Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 20, 2010

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THIS WEEK:

- **Sentencing; OCGA § 17-10-7 (a)**
- **DUI; Double Jeopardy**
- **Sufficiency of Evidence; Possession with Intent to Distribute**
- **Expert Witnesses; Shoe-print Comparisons**

Sentencing; OCGA § 17-10-7 (a)

Cook v. State, A10A1550

Appellant was convicted of burglary and sentenced as a recidivist to 20 years to serve 10, the balance on probation. Appellant, citing *King v. State*, 169 Ga. App. 444 (1984), contended that the sentence was void because the trial court considered a prior burglary conviction that had previously been admitted as similar transaction evidence at trial, The Court found that *King* was inapposite because the State did not use appellant's prior burglary conviction to establish an element of the instant burglary and nothing in the burglary statute limits the use of prior convictions to the guilt-innocence phase such that they cannot be used again at sentencing.

Appellant also contended that the trial court was not authorized to enhance his sentence based upon a probated sentence because OCGA § 17-10-7 (a) requires that he be "sentenced to confinement in a penal institution." It was undisputed that appellant had five felony convictions, in four of which he received a sentence of incarceration, and in one of which he received four years probation. The Court held that appellant properly received the maximum for burglary under OCGA § 17-10-7 (a) and (c). Moreover, as to the last conviction in which only appellant received a probated sentence, the Court noted that he was sentenced to four years confinement in a penal institution, "with the privilege of serving it on probation." Therefore, this sentence was in compliance with OCGA § 17-10-7 (a).

DUI; Double Jeopardy

Chandler v. State, A10A1604

Appellant appealed from the denial of his plea in bar on double jeopardy grounds. The evidence showed that on February 16, 2009, following a collision, an officer issued appellant a citation for following too closely. On April 15, after appellant's blood test results became known, the same officer issued him a second citation for driving under the influence of drugs. Both citations were filed in recorder's court. On April 22, appellant resolved the following too closely charge by forfeiting a bond, which involved paying a fine at a desk operated by the clerk of the recorder's court. On June 3, the Solicitor General filed an accusation in state court charging appellant with two counts of DUI and one count of following too closely.

Under OCGA § 16-1-7 (b), if "several crimes [1] arising from the same conduct are [2] known to the proper prosecuting officer at the time of commencing the prosecution and are [3] within the jurisdiction of a single court, they must be prosecuted in a single prosecution." It was undisputed that the charges arose from the same conduct and were within the jurisdiction of a single court. However, the Court found that appellant failed to prove that the solicitor had "actual knowledge of all the charges" at the time of the disposition of the following too closely charge in the recorder's court. First, the

Court stated, constructive knowledge is insufficient. Also, the solicitor, not the officer, was the "proper prosecuting officer" pursuant to OCGA § 16-1-7 (b). Thus, because the evidence showed that the traffic citation was issued by a police officer, filed in recorder's court, and disposed of at the clerk's office without the intervention of a prosecuting officer or a judge, the trial court did not err in denying the plea in bar as to the DUI charges.

Sufficiency of Evidence; Possession with Intent to Distribute

Jackson v. State; Royal v. State, A10A1062, A10A1105

Jackson, Royal and Tasha Jackson ("Tasha") were jointly indicted, tried, and convicted of possession of cocaine with intent to distribute and possession with intent to distribute a controlled substance within 1000 feet of a housing project. Royal also was convicted of three misdemeanors: tampering with evidence, possession of less than one ounce of marijuana, and obstruction of an officer. The evidence showed that officers executed a no-knock warrant at a two-story, two-bedroom apartment. The apartment was registered to Tasha, and she and Royal were named on the warrant. As the officers entered the apartment, Royal was on the living room couch, stuffing a baggie of marijuana into his mouth. No other drugs or drug paraphernalia were found on Royal or on the first floor of the apartment. In a bedroom on the second floor, the officers found Jackson kneeling over a piggy bank containing 37 baggies of cocaine. Tasha was in bed.

Royal contended that the evidence was insufficient to convict him of the two cocaine possession charges. The Court agreed and reversed. It held that the circumstantial evidence and the reasonable inferences derived therefrom were insufficient to connect Royal to the cocaine found in an upstairs bedroom occupied by his co-defendants. While the evidence that Royal was on the couch on the first floor, trying to eat a baggie of marijuana authorized his conviction of misdemeanor marijuana possession, it did not permit an inference that he possessed the 37 baggies of cocaine that were hidden in a piggy bank in the upstairs bedroom. No other drugs, drug-related paraphernalia, or cash were found on the first floor. The Court further found as significant that no evidence was introduced to show that Royal resided in the apartment, which might have authorized an inference that he possessed the property therein. Finally, the Court found that an agent's testimony that he conducted an "independent investigation" that gave him "reason to believe" that Royal was selling drugs out of the apartment did not connected Royal to the cocaine because it was hearsay and thus, had no probative value.

Expert Witnesses; Shoe-print Comparisons

In the Interest of J.D., A10A1552

Appellant was adjudicated a delinquent in juvenile court for burglary. Over the objection of defense counsel, the investigating officer was qualified as an expert and allowed to testify that a muddy shoeprint at the scene of the burglary matched the tread pattern and size of the shoes appellant was wearing when he was arrested. Appellant argued that that the trial court erred in qualifying the officer as an expert witness because he admittedly had no specialized training in forensics or shoe-print comparison. The Court found that the trial court did not abuse its discretion in qualifying the officer as an expert witness in the area of "observation and investigation of physical evidence." The officer testified that he had five years experience and investigated "hundreds if not thousands" of crimes, and had participated in numerous training programs, including instruction by forensic officers about crime-scene preservation and observation skills. Although the officer testified that he did not have specialized training in shoe-print matching, he had handled other cases involving shoe-print matching, and did not believe specialized training was needed to compare the shoe prints in this case.