

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 12, 2016

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THIS WEEK:

- **Sentencing; Merger**
- **Business Records; Self-Authentication**
- **Search & Seizure; Hearsay**
- **Authentication; O.C.G.A. § 24-9-901**
- **Statements; Ineffective Assistance of Counsel**
- **Statutory Rape; O.C.G.A. § 24-4-413(a)**
- **Search & Seizure**
- **Sentencing; Regent**

Sentencing; Merger

Mitchell v. State, A16A0041 (6/16/16)

Appellant was convicted of making harassing phone calls, burglary, two counts of aggravated assault, two counts of false imprisonment, three counts of aggravated sodomy, two counts of rape, and possession of a knife during the commission of a crime. The evidence showed that appellant entered the home of his ex-girlfriend and her son and committed the sexual assaults on the victim over the course of six hours.

Appellant contended that the trial court erred by failing to merge two aggravated sodomy counts (7 and 12) and the two counts alleging rape (8 and 13) because the averments in the two counts in each group were indistinguishable from each other. The Court agreed.

The evidence adduced at trial established at least two separate incidents of rape and two separate incidents of aggravated sodomy as alleged in Counts 7 and 12. Nevertheless, if two charges are indistinguishable because all of the averments, including victim and description of defendant's conduct constituting the offense were identical, only one sentence may

be imposed. Here, the Court found, Counts 7 and 12 both charged that Appellant "did place his sex organ in the mouth of [the victim], said act being done with force and against the will of said other person, the allegations of this count of the indictment being separate and distinct from the allegations of any other count in this indictment." Counts 8 and 13 both charged that appellant "did have carnal knowledge with [the victim], a female, forcibly and against her will, the allegations of this count of the indictment being separate and distinct from the allegations contained in any other count in this indictment." Although the indictments included the phrase "the allegations of this count of the indictment being separate and distinct from the allegations contained in any other count in this indictment," this phrase was not charged to the jury nor stated in the indictment as a material averment distinguishing the two counts. Accordingly, the Court concluded, because the trial court erred by failing to merge Counts 7 with 12 and Counts 8 with 13, the sentences were vacated and the case remanded for resentencing.

Business Records; Self-Authentication

Chase v. State, A16A0436 (6/16/16)

Appellant was convicted of impersonating a law enforcement officer. The evidence established that he filled out an application for a LeadsOnline account, claiming to be a major in the county sheriff's office. LeadsOnline is a database service used by law enforcement officers to determine whether items sold at pawn shops are stolen. Because the database contains sensitive personal information, the

service is not available to the general public. Only approved law enforcement personnel with LeadsOnline accounts and passwords have authority to access the database.

Appellant argued that the trial court erred in admitting into evidence a computer-generated record of his application to LeadsOnline. The record showed that the State tendered the application pursuant to the business records exception to the rule against hearsay and used the self-authentication procedure set forth in O.C.G.A. § 24-9-902(11). Appellant argued that the State failed to notify him in writing that it planned to use the self-authentication procedure in O.C.G.A. § 24-9-902(11). Pursuant to the statute, a party intending to use this procedure “shall provide written notice of such intention to all adverse parties.” The State did not serve appellant with separate written notice of its intent. But several days before trial, the State gave appellant an affidavit from the LeadsOnline records custodian. The affidavit was entitled “Business Records Affidavit” and contained information required for self-authentication. The State’s intent, therefore, was clear. Moreover, the Court stated, the purpose of the notice requirement is to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the self-authentication declaration. Where written notice is not given, actual notice that a party plans to utilize the self-authentication procedure may suffice. Here, appellant had actual notice before trial that the State intended to authenticate the LeadsOnline application record via a self-authentication declaration. Armed with this knowledge, he challenged the authenticity and overall admissibility of the record at a pre-trial hearing. He did not argue below — and did not demonstrate on appeal — that the lack of written notice prejudiced him in any particular way. Under these circumstances, the Court held the notice was sufficient.

Appellant also argued that that the LeadsOnline application did not fall within the business records exception to the hearsay rule. The Court noted that the exception permits the admission of a business record (A) made at or near the time of the described acts, events, conditions, opinions, or diagnoses; (B) made by, or from information transmitted by, a person with personal knowledge and a business duty to report; (C) kept in the course

of a regularly conducted business activity; and (D) it was the regular practice of that business activity to make the . . . record.

Here, the LeadsOnline records custodian testified that the company had received and maintained the account application in the regular course of business and made a computer-generated record of it shortly after receipt. The custodian also asserted that the record “contain[ed] exact copies of the data received electronically and kept by LeadsOnline and [was] formatted according to standard LeadsOnline procedures for maintaining and presenting data.” Appellant argued that the custodian’s testimony was insufficient because it did not establish that the document was “made by, or from information transmitted by, a person with personal knowledge and a business duty to report.” But, the Court stated, an authenticating witness does not need firsthand knowledge of the contents of the records, of their authors, or even of their preparation. Moreover, the records custodian asserted that the application record was created pursuant to standard company procedures for presenting data. Thus, the trial court did not abuse its discretion in concluding that this testimony satisfied O.C.G.A. § 24-8-803(6).

Search & Seizure; Hearsay

Taylor v. State, A16A0463 (6/21/16)

Appellant was convicted of homicide by vehicle in the first degree, driving without a valid license, and operating a vehicle without a current registration. The evidence showed appellant was involved in a collision that eventually led to his arrest. After appellant refused under implied consent, the officer sought and received a search warrant for the taking of appellant’s blood. Appellant argued that the trial court erred in denying his motion to suppress because the affidavit contained numerous false statements. For example, the officer stated that appellant was in the county jail at the time the application was made, but appellant was actually at the hospital. He said appellant refused to submit to field sobriety tests and refused to provide a sample of his breath, but no such test or breath samples were requested. The officer also stated that he initiated a traffic stop of appellant’s vehicle, but no officer made a traffic stop. The officer admitted these statements in the affidavit

were false, but attributed it to his inability to change certain fields in the computer program he used to prepare the warrant application.

The Court found that it did not have to decide whether any of these false statements were made knowingly and intentionally or with reckless disregard for the truth, because the rest of the information contained in the affidavit — which appellant did not challenge — established probable cause to believe appellant was driving while impaired. Specifically, the officer swore that there was evidence showing that appellant was the driver of a vehicle that had been involved in an automobile accident in which an unidentified black male had been killed. And the officer also swore that while being interviewed at the hospital, appellant admitted to drinking earlier that night. These circumstances alone were sufficient for a reasonable officer to conclude that appellant had been driving under the influence and thus, the magistrate had probable cause to issue the search warrant.

However, the Court then stated as follows: “Although we are able to conclude that the warrant affidavit established probable cause without the false statements, we must pause to observe the problematic nature of the warrant application process involved in this case. The magistrate judge issued a warrant based on an application containing numerous demonstrably false statements. The State places blame for the false statements on the software program used. If this is true, then the continuing use of a software program that automatically inserts false statements into the warrant applications . . . is, to say the least, deeply troubling. And regardless of what caused false statements to be present in the affidavit, an officer still swore that the contents of the affidavit were true and presented the application as such to a magistrate judge. It should not have to be said that individuals presenting testimony to a court have a duty of candor, or that individuals making statements under oath should take great care to make sure those statements are truthful. Unfortunately, we are compelled to say what should be obvious because not enough care was taken in this case, and because the flaws displayed in this warrant application process seriously undermines the integrity of the judicial process. Despite these flaws, the warrant application still had sufficient information to establish probable cause, and therefore we are required to conclude that the

trial court did not err in denying [appellant]’s motion to suppress.”

Appellant also argued that trial counsel was ineffective for failing to object to the officer’s testimony about the status of appellant’s driver’s license and vehicle registration because it constituted hearsay and because the State was required to meet the procedural requirements of O.C.G.A. § 24-9-902 and § 24-9-920 to present proof of the traffic violations. The Court agreed.

The officer’s testimony that appellant’s driver’s license was suspended and that his vehicle registration was expired relied on his checks of a computer system or statements made by other police officers. When an officer testifies about the results of a computer check of a registration tag or driver’s license, the testimony is hearsay. In order for hearsay to be admissible, it must fall within one of the statutory hearsay exceptions, and the moving party has the burden of establishing that one of the exceptions applies. The State failed to identify such an exception. Citing O.C.G.A. § 24-8-803(8)(B), the Court stated that the other police officer’s report that the officer relied upon does not qualify as a business record. A witness’s testimony about driving records may be admissible if the information is obtained from a terminal lawfully connected to the Georgia Crime Information Center. See O.C.G.A. § 24-9-924. However, the State offered no such proof, and thus the officer’s testimony about appellant’s driving record was inadmissible.

Although the decision of whether to interpose certain objections is generally a matter of trial strategy and tactics, trial counsel provided no reason for failing to object to the officer’s hearsay testimony about appellant’s license and vehicle registration. And, the Court stated, it could not identify any reason why a reasonable attorney would have decided not to object to the hearsay testimony that provided the only evidentiary basis for a conviction of the traffic offenses. As a result, trial counsel was deficient for failing to object to the officer’s hearsay testimony.

Moreover, the Court held, the prejudice from trial counsel’s deficiency was clear. The officer’s hearsay testimony was the only evidence offered to prove the elements of the traffic offenses. Had this evidence been excluded, there would not have been sufficient evidence to convict appellant of those offenses. Thus, but for counsel’s performance,

more than a reasonable probability exists that the outcome of the trial would have been different, and this amounted to ineffective assistance of counsel. Accordingly, the Court reversed the trial court’s denial of appellant’s motion for a new trial with respect to the two misdemeanor traffic violations.

Authentication; O.C.G.A. § 24-9-901

Amey v. State, A16A0242 (6/21/16)

Appellant was convicted of aggravated assault and cruelty to children. The evidence showed that he and two others were in an SUV. The SUV pulled along-side another vehicle and appellant then fired a weapon into that vehicle. At trial, the State introduced a letter given to an ADA (who left the office prior to trial) by appellant’s counsel. The envelope was hand-addressed to “Terrell Amey”; the sender, the envelope showed, was appellant’s cousin who had been the driver of the SUV during the drive-by. The letter inside was also handwritten. It stated, in pertinent part, “Rell, It hurt me to go along with that lie [the backseat passenger] told when he said yu shot at that car. I’m sorry. I just went along with it because I thought u had left the courtroom and I knew by me taking a plea that I was going to meet up with him in jail. And I didn’t want to have to fight him about him saying I told on him. He knew he shot out that back window. Yu was in the passenger seat. Yu was still sleep until the shot went off. But if yu have to go to trial yu know I’m not gone come and lie for him this time. . . . “E” a real dummy. . . . Love ya, Dip”

Appellant contended that the trial court erred because the letter was inadmissible for lack of authentication under O.C.G.A. § 24-9-901(a), which provides: “The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Specifically, appellant argued that the State presented no witness who saw the letter being written, presented no testimony by a handwriting expert or a witness familiar with the handwriting, and introduced no other writing with which the jury could compare the letter. Although appellant conceded that “he was, at one point, in custody of [the letter],” he nevertheless contended “[i]t would . . . be

a very unsafe rule to hold that the possession and ownership of a . . . document may authorize an inference that the owner . . . did write the matter contained in it.” The Court, however, stated that it agreed with the State that it sufficiently authenticated the letter pursuant to O.C.G.A. § 24-9-901(b), which allows for authentication based upon its “[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” As the State argued (and as the record demonstrated), the letter was offered to show that appellant fabricated a document in an attempt to deceive the State and avoid punishment. Hence, the State had the burden of presenting sufficient evidence to make out a prima facie case that the proffered evidence is what it purports to be. Once that prima facie case is established, the evidence is admitted and the ultimate question of authenticity is decided by the jury.

Here, the Court found, the contents and substance of the letter demonstrated that its author knew details of the drive-by shooting, including the occupants of the SUV and their seating arrangement. The author of the letter was familiar with the driver’s and backseat passenger’s nicknames: “Dip” and “E.” The letter was written by someone who knew that appellant’s traveling companions/co-indictees had pled guilty to the charges and agreed to testify against him — a fact of which appellant would have been aware through discussions with his attorney. The version of events set forth in the letter — that appellant had been asleep until the gun was discharged — was consistent with a conclusion that appellant was not guilty, even as a party to the crimes. Moreover, the letter contained purported admissions that the driver had perjured himself by falsely testifying that appellant was the shooter; but nothing in the record showed what the driver might have gained from admitting perjury. Appellant, on the other hand, stood to gain support for a defense that might have exonerated him of all charges. Moreover, as appellant conceded, the letter had been in his possession. And his lawyer subsequently gave it to the former ADA. Furthermore, although the letter was purportedly signed by the driver, the driver disclaimed writing it. Accordingly, the Court concluded, in light of these circumstances, the State carried its burden of presenting

sufficient evidence to make out a prima facie case that the letter was authored by appellant. Therefore, the trial court did not err by rejecting appellant's authentication objection.

Statements; Ineffective Assistance of Counsel

Wiggins v. State, A16A0162 (6/24/16)

Appellant was convicted of sexual exploitation of children, aggravated sodomy, child molestation, and cruelty to children in the first degree. The evidence, briefly stated, showed that appellant took sexually explicit pictures of the 11-year-old victim. Additionally, appellant took the victim to a man's house, bathed her in a bathtub, took her to the room where the man was waiting, stayed in the room while the man sexually assaulted her, and then accepted payment from the man afterwards.

Appellant argued that the trial court erred in denying her motion in limine to prevent testimony and evidence showing that she had been a victim of molestation when she was a child. The Court disagreed. The Court noted that the evidence concerned statements made by appellant as she took the victim to the man's house where he performed sexual acts upon the child. Thus, they were admissible under former O.C.G.A. § 24-3-3 as part of the res gestae, even if the evidence placed appellant's character in evidence. Also, the Court found, the evidence was relevant to the issue of appellant's knowledge and intent in taking the child to the man's house. Here, appellant's statements to the victim showed her intent in bringing the victim to the man and her knowledge of what was going to happen when they got there. Under these facts, therefore, the Court found no error in the admission of appellant's statements to the victim.

Appellant also contended that the trial court erred in denying her motion for mistrial on the ground that defense counsel was rendered ineffective when counsel became the focus of alleged criminal conduct during the trial. The record showed that the prosecutor sought the admission of jailhouse tapes between appellant and her boyfriend. When the prosecutor informed the trial court that the jailhouse tapes contained evidence suggesting that defense counsel had instructed the boyfriend to leave Georgia so that the State could not call him as a witness, the trial judge said that based on

his research, such actions could constitute the common law crime of obstruction of justice. The trial court later noted that the prosecution's description of those tapes raised "a serious accusation," implicating a criminal charge. The next day, defense counsel filed a written motion for mistrial, asserting that the prosecution's request to play the tapes and his allegations of their contents was designed to inhibit defense counsel's cross-examination of the State's witnesses, rendering her ineffective, as well as to create a conflict of interest between appellant and defense counsel. The trial judge denied defense counsel's motion for mistrial stating that from his perspective, defense counsel had been very zealous in her representation of appellant and was very much in control and that he did not believe that she was providing ineffective representation to her client.

At the hearing on the motion for new trial, defense counsel explained that when the prosecutor said that he was investigating her during the trial, "everything went off the rails." She stated that she spent that afternoon during the trial on her phone texting to seek advice about her own situation and further asserted that she was unable to prepare for the next day of trial because she was listening to the jailhouse tapes and addressing the issue of whether charges would be filed against her.

However, the Court noted, at the hearing, defense counsel failed to point to any instance where she rendered inadequate representation to her client and stated that she proceeded with her plan for the defense "for the most part" during the course of the trial. Appellant also failed to cite any incident of allegedly deficient performance at the hearing on the motion for new trial.

The Court stated that although the evidence and appellant's arguments indicated that defense counsel was concerned about and distracted by the possibility that she might be investigated in connection with the jailhouse tapes, it is the conduct of the lawyer, not her thinking, that is assessed for reasonableness, even though the thinking of the lawyer may inform the reasonableness of his conduct. Thus, a convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions

were outside the wide range of professionally competent assistance. Accordingly, the Court found, appellant failed to meet her burden of showing that defense counsel's performance was objectively deficient in light of the circumstances and prevailing professional norms. Therefore, because appellant failed to meet the first prong of the *Strickland* test, it did not need to address the second prong, and it found that appellant failed to show that the situation involving the jailhouse tapes rendered her counsel ineffective.

Moreover, the Court held, appellant failed to establish the existence of any conflict that adversely affected defense counsel's performance. Any such conflict of interest must be palpable and have a substantial basis in fact. A theoretical or speculative conflict will not impugn a conviction or sentence which is supported by competent evidence. Accordingly, the Court concluded that the trial court had not abused its discretion in denying the motion for mistrial on this ground.

Statutory Rape; O.C.G.A. § 24-4-413(a)

Steele v. State, A16A0617 (6/24/16)

Appellant was convicted of statutory rape and child molestation. He contended that the trial court erred in admitting his prior 2007 conviction based on his plea of guilty to a charge of misdemeanor statutory rape. Although he acknowledged that the circumstances involved in that conviction were similar to the facts in this case, he asserted that such similarity did not amount to relevance and that the evidence did not aid the State in presenting its case or the jury in considering the case in any proper way.

The Court stated that under the new Code, O.C.G.A. § 24-4-413(a) provides that "[i]n a criminal proceeding in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense of sexual assault shall be admissible and may be considered for its bearing on any matter to which it is relevant." (Emphasis supplied.) The statute defines sexual assault to include the crime of statutory rape. O.C.G.A. § 24-4-413(d). The language of this provision was intended to create a "rule of inclusion," with a strong presumption in favor of admissibility as it provides that such evidence "shall be admissible."

At the hearing on the admissibility of this evidence, the State indicated that it sought to introduce the evidence of the 2007 conviction for the purposes of intent, lustful disposition, and lack of mistake. The Court noted that although lustful disposition is not one of the purposes specifically set out in O.C.G.A. § 24-4-404(b) for the admission of other acts, O.C.G.A. § 24-4-413 provides an exception to the general rule in sexual assault cases and allows the admission of propensity evidence. Thus, the provisions of O.C.G.A. § 24-4-413(a) supersede the provisions of O.C.G.A. § 24-4-404(b) in sexual assault cases.

And here, the Court found, the jury was instructed that it could consider the other acts evidence only as it related to the issues of knowledge, intent, plan, preparation, motive, and opportunity. The evidence of the prior crime was relevant to the issues of appellant's knowledge, motive, preparation, and intent as it showed that he had previously engaged in sexual relations with an underage girl and undergone criminal prosecution for such conduct. Given the strong statutory presumption of admissibility and especially in light of the close similarities between the two crimes at issue, the Court found no clear abuse of discretion by the trial court in determining that the evidence of the 2007 conviction was relevant and admissible at trial.

Search & Seizure

Jones v. State, A16A0559 (6/23/16)

Appellant was convicted of possession of methamphetamine with intent to distribute, theft by receiving stolen property, and possession of a motor vehicle with the identification number removed. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant was shot at his mobile home residence and taken to the hospital. Law enforcement responded to the 911 call of the shooting and a detective met appellant at the hospital and obtained his consent to search his home for evidence related to the shooting. Officers conducting the initial search observed baggies, a propane tank and scales inside appellant's home, and coupled with information received while investigating the shooting, police formed the belief that appellant was involved in the drug trade, in particular the sale of methamphetamine. The detective then obtained a warrant to search appellant's home,

outlying buildings, and curtilage for evidence of the shooting and the sale and distribution of methamphetamine. During the execution of this second search, officers found a small amount of marijuana inside a drawer in the house and an outside shed and an ATV with a missing vehicle identification (VIN) number. The ATV was subsequently determined to be stolen. Further investigation led to the discovery of methamphetamine.

Appellant contended that the trial court erred in denying his motion to suppress. The Court disagreed. The Court stated that although many of the averments in the affidavit were properly discounted by the trial court, under the totality of the circumstances, probable cause existed to justify the issuance of the warrant. The investigation into the shooting at appellant's residence was ongoing, and a suspect had not yet been arrested for that aggravated assault. Thus, the need for continued investigation in the circumstances surrounding the shooting justified the issuance of the warrant for that purpose. And although the need to investigate the shooting in and of itself might not have justified the scope of the search into the outlying buildings and entire mobile home, the affidavit also contained information about appellant's drug activities, which supplied a possible motive for the shooting. Appellant was currently being prosecuted for the sale and possession of methamphetamine. Additionally, although the trial court found that a neighboring county investigator's statements to the detective that appellant was "known" to trade stolen goods for drugs appeared to be nothing more than rumor, the affidavit also contained the information obtained from the earlier consent search, when officers observed that appellant had shelves lined with electronic equipment. This information, coupled with the type and the sophistication of the surveillance equipment surrounding appellant's property, provided independent corroboration of this type of criminal activity so that the other infirmities in the affidavit were not fatal. Thus, the Court concluded, considering the totality of the circumstances, including the recent shooting on appellant's property, and mindful that marginal or doubtful cases are to be decided in favor of upholding the warrant, the magistrate had a substantial basis for concluding that a search of appellant's residence would produce evidence of the

methamphetamine. Accordingly, the trial court did not err in denying appellant's motion to suppress.

Sentencing; Regent

Hicks v. State, A16A0071 (6/27/16)

Appellant was convicted of aggravated assault (O.C.G.A. § 16-5-21(a)(2) (2013)) and simple battery (O.C.G.A. § 16-5-23 (2013)) as a lesser included offense of the aggravated battery charge. He contended that the trial court should have merged his convictions for aggravated assault and simple battery, which was the lesser included offense of the aggravated battery charge. Under the circumstances of this case, the Court agreed.

Georgia law prohibits multiple convictions if one crime is included in the other. In *Drinkard v. Walker*, 281 Ga. 211 (2006), the Supreme Court of Georgia set forth the required evidence test for determining whether convictions merge because one of the crimes was established by proof of the same or less than all the facts required to establish the other crime. Moreover, under O.C.G.A. § 16-1-6(2), one crime is included in the other where the only difference involves a "less serious injury or risk of injury to the same person ... or a lesser kind of culpability."

Here, the Court found, the aggravated assault charge required the State to prove that appellant used his hands as deadly weapons to choke the victim and beat her about the head and face in a manner that was likely to cause or actually resulted in serious bodily harm. As charged, the aggravated battery count required the State to prove that appellant seriously disfigured the victim's body by striking her about the head and face. The jury, however, found appellant guilty of the lesser included offense of simple battery, which only required proof that appellant intentionally made physical contact with the victim or intentionally caused her harm when he struck her about the head and face. The Court stated that these two offenses — aggravated assault and simple battery — differ only with respect to the risk of, or seriousness of, injury to the victim. Accordingly, citing *Regent v. State*, ___ Ga. S15G1829 (June 6, 2016) the simple battery merges under O.C.G.A. § 16-1-6(2). Consequently, the Court vacated appellant's conviction and sentence for simple battery and remanded for resentencing.