Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 17, 2015

THIS WEEK:

Right to Fair Trial; Electronic Security Belts

Weldon v. State, S14G1721 (7/7/14)

Appellant was convicted of twelve counts of armed robbery and other crimes. On the first day of trial, the court noted that appellant had not been paying much attention to his case. Instead, appellant spent most of his time looking around the courtroom and paying attention to where the exits were and who was coming and going. Given this behavior, the court determined appellant to be a flight risk. Therefore, the court ordered that appellant be required to wear an electronic security shock sleeve that would not be visible to the jury. Appellant refused initially to participate in the trial while wearing the device. The trial court proceeded with his trial in his absence. After the first recess, appellant agreed to wear the device in the courtroom, and the trial court assured him that he would be able to move around the courtroom to view the evidence without the risk of being shocked.

The Court stated that although it is well settled that a defendant is entitled to a trial free of partiality which the presence of excessive security measures may create, it is also as well established that the use of extraordinary security measures to prevent dangerous or disruptive behavior which threatens the conduct of a fair and safe trial is within the discretion of the trial court. The utilization of a remedial electronic security measure shielded from the jury's view is permissible where the defendant fails to show that he was harmed by its use. And here, the Court found, there was no evidence that the shock sleeve was apparent to the jury, and appellant failed to show that he suffered any harm arising from adverse jury partiality created by the shock sleeve, or that the court abused its discretion in finding a necessity for it to be worn.

Nevertheless, appellant contended that he was denied the right to a fair trial because he was not able to focus during the trial because he feared being shocked by accident. However, the Court found, at no time during the course of the trial did appellant claim that the shock sleeve was causing him any such inability. A party cannot during the trial ignore what he thinks to be an injustice, take his chance on a favorable verdict, and complain later. Thus, the failure to raise the issue deprived the trial court of the opportunity to take appropriate remedial action and waived appellate review of any alleged impropriety.

Prior Bad Acts Evidence

Powell v. State, A15A0610 (6/8/15)

Appellant was acquitted of aggravated assault with a knife but convicted of family violence battery, family violence terroristic threats

and two counts of cruelty to children in the third degree for having committed aggravated assault and battery in the presence of a minor. The evidence showed that appellant attacked the victim, her 13-year-old granddaughter, by pushing her up against a wall and coming at her with a knife. Appellant said she pushed the victim because she refused to be disrespected, but denied pushing the victim into a wall. She also denied threatening the victim with a knife, explaining to an investigator that she had been in her bedroom cutting up onions for her soup and stood up holding the knife when she overheard someone talking about her.

At trial, the State presented Rule 404 (b) evidence that appellant had previously threatened others with a knife. Appellant contended that the trial court erred in admitting this evidence. Specifically, that that there was no probative value in the evidence of other acts because it was not relevant to show her intent, lack of mistake, or motive. The Court disagreed.

The Court noted that with regard to intent, the State must always prove the intent of a defendant who pleads not guilty. Absent affirmative steps by the defendant to remove intent as an issue, if the state of mind required for both the charged offenses and the other act are the same, the other act is relevant and the first prong is met. Further, appellant told the investigator that she just stood up with the knife in her hand while cutting onions, which would suggest a lack of intent that the State was entitled to rebut. Thus, the Court found, here, the charged offenses of battery and terroristic threats and the other acts involved the same mental state and since appellant did not take steps to remove intent as an issue, evidence of the prior acts was relevant to establish her intent.

Appellant also argued that the evidence was unduly prejudicial under Rule 403. Specifically, she argued that because the other acts were exactly the same crime she was accused of here — threatening to kill someone with a knife — evidence about them was only probative of a propensity for doing that exact thing. Therefore, she contended, the risk was great that the jury would judge her on her character for threatening family members with knives instead of on her actions in this case, and the trial court abused its discretion in allowing the evidence.

The Court again disagreed. A trial court's discretion to exclude evidence of other acts because of undue prejudice is an extraordinary remedy which should be used only sparingly since it permits the trial court to exclude concededly probative evidence. Balancing the prejudicial effect against the probative value lies within the discretion of the trial court and calls for a common sense assessment of all the circumstances surrounding the extrinsic offense, including prosecutorial need, overall similarity between the extrinsic act and the charged offense, as well as temporal remoteness. And here, the Court found, the similarity between the two crimes and the facts relating thereto make the former act highly probative of the defendant's intent, and the risk of undue prejudice to appellant was reduced by the court's limiting instruction. Given the circumstances, the Court concluded that the trial court did not abuse its discretion in finding that the probative value of the similar transaction evidence was not substantially outweighed by its prejudicial effect.

DUI; Synthetic Marijuana

Jones v. State, A15A1142 (6/9/15)

Appellant was convicted of DUI (drugs) and other offenses. The evidence showed that appellant was stopped for failure to wear his seat belt. He admitted to the officers that he had smoked synthetic marijuana and had taken his prescription Thorazine. The officers asked him to perform a series of field sobriety tests and thereafter arrested him for DUI. At trial, an officer testified that the term "synthetic marijuana" is used to describe the result of a manufacturer spraying a psychoactive drug, such as a stimulant, a depressant, or a hallucinogen, on some leafy plant matter that can be smoked as the means of ingesting the drug. He also testified that Thorazine is a central nervous system depressant that can cause horizontal gaze nystagmus.

Appellant contended that the DUI count of the accusation failed to charge him with any offense under Georgia law. The Court noted that this count accused appellant of committing the offense of driving under the influence of drugs to the extent it was less safe to drive because he "did drive a moving vehicle, while under the influence of a drug, to wit: synthetic marijuana, to the extent that it was less safe for him to drive." As the arresting officer explained, synthetic marijuana denotes, not a single chemical compound, but a category of drugs, with the common element that the drug is ingested by smoking leafy plant material sprayed with the drug. Thus, the Court concluded, appellant could not admit the charge as made and still be innocent of violating O.C.G.A. § 40-6-391(a)(2).

Nevertheless, appellant contended, there was a fatal variance between the accusation and the evidence. Specifically, that while the accusation charged him with driving under the influence of synthetic marijuana, the evidence was fully consistent with the theory that his impairment actually resulted from his prescribed medication, Thorazine. The Court disagreed. A variance between the indictment and the evidence at trial is fatal if the allegations fail to meet these two tests: (1) the allegations must definitely inform the accused as to the charges against him so as to enable him to present his defense and not be taken by surprise by the evidence offered at trial, and (2) the allegations must be adequate to protect the accused against another prosecution for the same offense. An accusation charging a violation of O.C.G.A. § 40-6-391(a)(2) need not specify a particular drug responsible for impairing the defendant's ability to drive safely. Consequently, the "synthetic marijuana" detail incorporated into the accusation was an unnecessary specification of a legally unnecessary fact. Accordingly, the Court concluded, appellant failed to show a fatal variance under the applicable standard.

Search & Seizure

State v. Lucas, A15A0620 (6/10/15)

Lucas was charged with VGCSA. The evidence showed that Lucas was stopped for speeding. He failed to produce a license, but gave the officer his name and DOB. The officer ran the information through GCIC and determined that Lucas had an outstanding arrest warrant. A search incident to arrest revealed the contraband. The trial court granted the motion to suppress after the State failed to produce an arrest warrant for Lucas either in discovery or in response to the motion to suppress.

The State appealed and the Court reversed. Probable cause to arrest arises once an arresting officer learns of the existence of an arrest warrant and whether or not the information about the warrant later proves incorrect or invalid is immaterial. Here, the officers learned from GCIC that Lucas had

an outstanding warrant for his arrest; verified through a probation officer Lucas's identity based on a tattoo; and verified through a fingerprint rapid identification device that Lucas was the subject of the warrant. Citing *Harvey v. State*, 266 Ga. 671(1996), the Court held that this information provided a reliable basis for a determination of probable cause to arrest, and the trial court erred by concluding that the failure of the State to produce a valid arrest warrant invalidated the arrest.

O.C.G.A. § 16-12-100.2(d)(1); Solicitation

Schlesselman v. State, A15A0118 (6/10/15)

Appellant was convicted of violating the Computer or Electronic Pornography and Child Exploitation Prevention Act, which, at the time of the offense, provided: "It shall be unlawful for any person intentionally or willfully to utilize a computer on-line service or Internet service, including but not limited to a local bulletin board service, Internet chat room, e-mail, on-line messaging service, or other electronic device, to seduce, *solicit*, lure, or entice, or *attempt to* seduce, *solicit*, lure, or entice a child or another person believed by such person to be a child to commit any illegal act described in … Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation." O.C.G.A. § 16-12-100.2(d)(1) (2012) (emphasis supplied). The evidence showed that appellant established email contact with "GeorgiaJenn" a law enforcement officer whom appellant believed was the mother of a 14-year-old girl. Through numerous email communications with GeorgiaJenn, appellant arranged to pay for a night of "companionship" with the child. He asked for, and approved, "guidelines" for the night, which could have been construed as sexual in nature. He then traveled to Georgia by plane, drove from Atlanta to a designated meeting point, and waited with almost $300 in cash for GeorgiaJenn to arrive. At some point, he also researched underage sex stings on his cell phone.

Appellant contended that his conviction must be reversed because he had no direct contact or communication with a child or someone he believed to be a child. Instead, he communicated only with GeorgiaJenn. Therefore, he argued, he did not "solicit a person he believed to be a child to commit illegal acts," as alleged in the indictment. The Court disagreed. In *State v. Cosmo*, 295 Ga. 76, 81 (2014), the Supreme Court rejected a similar argument, finding that direct communication with the child was not necessary for a conviction under O.C.G.A. § 16-12-100.2(d)(1). Although appellant acknowledged *Cosmo*, he argued that it was distinguishable from his case because the *Cosmo* defendant was charged with *attempting to solicit* a minor to do illegal acts, while he was charged with *soliciting* those acts. Appellant contended that communication through an intermediary was sufficient for attempted solicitation, but insufficient for solicitation itself. In other words, he asserted, direct communication between the defendant and child must be established to prove solicitation.

The Court again disagreed. The Court stated that it is true that O.C.G.A. § 16-12-100.2(d)(1) criminalizes both solicitation and attempted solicitation of a minor, and much of *Cosmo*'s analysis focuses on the requirements for proving attempt. The *Cosmo* Court, however, made clear that solicitation can occur through a third party. And in this case, the Court found, the evidence of solicitation was sufficient. In the criminal context, the term "solicit" means "to command, authorize, urge, incite, request, or advise another to commit a crime." Black's Law Dictionary (5th ed. 1979). Here, the jury was authorized to find that, through email communications with GeorgiaJenn, appellant urged and requested a person he believed to be a 14-year-old girl to engage in immoral or indecent acts, in violation of O.C.G.A. § 16-6-4(a)(1). Although the communications did not reference particular sexual acts, the jury could conclude — based particularly on the agreement to pay for a night of companionship with GeorgiaJenn's child, that appellant's request for "guidelines" with respect to the overnight visit, and GeorgiaJenn's response to the request — that the purpose of the solicitation was a sexual encounter. The evidence, therefore, was sufficient to sustain his conviction for internet child exploitation.

Motions to Suppress; Waiver

Frost v. State, A15A0242 (6/10/15)

Appellant was convicted of two counts of VGCSA and obstruction of a law enforcement officer. He contended that the trial court erred in denying his motion to suppress. The record showed that after hearing evidence on the motion and arguments of counsel, the court took a recess until the next day. When court resumed, defense counsel stated that "[appellant] wishes to proceed with a stipulated bench trial as to the facts. He will also stipulate to the disposition recommended by the prosecution." After hearing a brief synopsis of the evidence, including the results of testing of the drugs by the police and the GBI, defense counsel responded, "That's correct, Judge." At no point did the parties or the trial court refer to a ruling on the motion to suppress, and the record did not contain an order ruling on the motion.

The Court found that although the record contained the timely filed motion to suppress as well as the transcript of the hearing on the motion, the record contained neither a ruling on the motion nor an objection to admission of the evidence during the stipulated bench trial. Therefore, the Court held, in the absence of a ruling on the pretrial motion and of an objection when the evidence was offered at trial, appellant waived his right to contest the admissibility of the evidence on appeal.

Search & Seizure

Lewis v. State, A15A0099 (6/11/15)

Appellant was convicted of misdemeanor possession of marijuana and possession of drug related objects. He contended that the trial court erred by denying his motion to suppress. The evidence showed two officers and a narcotics dog were on patrol in one marked vehicle when they stopped appellant in his recreational vehicle (RV) for erratic driving. After one officer informed appellant that he would receive a warning, he requested appellant consent to a search of his RV. When appellant said no, the officer immediately gave the warning slip to the second officer to continue filling out while the first officer retrieved his narcotics dog out of the cruiser. After the dog alerted, the subsequent search revealed the contraband.

Appellant did not contest the basis for stopping his vehicle, but argued that the stop was unreasonably prolonged prior to executing the free-air search with the narcotics dog. The Court disagreed. The Court found that

the dog sniff did not unreasonably prolong the traffic stop because it was conducted before completion of the traffic stop, and it did not hinder the officers' timely completion of the mission of the traffic stop. The dog sniff was initiated by one officer while a second officer finished filling out the written warning and while the officers waited for dispatch to return the check on appellant's driver's license information. The dog sniff was initiated within six minutes of the moment the officers first made contact with appellant on the roadside, and it was completed fewer than ninety seconds later. The license check was an ordinary inquiry incident to the traffic stop, and it served the same objective as enforcement of the traffic code. It is permissible to conduct an open air search around a vehicle while a traffic stop is still in progress so long as the stop has not been unreasonably prolonged for the purpose of conducting the search. Thus, the Court concluded, based on the evidence that the dog sniff occurred during the ordinary course of the traffic stop and did not unreasonably prolong the process of the traffic stop, the trial court did not err by finding it permissible. And in light of the behavior of the trained narcotics dog during his free-air sniff, the officers' search of the RV was authorized.

Bond Revocations; Special Conditions

Singleton v. State, A15A0011 (6/12/15)

The Court granted appellant's application for discretionary review from the trial court's order revoking his probation. The record showed that in June 2012, appellant pled guilty to one count of sale of marijuana. The trial court sentenced him to ten years, with one year to serve in confinement and the balance to be served on probation. In addition to complying with the general terms of probation, appellant was required to pay a $2,000 fine, pay a monthly supervision fee, and submit to random drug testing. In March 2014, the State filed a petition to revoke or modify appellant's probation based on allegations that he committed the offenses of misdemeanor possession of marijuana and felony obstruction of a law enforcement officer, as well as failing to pay the court-ordered fine and fees. Following a hearing, the trial court found that appellant violated his probation and revoked the balance of his probation — eight years and 17 days.

Appellant contended that the trial court was not authorized to revoke the balance of his probation because there were no special conditions on his probation, and the trial court could only revoke five years of his probation based on his commission of felony obstruction. The Court agreed. O.C.G.A. § 42-8-34.1(e) provides for revocation of the balance of probation if the defendant is shown to have violated a special condition. To be a "special condition" as defined under O.C.G.A. § 42-8-34.1(a), the trial court must warn of the consequences of violating it; that the warning be in writing; and that the warning be in the court's sentence.

Here, however, appellant's written sentence contained only a section for general conditions of probation, of which several pertinent items are checked, such as the provision that appellant shall not violate any laws and that he must pay court fines and fees in full. The additional terms of probation provided that appellant must submit to random drug testing and that he is allowed to convert his fine by performing community service. Nowhere on the sentencing form, however, was it expressly stated that any of the conditions are special conditions of probation, and the sentencing form failed to specify that a possible consequence of violating any of the probation conditions would be the revocation of the entirety of his remaining probated sentence. Thus, the Court found, the trial court was not authorized to revoke the balance of appellant's probation due to any violation of his probation conditions.