, but I don't believe I have to.*" (Emphasis supplied.) The Court, however, held that counsel should have been "more specific" and thus, did not preserve the issue for appeal.

MoneyGram's representative testified that Exhibit 44 was a spreadsheet of transactional data generated by the food store's receipt of MoneyGram transmissions. The document was created in the ordinary course of MoneyGram's business and it was MoneyGram's ordinary course of business to generate such documents. The entries were made as the transactions were generated. After defense counsel conducted voir dire of the MoneyGram witness regarding Exhibit 44, he stated he "[did] not object to No. 44." The Court found that a proper foundation for admission of this document pursuant to O.C.G.A. § 24-3-14(b) had been laid and that it had been properly admitted. Additionally, the Court noted, defense counsel's belated attempt to voice objection to Exhibit 44 later in the trial was ineffectual.

Next, appellant contended that the trial court erred by not granting some remedy allowed under O.C.G.A. § 17-16-6 when the State presented evidence that allegedly was entered in violation of the discovery rules. Under O.C.G.A. § 17-16-4(a)(3)(A), "the prosecuting attorney shall, . . . , permit the defendant . . . to inspect and copy or photograph . . . papers, documents, . . . or copies or portions thereof . . . within the possession, custody, or control of the [S]tate or prosecution and are intended for use by the prosecuting attorney as evidence in the prosecution's case-in-chief or rebuttal at the trial or were obtained from or belong to the defendant." When the State fails to comply with reciprocal discovery requirements, the trial court may, under O.C.G.A. § 17-16-6, "order the [S]tate to permit the discovery or inspection, . . . grant a continuance, or, upon a showing of prejudice and bad faith, prohibit the [S]tate from introducing the evidence not disclosed."

The record showed that during trial, defense counsel became aware that the prosecution was going to introduce four boxes of documents which had been seized from the food store and which were not made available to appellant during discovery. During the discussion of the discovery issue, the chief investigator testified that appellant's previous trial counsel had examined the four boxes of evidence. Defense counsel stated that he believed the failure to produce these four boxes of documents for his personal review was inadvertent, not willful. Defense counsel also stated that he had been to the district attorney's office on two occasions and had seen boxes of Western Union and MoneyGram documents which he spent hours reviewing. The Court found that because appellant's previous counsel had seen the four boxes, the State complied with its discovery obligation. Moreover, the Court noted, although defense counsel did not see the four boxes of documents seized from the food store prior to trial, defense counsel and an associate had an hour and a half break during the trial when they were able to review the four boxes. Therefore, even assuming without deciding that a discovery violation occurred, trial counsel was given one of the remedies provided by O.C.G.A. § 17-16-6; a chance to review the documents. Thus, there was no reversible error.

Search & Seizure; Hearsay

Garcia-Carillio v. State, A13A0126 (6/27/13)

Appellant was convicted of trafficking cocaine, driving without a license, and following too closely. The evidence showed that a known cocaine trafficker named Ada Cordero was the target of a narcotics unit investigation that included a wiretap on Cordero's telephone. The investigators intercepted telephone calls between Cordero and "a Hispanic male that was going by the name of Manolo and Potrillo." The next day, the investigators intercepted several telephone calls implicating Manolo/Potrillo in Cordero's drug trafficking organization. Based upon one of these phone calls,

police believed that Manolo/Potrillo lived in number 904 of the Chatelaine Apartments and consequently began conducting surveillance outside Apartment 904. After conducting days of surveillance, the investigators witnessed a suspicious transaction and in order to try to figure out what was happening, the investigators radioed for a uniformed officer in a marked police vehicle to conduct an identification stop. Investigators wanted the uniformed officer to follow behind the vehicle, wait for a traffic violation to occur, and then conduct a traffic stop to identify the individuals in the vehicle. After witnessing appellant follow too closely for about a half mile, the officer stopped appellant. When the officer asked appellant for his driver's license, appellant stated "he didn't have one, that he had a Mexican driver's license." The appellant then handed the police officer a Mexican driver's license and a Mexican consulate card, explaining that he had nothing else. When the officer checked the driver's name, he learned that he did not have a license in Georgia and arrested him. The officer then impounded the vehicle because it was stuck in a turn lane and thus, a traffic hazard. During an inventory following the impound of the vehicle, the officer discovered 987.20 grams of cocaine hidden in an empty toaster box on the backseat.

Appellant contended that the trial court erred in denying his motion to suppress because (a) the patrol officer lacked probable cause to stop him; (b) the stop was a pretext based upon the instruction of the investigator; and (c) his arrest for driving without a license was illegal. The Court disagreed. First, probable cause to arrest is not necessary to stop a vehicle. Instead, all that is required is specific and articulable facts that provide a reasonable suspicion that the individual being stopped is engaged in criminal activity and here, the patrol officer's testimony about the distance he observed between appellant's vehicle and the other vehicle provided a reasonable suspicion that appellant was following too closely in violation of O.C.G.A. § 40-6-49. Second, an allegation of a pretextual traffic stop necessarily fails where an officer observes the motorist committing even a minor traffic violation.

Last, the Court held, appellant was not arrested illegally for driving without a license. O.C.G.A. § 40-5-20(a) provides, "[n]o person, except those expressly exempted in this chapter, shall drive any motor vehicle upon a highway in this state unless such person has a valid driver's license under this chapter for the type or class of vehicle being driven. Any person who is a resident of this state for 30 days shall obtain a Georgia driver's license before operating a motor vehicle in this state." The first sentence of O.C.G.A. § 40-5-21(a) prohibits any person from driving in Georgia without having a valid driver's license for the vehicle being driven, unless he comes within one of the 13 exempt categories set forth in O.C.G.A. § 40-5-21. The second sentence of O.C.G.A. § 40-5-20(a) then requires persons who become "residents" of Georgia, and thus presumably will be driving on this state's roads on a regular and ongoing basis, to obtain a *Georgia* driver's license after a 30-day grace period. No person is considered a resident of Georgia for purposes of the driver's license chapter of the Georgia Code unless such person is either a United States citizen or an alien with legal authorization. The only applicable exemption is for any nonresident of Georgia who could receive a Georgia driver's license if he or she were a Georgia resident and who has in his or her immediate possession a valid driver's license issued to him or her in his or her home state or country and, if the foreign license is in a language other than English, also has in his or her immediate possession a valid international driving permit. Here, appellant admitted to the police officer that he had no visa or passport, and that the only documentation he could present was a Mexican driver's license written in Spanish and the Mexican consulate card. Thus, the police officer had probable cause to arrest him for driving without a license.

Appellant also contended that the trial court erred by admitting into evidence, over his hearsay objection, recorded telephone conversations recorded the day after his arrest. The record showed that the trial court admitted this evidence based upon its conclusion that there was an ongoing conspiracy and for the purpose of showing identity—that appellant was the same person as Manolo/Potrillo. Former O.C.G.A. § 24-3-5, in effect at the time this case was tried, provided that, "[a]fter the fact of conspiracy is proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." The statutory provision, a rule of evidence, did not include any condition precedent of indictment of a co-conspirator before the provision became applicable. Evidence of the declarations of the other conspirators made during the pendency of the conspiracy, including the wiretap conversations to which appellants had not been parties, could be admitted under the statute. Moreover, a conspiracy does not necessarily end simply because one or more of the conspirators have been arrested. So long as the conspiracy to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues, the parties to such conspiracy are to be considered so much a unit that the declarations of either are admissible against the other. The Court found no error in the admission of this evidence. One of appellant's defenses at trial was that he was *not* the same person identified as Manolo/Potrillo in the recorded conversations and that he should not have been charged with possession of the cocaine found in a car owned by another person and concealed in a toaster box in the backseat of the car. Moreover, the State's evidence showed that the conspiracy was ongoing after appellant's arrest, and the recorded phone calls were relevant to show his identity as Manolo-Potrillo, as well as his intent to possess the cocaine found in the backseat of the car he was driving at the time of his arrest.