

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING AUGUST 15, 2014

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## THIS WEEK:

- **Child Molestation; Split Sentencing**
- **Voir Dire; Batson Challenges**
- **Merger; Constitutional Speedy Trial Claims**
- **Search & Seizure**
- **Jury Charges; Knowledge of Chemical Composition of Drugs**

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### **Child Molestation; Split Sentencing**

*Clark v. State, A14A0692 (7/14/14)*

Appellant pled guilty to one count of child molestation and was sentenced to 20 years to serve. He contended that his sentence was illegal and void under O.C.G.A. §§ 16-6-4(b)(1) and 17-10-6.2(b). The Court agreed and reversed.

In reviewing the language of O.C.G.A. § 17-10-6.2(b), the Court found that the statute's express requirement that the trial court issue a "split sentence" that includes the minimum term of imprisonment and at least one year of probation is plain and unambiguous. As a result, the trial court was not authorized to construe the statute so as to allow the 20-year sentence imposed. Accordingly, because O.C.G.A. § 17-10-6.2(b) expressly provides that a sentence for a first conviction for child molestation must be a "split sentence" that includes at least the mandatory minimum of five years of imprisonment and at least one year of probation, it concluded that appellant's twenty-year sentence of imprisonment was void.

Appellant also contended that the trial court erred in not considering whether he was eligible for a deviation from the minimum term of imprisonment, pursuant to O.C.G.A. § 17-10-6.2(c)(1). The Court noted that the indictment accused appellant of committing child molestation by "touching and rubbing [the victim's] butt[.]" During the guilty plea hearing, the only relevant fact proffered by the State to support this specific charge was that the victim reported that the defendant "touched her on the butt" while they were at a county "drug house." Although the facts showed that appellant had driven the victim the evening of the incident, appellant did not commit the charged offense until later, while they were at the drug house. Therefore, the offense itself did not involve any transportation of the victim or any of the other factors listed in O.C.G.A. § 17-10-6.2(c)(1) that would prohibit the trial court from sentencing appellant under that subsection.

Moreover, the Court noted, the hearing transcript shows that the trial court appeared to believe that it had no discretion to sentence appellant to anything less than 20 years of imprisonment. Neither the defense counsel nor the prosecutor informed the trial court that it had the option of using its discretion to sentence appellant under O.C.G.A. § 17-10-6.2(c), and the court did not make any findings regarding, or even refer to, that provision during the guilty plea hearing or in its order denying appellant's motion to vacate his sentence. Thus, based upon the record, the Court concluded that the trial court failed to exercise its discretion to consider whether to deviate from the mandatory minimum sentence, pursuant to O.C.G.A. § 17-10-

6.2(c)(1), when sentencing appellant. Thus, this provided a second reason for remand back to the trial court.

### **Voir Dire; Batson Challenges**

*Minor v. State, A14A0249; A14A0250 (7/10/14)*

Appellants were convicted of armed robbery and criminal attempt to commit armed robbery. They contended that during jury selection, the State violated *Batson v. Kentucky* by failing to give a race-neutral reason for one of its strikes. *Batson* provides a three-step process for adjudicating a claim that a peremptory challenge was based on race: (1) the opponent of a peremptory challenge must make a prima facie showing of racial discrimination; (2) the proponent of the strike must then provide a race-neutral explanation for the strike; and (3) the court must decide whether the opponent of the strike has proven discriminatory intent. The exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party. And the proffer of a pretextual explanation naturally gives rise to an inference of discriminatory intent.

The record showed that as to one black juror, the prosecutor explained his strike by noting that the juror had a conviction for theft by receiving and this case “is a theft-related case.” He also noted that the juror had gold teeth, and he did not like gold teeth. The prosecutor stated that he would have had the same reaction to a white juror with gold teeth. The prosecutor emphasized that his strike was primarily based on the juror’s prior conviction. Defense counsel then started to address the “gold teeth” explanation, but the trial court interrupted and interjected that she “[was] not impressed [with] the [State’s] gold teeth argument.” The trial court then agreed with the prosecution that the juror had been charged with theft and found that the juror’s prior theft charge presented a race-neutral basis for the strike. And after noting that the State’s last strike was of white female, she denied the *Batson* challenge.

The Court noted that the State cited two reasons for striking the juror: his prior theft-related charge and his gold teeth. Appellant argued that in striking the juror based on his gold teeth, the prosecution was relying upon a racial stereotype, citing *Rector v. State*, 213

Ga.App. 450, 452 (2) (1994). The Court stated that the jury selection process is invalidated under *Batson* when a racially motivated explanation for striking a juror accompanies a racially neutral explanation for removal of that juror. Thus, where it can be determined that the racially neutral explanation is, in fact, *pretextual* since there is a racially motivated reason that can be independently determined, the jury selection process is invalid under *Batson*. Nevertheless, there must be some indication that the “additional reason” is, in fact, racially motivated.

Here, the Court found, defense counsel never argued that the prosecution’s strike based on the juror’s gold teeth arose from a racial stereotype, but each time that counsel began to address the gold teeth explanation, the trial court interrupted him. And although the trial judge stated that she was “not impressed” with the gold teeth explanation and was not going to “accept” it, she made no express finding as to whether the prosecutor’s reliance on the juror’s gold teeth to strike him was inherently discriminatory or whether it was race neutral. Although the trial court apparently found the reason to be invalid in some regard, she failed to make the express finding required under *Batson*. Thus, the Court found, citing *Rector*, a possibility exists that the trial court may have found the gold teeth explanation not to be racially neutral, or the defense may have been able to show that the “additional reason” was merely pretextual. But, the defense had no such opportunity, and the trial court did not make a finding, one way or the other. Therefore, the defense was deprived of the opportunity to fully address the prosecution’s explanations for the strike and the trial court also failed to decide whether the opponent of the strike had proven the proponent’s discriminatory intent as required under *Batson*. Since the trial court did not allow the defense to explain their argument that the strike was racially discriminatory, the Court found it must remand the case in order to permit the defense to do so and to allow the trial court to make findings under *Batson*. And, should the trial court determine that the State did not fulfill its burden to provide racially-neutral reasons, a new trial would be in order.

### **Merger; Constitutional Speedy Trial Claims**

*Culbreath v. State, A14A034 (7/10/14)*

Appellant was convicted of multiple counts of aggravated assault with a deadly weapon, false imprisonment, possession of a firearm during the commission of certain crimes and one count each of burglary, aggravated assault with intent to rob, attempted armed robbery, kidnapping, and cruelty to children in the first degree. The evidence showed that appellant broke into a home and assaulted the Mr. and Mrs. Parris, a senior citizen couple, and then went upstairs and assaulted another adult and a child.

Appellant contended that the aggravated assault on Mrs. Parris should have merged with the attempted armed robbery. The Court agreed. Appellant was charged with aggravated assault against a person age 65 or older with a handgun. The evidence showed that appellant approached Mrs. Parris, pointed a gun at her, demanded money, and threatened her. Appellant then forced Mrs. Parris to lie down on the floor and he bound her hands, feet, and mouth with tape. The State argued that the aggravated assault and attempted armed robbery against Mrs. Parris did not merge because the State had to show an additional element of aggravated assault not included in armed robbery: namely, that Mrs. Parris was age 65 or older. But, the Court found, the age-related provisions of aggravated assault are penalty enhancements and they do not create a separate offense. Legislative intent determines whether an amendment creates a separate crime or is simply a penalty enhancement. The General Assembly enacted the age-related provisions of the aggravated assault statute so as to change the penalty provisions relating to persons convicted of the crime of aggravated assault. Accordingly, the victim’s age is not a separate element of the crime, and the convictions must merge where, as here, the two crimes occurred against the same victim as part of the same act or transaction. The Court therefore vacated appellant’s conviction for aggravated assault against Mrs. Parris and remanded to the trial court for resentencing.

Appellant also argued that the trial court failed to properly analyze his speedy trial claim and, therefore, remand was required so that the trial court could enter findings of

fact and conclusions of law. The Court again agreed. Although the trial court correctly determined that the 18 month delay raised a presumption of prejudice requiring a full analysis of the four *Barker-Doggett* factors, it failed to do so. Specifically, the trial court failed to make findings of fact regarding whether the delay was uncommonly long; the trial failed to indicate whether it attributed the reason for the delay to appellant or to the State and what weight it gave to this factor; and the trial court failed to indicate what weight, if any, it gave to the timing of appellant's motion. The trial court also failed to weigh various factors for or against appellant and, therefore, did not properly balance the four *Barker-Doggett* factors. The Court stated that it is not the function of the appellate court to weigh the factors in the first instance. Accordingly, the trial court's order on appellant's motion for speedy trial was vacated and the case remanded for the entry of a proper order.

## Search & Seizure

*Bodiford v. State, A14A0683 (7/14/14)*

Appellant was charged with VGCSA. He contended that the trial court erred in denying his motion to suppress. The Court agreed and reversed.

The evidence (including a video of the stop) showed that appellant was stopped for speeding. Appellant was visibly nervous. The officer asked him to step out of his vehicle and the officer wrote appellant a warning while conversing with appellant. After explaining the warning, appellant signed it. However, the officer did not hand the warning to appellant. Instead, the officer began questioning appellant about the status of his driver's license. He then told appellant he needed to run his license. After transmitting the information to dispatch on his shoulder-mounted radio, the officer asked appellant about whether he had drugs, guns or an excessive amount of cash in the vehicle. Appellant said no. The officer asked for consent to search. Appellant didn't respond. The officer then went to get his dog out of his vehicle to conduct a free-air search. At this point, dispatch attempted to contact the officer, but the officer ignored it. The officer then took the dog out of the vehicle. As the officer was standing with the dog next to

appellant's car, dispatch again attempted to make contact with the officer. The officer responded, but said, "I'm in a bad spot here" which was apparently department code to dispatch for "don't call me, I'll call you when I can." The officer then walked his dog around the car. The dog alerted and drugs were found in the vehicle.

The Court stated that the general rule is that an officer may run a check of the driver's license of both the car's driver and any passengers without unreasonably prolonging a traffic stop. This rule, however, assumes that the time involved in running license checks will be relatively brief, and any undue delay in that process could render the length of the detention unreasonable. Thus, the law does not allow an officer unilaterally to extend the time reasonably required for a traffic stop by knowingly avoiding communication with dispatch after requesting a license check. And here the Court found, the officer unilaterally extended the time for the traffic stop by failing to respond to dispatch. Specifically, the officer chose to ignore the dispatcher, despite his admitted knowledge that if the license check showed no problems, the traffic stop would be at an end and appellant would be free to go. According to the officer, he heard the dispatcher but did not respond because he was "in [the] process of hooking my lead up to my dog and I didn't want to take my hands off it." But, the officer admitted, he had not yet removed his dog from the car at that point. After he had retrieved his dog from his patrol car and walked towards appellant's car, the officer responded to the dispatcher's second attempt to reach him but told her that he was in a "bad spot" for radio reception, thereby signaling the dispatcher that she should make no further effort to contact him. Thus, the Court found, the officer's actions thereby ensured that the traffic stop would be prolonged at least until he had the opportunity to have his dog perform a free-air sniff around appellant's car.

Moreover, the Court found, even construing the evidence as showing that the officer and the dispatcher were having problems communicating via the officer's shoulder-mounted radio, there was no evidence of any extenuating circumstances, such as concern for officer safety, which prevented the officer from responding to dispatch by using the radio in his patrol

car. The record showed that by the time dispatch attempted to contact him, the officer had frisked appellant for weapons and had found none. Additionally, appellant, who cooperated completely with the officer throughout the traffic stop, was standing away from his car and next to the officer's patrol car as instructed by the officer. Accordingly, given the lack of extenuating circumstances, the fact that the officer and dispatch may have had some problems communicating over the officer's shoulder-mounted radio did not relieve the officer of his responsibility to respond to dispatch before extending the traffic stop any further. The fact that the officer did not want to interrupt the process of retrieving the police dog, which was still in his patrol car, to respond to dispatch did not change the Court's analysis.

Therefore, the Court concluded, the officer's conduct unreasonably prolonged the traffic stop of appellant and that, absent a valid reason for extending the stop beyond the investigation of the traffic violation, the search of appellant's car resulted from his illegal detention. And here, the Court found, the officer testified that he suspected that appellant was engaged in criminal conduct because of the extreme nervousness appellant displayed at the outset of the traffic stop. But, the Court, stated, it has repeatedly held that nervousness alone cannot provide reasonable suspicion of criminal activity. Accordingly, the officer had no basis for prolonging the traffic stop beyond the time reasonably required to complete his investigation of appellant's traffic violation. The search of appellant's car, therefore, resulted from an illegal detention and thus, the trial court erred in denying appellant's motion to suppress.

## Jury Charges; Knowledge of Chemical Composition of Drugs

*Patterson v. State, A14A0121 (7/10/14)*

Appellant was convicted of one count of distribution of methamphetamine, one count of possession of hydrocodone, and one count of possession of marijuana. After a controlled buy of methamphetamine, law enforcement executed a search warrant at appellant's home. The search revealed a marijuana grinder, a small tray with loose marijuana and rolling papers, a pipe with the smell of burnt

marijuana, and a small oval, white pill, which was sitting on appellant's kitchen counter and which was later identified as hydrocodone. Appellant admitted at trial that he used the pipe for smoking marijuana and that he had marijuana in the house at the time of his arrest, but he testified that he had never seen the pill the police found at his house before he swept it out from under his computer desk, picked it up and put it on his counter, thinking it might belong to his mother. Appellant's sister testified that the Lortabs her mother took were oval, white pills, like that found, and that her mother had those pills at appellant's house when her mother stayed with appellant.

Appellant argued that that the trial court erred in instructing the jury on the charge of possession of hydrocodone under O.C.G.A. § 16-13-30(a). He asserted that the trial court should have instructed the jury in accordance with the law as clarified in *Duwall v. State*, 289 Ga. 540 (2011) ("*Duwall II*") with regard to the intent required for that crime. Because defense counsel did not object at trial, the Court found that it must be reviewed only for plain error. The Court stated, that this standard of review can be succinctly summarized as whether the instruction was erroneous, whether it was obviously so, and whether it likely affected the outcome of the proceeding.

The Court noted that in *Duwall II*, it was held that possession of a controlled substance is not a strict liability offense. The criminal intent required by O.C.G.A. §§ 16-13-30(a) is intent to possess a drug with knowledge of the chemical identity of that drug. And, knowledge of the chemical identity of the substance in one's possession is purely a question of fact. Here, appellant's defense to the charge of possessing hydrocodone, as argued by his trial counsel in closing, was that he did not know that the pill found in his apartment contained hydrocodone, and because he lacked that knowledge, he could not be guilty of possessing a controlled substance in violation of the law. Thus, he was not asserting a defense of mistake of fact as in *Duwall*; instead, he was asserting, as his sole argument to rebut the hydrocodone charge, that he lacked the necessary intent, or *mens rea*, to commit the crime. But the trial court failed to charge on the intent required to prove a violation of O.C.G.A. § 16-13-30(a).

The Court found that the trial court's jury charge to be error in light of evidence presented at trial and the holding in *Duwall II*. Appellant produced at least some evidence that the pill at issue belonged to his mother and that he did not know that it contained hydrocodone. Under the charge as given, however, the jury could have convicted appellant of possession of hydrocodone based solely on a finding that he intended to possess the pill, without making a finding regarding his knowledge that the pill contained hydrocodone. Moreover, the Court found the error to be an obvious defect rather than a merely arguable defect. Although the holding in *Duwall II* was the first clear expression that O.C.G.A. § 16-13-30(a) requires knowledge of the chemical identity of the controlled substance, Georgia courts previously have imposed the requirement under this statute that a defendant have knowledge that he is possessing contraband.

Additionally, the Court found that this erroneous charge affected appellant's substantial rights and likely contributed to the outcome of the case, in that it allowed the jury to convict him under O.C.G.A. § 16-13-30(a) without consideration of one of the essential elements of the crime. In fact, the Court noted, in closing argument, the prosecutor expressly argued that it did not matter whether appellant knew the pill contained hydrocodone and this misstatement of the law was compounded by the judge's failure to charge the jury on possession (i.e., that possession under O.C.G.A. § 16-13-30(a) had to be knowing). Therefore, the Court concluded, because the erroneous charge seriously affected the fairness of appellant's trial with regard to the charge of possession of hydrocodone under O.C.G.A. § 16-13-30(a), it would exercise its discretion to reverse his conviction on that charge.