

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 4, 2017

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THIS WEEK:

- **Jury Instructions; Plain Error**
- **Ineffective Assistance; Plea Offers**
- **Statute of Limitations; Grand Jury**
- **Sentencing; Units of Prosecution**
- **Voir Dire; Juror Impartiality**

Jury Instructions; Plain Error

Bailey v. State, A17A0529 (6/13/17)

Appellant was convicted of possession of cocaine with intent to distribute. The evidence, briefly stated, showed that appellant was a passenger in a vehicle. Another passenger told the officer that stopped the vehicle that appellant had cocaine in his shoe. An officer asked appellant to remove his shoes, and he complied. The officer felt along appellant's socks and detected a bulge underneath appellant's right sock at the arch on the bottom of his foot. The officer removed the sock, and a bag containing 32 smaller bags of cocaine fell out.

Appellant argued that the trial court committed plain error when it failed to charge the jury that the State had to prove his knowledge of possessing cocaine beyond a reasonable doubt. The Court stated that assuming, *without deciding*, that a failure to provide a charge that a defendant must *knowingly* possess cocaine with an intent to distribute is *always* erroneous as a matter of law, appellant's claim of plain error failed because he could not establish that the alleged error affected the outcome his trial. Appellant argued the evidence justifying the charge was that (1) he willingly removed his shoes when a police officer requested that

he do so, and (2) appellant expressly denied having anything on his person. But, the Court stated, both of these facts were testified to by an officer at trial. Yet neither of these facts supported a conclusion that appellant did not know or was mistaken about the substance of the drugs found on him. Rather, these facts constituted a complete denial of the existence of the 32 bags hidden inside his sock at the bottom of his right foot. Therefore, because there did not appear to be any evidence in the record demonstrating that the jury could have been misled or confused into convicting appellant based solely on a finding that he possessed the drugs without making a finding regarding his knowledge, appellant could not show that the failure to instruct the jury as to knowledge affected the outcome of the trial court proceedings. Thus, the Court found no plain error.

Ineffective Assistance; Plea Offers

Walker v. State, A17A0437 (6/14/17)

Appellant was convicted of rape and false imprisonment and sentenced to life plus five years. He alleged that he received ineffective assistance of counsel for failing to adequately advise him regarding a pre-trial plea offer from the State. The record showed that during pre-trial plea negotiations, the State offered to recommend to the trial court that appellant serve 20 years in prison in exchange for his guilty plea to the charged offenses of rape and false imprisonment. It is undisputed that, when the State made the plea offer, both the prosecutor and appellant's trial counsel erroneously believed that 20 years was the maximum sentence that appellant could receive on the

rape charge, when, in fact, he could receive a life sentence. Based on counsel's erroneous advice that 20 years was the maximum rape sentence, appellant rejected the plea offer, went to trial, was convicted on both charges, and received a sentence of life imprisonment for rape plus five years for false imprisonment. Appellant testified at the hearing on the new trial motion that trial counsel told him about the State's 20-year plea offer and that "more than likely" he would have taken the plea offer if trial counsel had advised him that the maximum sentence for rape was life imprisonment. Although appellant testified that he did not learn about the possibility of life imprisonment until sentencing, trial counsel testified that, just prior to opening statements, the prosecutor told her that the maximum sentence for the rape charge was life imprisonment and that appellant was also made aware at that time that the maximum sentence was life.

The Court stated that if a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. Because trial counsel's erroneous advice that 20 years was the maximum rape sentence was clearly deficient performance under the first *Strickland* prong, the issue is whether appellant proved under the second *Strickland* prong that counsel's deficient performance prejudiced the defense.

The Court noted that in addressing the prejudice prong, the trial court ruled that appellant learned during the trial that the maximum sentence for rape was life rather than 20 years, that "before and during trial, [appellant] repeatedly rejected a plea offer of twenty years to serve," and that "nothing in the record suggests that [appellant] would have acted any differently had the proper sentence guidelines been conveyed to him prior to trial." Essentially, the trial court ruled that appellant failed to show he was prejudiced by counsel's deficient advice because (with knowledge that life was the maximum sentence) he repeatedly rejected the State's 20-year plea offer. However, the Court found nothing in the record to support the court's ruling. Evidence showed that appellant rejected the State's pre-trial 20-year plea offer prior to learning that life imprisonment was the maximum sentence for rape. But there was nothing in the record showing that, after trial counsel and appellant learned from the prosecutor that life was the maximum sentence, the State re-offered a 20-year plea deal

or appellant rejected it. Accordingly, the Court vacated the trial court's ruling on the prejudice prong and remanded for further findings and conclusions of law on whether appellant was in fact prejudiced.

Statute of Limitations; Grand Jury

State v. Dorsey, A17A0108 (6/14/17)

Dorsey was working as a sheriff's deputy in the courthouse. On two separate incidents, he allegedly groped women after taking them out of a courtroom and confiscating their cellphone. The indictment alleged that Dorsey committed false imprisonment against one woman on October 3, 2011, and that Dorsey committed false imprisonment, two counts of sexual battery, and one count of simple battery against another woman on May 30, 2012. Dorsey filed a plea in bar and motions to dismiss the indictment. The trial court granted the plea in bar as to the misdemeanors, but denied the motion to dismiss the false imprisonment charges.

The State argues that the trial court erred when it granted Dorsey's plea in bar as to the three misdemeanor counts on the grounds that the indictment was filed one day late. The Court disagreed. The record showed that the indictment was filed on May 30, 2014, exactly two years after the incidents that took place on May 30, 2012. The trial court granted Dorsey's plea in bar, reasoning that the date of the offense is counted in the computation of the limitation period and, thus, that the indictment had been filed a day after the expiration of the statute of limitation. The Court noted that in *McLendon v. State*, 14 Ga. App. 274 (1914), it noted that two lines of cases had developed: in one, "[w]here days are to be computed," the time computation statute applied and "only the first or the last [day] counted," but in the other, where the computation is of months or years, "the right is lost, unless invoked on or before the day last preceding the day of the month or year corresponding to the day upon which the right accrued." As the misdemeanor statute of limitation was measured in years, and not days, *McLendon* held that an accusation filed on the second anniversary of the alleged crime was one day late.

Nevertheless, the State argued, *McLendon* was been superceded in 1985, when the General Assembly amended OCGA § 1-3-1,

governing computation of time. The Court again disagreed. The Court found that OCGA § 1-3-1 (d) (3) does not apply to the statute of limitations in criminal prosecutions. Criminal defendants have the right to be prosecuted in a timely manner, and the General Assembly did not grant the State additional time in which to seek such a prosecution if the statute of limitations falls on a weekend or a legal holiday. Accordingly, the Court found that the trial court did not err in concluding that the State's prosecution of the three misdemeanor charges was barred by the statute of limitation.

Dorsey contended that the trial court erred in not dismissing the two felony false imprisonment charges. The Court disagreed. The Court noted that Dorsey moved to quash the indictment on the ground that he had not been permitted to be present and to make a sworn statement when the case was presented to the grand jury. Peace officers are afforded these rights under OCGA §§ 17-7-52 and 45-11-4 if charged with a crime which is alleged to have occurred while in the performance of their official duties. However, the Court found, citing *Gober v. State*, 203 Ga. App. 5, 5 (1) 1992), overruled in part on other grounds, *Dudley v. State*, 273 Ga. 466, 468, n. 4 (2001), Dorsey stepped aside from the performance of his official duties when he allegedly engaged in acts of restraining women against their will, groping their breasts and buttocks, and exposing his genitalia. Thus, since Dorsey was not acting within the performance of his official duties, the trial court's denial of the defendant's motion to quash the indictment for failure to comply OCGA § 17-7-52 and 45-11-4 was not in error.

Sentencing; Units of Prosecution

Coates v. State, A17A1098 (6/15/17)

Appellant was convicted of misdemeanor possession of marijuana and four counts of possession of a firearm by a convicted felon. The trial court sentenced him separately on each count, with the sentences to run consecutively. Appellant argued that the trial court should have merged his four convictions for possession of a firearm by a convicted felon under OCGA § 16-11-131 (b). Specifically, he argued that the statute is ambiguous as to whether the possession of each firearm constitutes a separate unit of prosecution, and the statute therefore should

be construed under the rule of lenity to mean that the simultaneous possession of multiple firearms constitutes only one offense.

The Court found that when the phrase “any firearm” found in OCGA § 16-11-131 (b) is read in conjunction with the words surrounding it, the phrase clearly was intended to refer to a single firearm rather than multiple firearms. OCGA § 16-11-131 (b) further states that a convicted felon who possesses “any firearm” can be convicted and imprisoned from one to five years; “provided, however, that if the felony as to which the person is on probation or has been previously convicted is a forcible felony, then upon conviction of ... possessing[] ... *a firearm*, such person shall be imprisoned for a period of five years.” (Emphasis supplied.) Use of the article “a” in the proviso of subsection (b) expresses an unambiguous intent to make each firearm a unit of prosecution. And because all parts of a statute, including provisos, are to be construed together, the language of the proviso in subsection (b) clarifies that punishment imposed under that subsection is predicated on possession of a single firearm.

The Court also stated that further clarification is provided by OCGA § 16-11-131 (b.1), the other subsection of the statute that creates a felony firearm offense and thus sheds light on the proper unit of prosecution. Subsection (b.1) provides: “Any person who is prohibited by this Code section from possessing a firearm because of conviction of a forcible felony or because of being on probation as a first offender for a forcible felony pursuant to this Code section and who attempts to purchase or obtain transfer of *a firearm* shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.” (Emphasis supplied.) Through its reference to “a firearm,” subsection (b.1) confirms that the legislature intended to link conviction and punishment under the statute to a single firearm.

Accordingly, the Court concluded that the phrase “any firearm” found in OCGA § 16-11-131 (b), when read in conjunction with the statutory proviso and with subsection (b.1), is unambiguous and was intended by the legislature to refer to a single firearm rather than multiple firearms. Therefore, the unit of prosecution under OCGA § 16-11-131 (b) is possession of a single firearm, and appellant could be separately punished for his possession of each of the firearms seized from his house.

The trial court therefore committed no error in declining to merge the four firearm-related convictions for purposes of sentencing.

Voir Dire; Juror Impartiality

Lundy v. State, A17A0607 (6/15/17)

Appellant was convicted of kidnapping with bodily injury. He contended that the trial court erred by denying his motion to strike Juror No. 1 for cause. The record showed that the juror initially stated that because she had been a victim of a crime and her “life has never been the same since that happened to me[,] she felt she would be unfair to [appellant] by [being] up here today.” However, upon further questioning by the prosecutor, the juror stated that she could be fair and impartial.

The Court stated that after a juror has expressed doubts about her ability to be fair and impartial, the parties and the trial court are permitted to ask questions that might rehabilitate the juror, but it is improper to browbeat the juror into affirmative answers to rehabilitative questions by using multiple, leading questions. Here, the Court found, the record showed that the prosecutor did not ask Juror No. 1 the same question multiple times. Rather, the prosecutor explored the juror's professed bias by asking what had happened to her and whether she could nevertheless hold the State to its burden of proof. The juror confirmed that she could be fair and impartial in reaching a verdict and that she would not let her past experiences affect her ability to reach a verdict. Based on the juror's responses, demeanor, and voice, the trial court determined that Juror No. 1 could be fair and impartial despite her personal experiences. Under these circumstances, the Court found no abuse of the trial court's extremely broad discretion.