Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 12, 2014

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THIS WEEK:

Sexual Registration Requirements; Rule of Lenity

Smith v. State, Georgia, A14A1180 (8/26/14)

Appellant entered a negotiated guilty plea to the charge of statutory rape and was sentenced under the First Offender Act. The record showed that when he was 20 years old, he had sex with a 15-year-old. He signed a "Statement of Defendant Desiring to Enter Negotiated Plea" which provided that he would not be required to register as a sex offender as a special condition of probation, and no such special condition was ordered by the trial court. However, when told by his probation officer that he would have to register, appellant filed a motion to enforce the terms of his plea that he not be required to register. The trial court denied the motion.

Appellant argued that the specific definition in O.C.G.A. § 42-1-12(a)(10)(B) (dangerous sexual offense) "overrules" the alleged general definition provided in O.C.G.A. § 42-1-12(a)(9)(B) (criminal offense against a victim who is a minor), and that because he was age 20 at the time of the offense, O.C.G.A. § 42-1-12(a)(10)(B)(vii) does not apply, and he therefore is not required to register as a sex offender. O.C.G.A. § 42-1-12(a)(10)(B)(vii) ("Statutory rape in violation of Code Section 16-6-3, if the individual convicted of the offense is 21 years of age or older.") provides only that registration is required for a statutory rape conviction for an individual 21 or older. So appellant's argument was that what is *implied* by this subsection (registration is not required if the individual is under the age of 21) is specific, and prevails over what he deemed is the general provision of O.C.G.A. § 42-1-12(a)(9)(B)(iii). But, the Court stated, each of these provisions is specific in describing the categories of persons who are required to register either for having committed a specific crime or having engaged in certain conduct. And while appellant may have negotiated no registration, the regulatory requirements of O.C.G.A. § 42-1-12 are independent of any term or condition of probation that could be imposed by the trial court. Therefore, his motion to enforce the terms and conditions of his sentence was ineffectual to address the regulatory mechanism requiring him to register as a sex offender.

The Court agreed that O.C.G.A. § 42-1-12(a)(10)(B)(vii) does not apply here to require appellant to register as a sex offender because he was not "21 years of age or older" when he committed the statutory rape, and therefore did not commit a "dangerous sexual offense" as defined by that subsection. But, the Court found, this does not foreclose the requirement that he register for having committed a "criminal offense against a victim who is a minor" consisting of "criminal sexual conduct toward

a minor" pursuant to O.C.G.A. § 42-1-12(a)(9)(B)(iii). Appellant pled guilty to the statutory rape of a 15-year-old girl, which "falls within the category of criminal sexual conduct toward a minor." Thus, the Court said, "Had the legislature intended for O.C.G.A. § 42-1-12(a)(9)(B)(iii) to apply only to those age 21 and over, as it did in O.C.G.A. § 42-1-12(a)(10)(B)(vii), it could have specifically provided so."

Appellant also argued that the rule of lenity should apply. The Court disagreed. The rule of lenity comes into play only to resolve ambiguities that remain after applying all other tools of statutory construction and there is no ambiguity in the language of O.C.G.A. § 42-1-12 describing the categories of individuals that must register as a sex offender. Moreover, O.C.G.A. § 42-1-12 is not a criminal statute that prescribes punishment.

Finally, appellant argued that he did not have to register because he pled guilty as a first offender. However, the Court found, O.C.G.A. § 42-1-12(a)(8) provides that a conviction, for purposes of the sex offender registry, includes a plea of guilty and those sentenced as first offenders. As appellant has not yet been discharged for the completion of his sentence, he is required to register as a sex offender pursuant to O.C.G.A. § 42-1-12(a)(9)(B)(iii) for having committed a "crime against a victim who is a minor." The trial court therefore did not err.

Theft by Taking; Sufficiency of the Evidence

Harris v. State, A14A0933 (8/20/14)

Appellant was convicted of burglary and felony theft by taking. The evidence showed that appellant was seen leaving the grounds of an auto recycling business which had been closed for several months. The witnesses noticed that appellant had five or six radiators in his vehicle. One of the witnesses recognized appellant. When the witnesses investigated, they noticed multiple tire tracks leading from the gate to a loading dock of one of the buildings. The owner estimated that over $6,000.00 worth of automotive parts were missing from his warehouse, but he could not testify that all of it was taken on the incident date. Appellant went to one of the witnesses later and admitted to taking a battery from the property.

Appellant contended that the evidence was insufficient to support his conviction under former O.C.G.A. § 16-8-12(a)(5)(A)(1) which provided that a person shall be convicted of felony theft by taking if he unlawfully takes motor vehicle parts which exceed $100 in value. The Court agreed. The value of the stolen property is not an element of the offense, but it is relevant for sentencing purposes. Thus, under former O.C.G.A. § 16-8-12, a person convicted of theft by taking of motor vehicle parts shall be convicted of a misdemeanor if the value does not exceed $100.

The State argued that the evidence appellant left through a back gate with radiators and the presence of multiple tire tracks in the area which indicated that multiple trips had been made was sufficient to prove that appellant stole all of the other items that were reported missing from the warehouse. But, the Court stated, while this evidence may prove that someone had made multiple trips to the warehouse, the only items observed in appellant's possession were the radiators. Thus, the evidence was insufficient for a rational trier of fact to find that appellant stole all of the items that were reported missing from the warehouse.

However, the Court found, the evidence was sufficient to show that appellant unlawfully took radiators and at least one battery. Appellant was present on the victim's property and in possession of radiators similar to those that had been taken from the warehouse, and he later told a witness that "the only thing I ever went there and got was a battery." Thus, the issue was whether there was any evidence to support the trial court's finding that these particular items exceeded $100 in value.

The proper measure of value is the fair cash market value either at the time and place of the theft or at any time during the receipt or concealment of the property. Here, the Court found, the State presented evidence as to the fair market value of the radiators. The victim testified to the process he used to calculate the value of the radiators, which was based on his experience dealing with such items in the ordinary course of his former business. He estimated the sale price between $5 and $55, depending on the type of radiator, but that the average fair market price was around $15. Because his calculation is based on his experience in selling radiators, it was sufficient to determine value. The evidence showed that appellant had five or six radiators in his vehicle and at $15 per radiator, the overall value for these items would be $75-$90. Thus, the theft of these radiators fell short of the $100 threshold for a felony. Furthermore, the trial court's inclusion of batteries in determining the value of the items taken was also found to be in error. Even if appellant did steal one or more batteries at some point, the State failed to present any evidence whatsoever regarding the value or quantity of the batteries alleged to have been taken.

Jury Charges; Restitution

Williams v. State, A14A1315 (8/29/14)

Appellant was charged with felony theft by conversion but convicted of misdemeanor theft by conversion of property with a value less than $500 pursuant to O.C.G.A. § 16-8-4(a). The evidence showed that appellant rented two televisions from a furniture store and signed a separate rental contract for each TV. After making some payments, she stopped paying and moved the televisions to another location in violation of the rental agreements.

Appellant contended that the trial court erred in charging the jury on the appropriate measure of damages. The Court noted that since appellant did not object to the charge, it must review this enumeration of error under a plain error standard of review. The record showed that the court gave the following charge: "[w]hen value is an element of an offense, the value that must be proved by the State is fair-market value of the property at the time of the taking. Fair-market value is defined as the price agreed upon by the seller who is willing but not compelled to sell, and a buyer who is willing but not compelled to buy." Appellant argued that the correct formula for determining fair market value is set forth in O.C.G.A. § 16-8-4(c)(3)(A). But, the Court found, O.C.G.A. § 16-8-4(c)(3)(A) sets out the formula for determining replacement costs of converted personal property, not the formula for determining market value for purposes of the $500 felony threshold. Moreover, the owner's testimony authorized appellant's conviction for misdemeanor theft by conversion. Accordingly, there was no plain error in giving this charge.

Appellant also argued that the trial court erred in determining the amount of restitution. The Court disagreed. With regard to restitution, O.C.G.A. § 16-8-4(c)(3) pertinently provides:

"[i]n the event that any personal property is not returned as provided for in the lease or rental agreement and the court orders the lessor

or renter to pay replacement costs, replacement costs *shall include but not be limited to*: (A) The market value of the personal property.… (B) *All rental charges from the date the rental agreement was executed until the date of the trial* or the date that the property was recovered, if recovered; and (C) Interest on the unpaid balance each month at the current legal rate from the date the court orders the lessor or renter to pay replacement costs until the date the judgment is satisfied in full. (Emphasis supplied). Here, the State presented the testimony of the owner of business, who stated that he was owed $2,197.07, based on the difference between the payments appellant made on the two televisions and the amount that she would have paid over the course of 24 months under the two rental agreements. The owner further stated that the figure of $2,197.07 included late fees, as well as postage, filing and trip fees. The trial court subsequently ordered appellant to pay $2,198.07 in restitution.

Thus, the Court found, the evidence was sufficient to support the trial court's determination of the amount of restitution awarded. Notably, the evidence showed that the rental agreements required appellant to either make monthly payments on the televisions or return the televisions to business; the rental agreements provided for a total $2,797.90 in monthly payments on the televisions; appellant made only $573.60 in payments; and appellant never returned the televisions. Pursuant to O.C.G.A. § 16-8-4(3)(B), the trial court could have awarded as much as $2,224.30—the difference between the total monthly payments under the rental agreements and the amount appellant paid—plus interest on the unpaid balance. Accordingly, the trial court did not err in awarding only $2,198.07 in restitution.

Double Jeopardy

Cotman v. State, A14A1287 (8/13/14)

Appellant was charged with conspiracy to violate the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO) (O.C.G.A. § 16-14-4(c)) and with influencing witnesses (O.C.G.A. § 16-10-93) in an initial indictment (the First Indictment). Appellant filed a special demurrer seeking to quash Count 4 of the First Indictment alleging the influencing of a witness. The State then re-indicted appellant solely on the influencing witnesses charge ("the Second Indictment") and that same day, also filed a motion for nolle prosequi of the original influencing witnesses charge in Count 4 of the First Indictment and a motion for joinder of the two indictments. Appellant objected to the motion for joinder and filed a demand for a speedy trial on the Second Indictment. Appellant was then tried separately on the Second Indictment and was acquitted of influencing witnesses. After her acquittal for influencing witnesses under the Second Indictment, appellant filed a plea in bar contending that she could not be tried under the First Indictment by reason of O.C.G.A. § 16-1-8 and the Double Jeopardy Clause of the Georgia and United States Constitutions. The trial court denied the plea in bar.

Appellant argued that the trial court erred in denying her plea in bar. Specifically, she argued that, under O.C.G.A. § 16-1-8(b), the RICO conspiracy and the influencing witnesses charges should have been tried together since the charges involved the same conduct and the State knew of both the RICO conspiracy and influencing witnesses charges at the time of trial, and that having two separate trials results in double jeopardy. The Court disagreed.

The Court stated that pretermitting whether O.C.G.A. § 16-1-8(b) might otherwise bar a prosecution under the First Indictment, appellant faced subsequent prosecution because she chose to have the two indictments tried separately. The State wanted the indictments tried together, as indicated by the filing of its motion to join them. But, it was appellant who pursued a speedy trial on the Second Indictment only and objected to joinder, thereby indicating her desire to have the two indictments tried separately. Although appellant relied primarily on the protections afforded her by the Georgia statutes, the Court found federal law to be persuasive. Particularly, *Jeffers v. United States*, 432 U. S. 137, 152 (II) (B) (1977), in which the United States Supreme Court found that even where a defendant is normally entitled to have charges resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election. Accordingly, the Court concluded, appellant, having opposed the State's invitation to join the two indictments for a single trial, faced subsequent prosecution because of her own election and thereby waived the protections against subsequent prosecutions afforded by O.C.G.A. § 16-1-8(b).

Severance

Ray v. State, A14A07 (9/4/14)

Appellant was convicted of three counts of rape, three counts of aggravated assault, two counts of kidnapping with bodily injury and one count of aggravated sodomy. The record showed that this case arose out of three sexual assaults against three different women that occurred in the same county between November 2002 and April 2003. He contended that the trial court erred in denying his motion to sever the charges.

The Court stated that as a general rule, where the evidence of the other crimes would be admissible as similar transaction evidence at trial, or where the similarity of the offenses manifests a pattern, the trial court does not abuse its discretion in denying the motion for severance. Although a defendant has a right to sever multiple offenses if they are joined solely because they are of a similar character, offenses have not been joined solely because they are of the same or similar character when evidence of one offense can be admitted upon the trial of another, i.e., when they are so strikingly similar as to evidence a common motive, scheme or bent of mind. Additionally, where the modus operandi of the perpetrator is so strikingly alike, that the totality of the facts unerringly demonstrate and designate the defendant as the common perpetrator, the offenses may be joined—subject to the right of the defendant to severance in the interests of justice. Under such circumstances, a defendant is entitled to severance only if, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact would be unable to distinguish the evidence and apply the law intelligently as to each offense.

Here, the Court found, although the crimes in this case occurred at different times and different locations and involved different victims, they were connected by more than just their similar character. The charges against appellant clearly showed a recurring pattern of conduct suggesting a common scheme or modus operandi. The victims of the three sexual assaults were adult women between the ages of 23 and 38 years old, none of the women knew appellant, all three incidents occurred in same county within 6 months of

each other, each victim was taken by vehicle to a secluded location before they were raped, all three incidents involved a handgun, and semen matching appellant's DNA profile was found on each victim. Moreover, the trial court properly found that each incident would be admissible as a similar transaction to show a common motive, plan, scheme, and bent of mind. And, this case was not so complex as to impair the jury's ability to distinguish the evidence and apply the law intelligently as to each offense. Consequently, the Court found that the trial court did not abuse its discretion in denying the motion to sever the offenses.

Ineffective Assistance of Counsel

Brewer v. State, A14A0799 (8/6/14)

Appellant was convicted of two counts of committing an act of child exploitation through the use of a computer or electronic device, O.C.G.A. § 16-12-100.2(d)(1). The record showed that appellant was indicted on two counts of criminal attempt to commit child molestation. Each count charged appellant with performing an act which constituted a substantial step toward the commission of child molestation, specifically, sending messages via a computer to an underage victim indicating that he wanted to have anal sodomy with her when he was released from prison in two months. Appellant was appointed defense counsel, but he nevertheless filed pro se demurrers to the indictment arguing that the indictment should be dismissed because in sending the e-mail messages at issue, he did not take a substantial step toward the commission of child molestation. He also harassed his defense counsel into filing a demurrer as well. Defense counsel testified that she thought there was a small chance that he could be acquitted "if we….just kept our mouths shut" and that even if convicted, it would make a good appellate issue. Nevertheless, appellant insisted that she file the general demurrer. The State then re-indicted him on the child exploitation counts.

Appellant contended that his court-appointed defense counsel provided ineffective assistance by filing a general demurrer to the State's original indictment. He argued that his counsel's general demurrer "alert[ed] the prosecution to [the indictment's] problems of proof before jeopardy attached, and induc[ed] it to retreat to charges better tailored to its proof, easier to establish, and carrying greater sentences." According to appellant, the fact that counsel filed the demurrer at his insistence was legally insignificant. The Court disagreed.

Pretermitting whether defense counsel should have agreed to file the demurrer, the Court stated, a defendant will not be allowed to induce an asserted error, sit silently hoping for acquittal, and obtain a new trial when that tactic fails. Induced error is impermissible and furnishes no ground for reversal. Moreover, even if appellant had been able to show that his counsel provided deficient performance by filing the demurrer, he was unable to show that, but for her doing so, there was a reasonable likelihood that the State would have proceeded to trial on the original, defective indictment because it was undisputed that appellant himself filed pro se demurrers and related pleadings that raised the same issues as counsel's demurrer, thus independently alerting the State to the same problems with the indictment that prompted it to re-indict him. Accordingly, appellant failed to show that he was prejudiced by counsel's allegedly deficient performance.

Impeachment Evidence; O.C.G.A. § 24-6-609(a)(1)

Williams v. State, A14A0986 (8/26/14)

Appellant was convicted of burglary. In response to a question during cross-examination, the victim stated, "You know, I'm the type of fellow, you know, I done been in some trouble too. I've got a record. I've been to prison and all that, and I've got a brother that has done did murder charges and all that." Almost immediately after this statement was made, a bench conference ensued, during which the prosecutor noted that the victim was convicted for possession of cocaine approximately nine years prior to this trial. Defense counsel then sought admission of that conviction into evidence, but the prosecutor argued that such evidence should be excluded as irrelevant. Ultimately, the trial court found that the prejudicial effect of the victim's conviction outweighed its probative value and, therefore, excluded it.

Appellant argued that the trial court failed to correctly analyze the admissibility of the victim's prior conviction under the new evidence code, and thus, erred in excluding it. O.C.G.A. § 24-6-609(a)(1) provides, in relevant part, that: "For the purpose of attacking the character for truthfulness of a witness . . . [e]vidence that a witness other than an accused has been convicted of a crime shall be admitted subject to the provisions of Code Section 24-4-403 if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted . . ." And pursuant to § 24-6-609(b), "[e]vidence of a conviction under this Code section shall not be admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for such conviction, whichever is the later date . . . ."

Here, the Court found, it was undisputed that the victim's conviction for possession of cocaine was less than ten years old and constituted a crime punishable by imprisonment in excess of one year. Thus, pursuant to O.C.G.A. § 24-6-609(a)(1), the admissibility of that conviction hinged upon the application of O.C.G.A. § 24-4-403, which tracks Federal Rule of Evidence 403, and provides: "Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Under this standard, the Court noted, the trial court merely found that the probative value of Curry's prior conviction for possession of cocaine was outweighed by its prejudicial effect and did not require the State to show that such prejudice *substantially* outweighed any probative value. In doing so, the trial court failed to analyze the issue under O.C.G.A. § 24-4-403, and, consequently, it erred.

Nevertheless, the Court stated, it is a fundamental principle that harm as well as error must be shown for reversal, and here, appellant was not harmed by the trial court's evidentiary ruling.

Thus, the Court found, even before the bench conference, the victim testified that he had prior troubles with the law, that he had a criminal record, and that he spent time in prison. Thus, evidence of the victim's criminal history—albeit unspecific—was presented to the jury. In fact, the victim's own testimony arguably damaged his credibility far more than appellant would have done by being limited to merely introducing the record of the victim's prior conviction for possession of cocaine.

Consequently, at most, the admission of the victim's prior conviction would have been cumulative of his own damaging testimony. Accordingly, the trial court's error in failing to correctly apply O.C.G.A. § 24-4-403 in determining the admissibility of the victim's prior felony conviction was harmless.

Public Access to the Courts; Sentencing

Freeman v. State, A14A0610 (7/16/14)

Appellant was convicted of burglary and attempted malice murder. He contended that the trial court erred in closing the courtroom for one witness's testimony during his sentencing hearing. The record showed that at the hearing, appellant's counsel proffered that, as part of his mitigation defense, he would elicit testimony from law enforcement that appellant would offer substantial cooperation with ongoing criminal investigations. The State did not want to impede open investigations by revealing information about those investigations, so the State requested that the trial court exclude the public during those witnesses' testimony. Appellant's counsel did not object because he believed it would benefit his client to facilitate the law enforcement testimony showing his client's cooperation.

In a 4-3 decision, the en banc Court found that because appellant agreed to the closure, the issue of closure may only be raised in the context of an ineffective assistance of counsel claim. This was because a defendant is not allowed to induce an asserted error, sit silently hoping for acquittal, and obtain a new trial when that tactic fails. Induced error is impermissible and furnishes no ground for reversal.

The Court noted that despite this waiver, the dissent believed that the courtroom's closure required reversal, emphasizing the importance of a public trial. But, the Court found, this precise concern was addressed in *State v. Abernathy*, 289 Ga. 603, 611 (5) (2011) in which the Supreme Court of Georgia explained that the right to public trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial. And here, it was clear that the trial court held a hearing on the record in which it considered the least intrusive way to protect appellant's interests in presenting mitigation evidence without hindering the State's ongoing criminal investigation. The trial court carefully considered alternatives to the temporary closure as well as ways to limit closure to only certain witnesses' testimony. The court made explicit findings on the record and identified the overriding nature of appellant's due process interest and the State's interest in protecting sensitive information involved in the criminal investigation. The parties proffered specific facts supporting the trial court's findings and exercise of discretion. The closure was narrowly tailored to a single witness, and the courtroom was promptly reopened after the relevant evidence was presented; there was no indication that the full transcript of the sentencing was ever withheld from anyone seeking it. Under these circumstances, and in light of appellant's waiver, the Court found no basis for reversal on the enumerated ground.

Finally, as to the whether defense counsel rendered ineffective assistance by consenting to the closure, the court also found no error. Defense counsel's decision was a strategic one designed to allow mitigation evidence during sentencing. Prior to sentencing, trial counsel stated that he believed that law enforcement witnesses would be more forthcoming if the courtroom were closed. In light of this reasonable strategic decision, and in light of any showing of harm, appellant failed to meet his burden under *Strickland v. Washington*.

Sentencing; Merger

Hopkins v. State, A14A0908 (8/6/14)

Appellant was convicted of five counts of obtaining a controlled substance by fraud in violation of O.C.G.A. § 16-13-43(a)(3). The evidence showed that appellant's girlfriend, Morgado, worked for a doctor. Without authority, on November 28, she called in prescriptions for herself, each with two refills, for the controlled substances Lortab® (40 pills), Ambien® (30 pills), and Xanax® (60 pills); she also called in a prescription for Lortab® (40 pills) for appellant. On December 8, she ordered a refill of her Lortab® prescription and appellant picked it up. The relevant counts of the indictment were as follows: Count 1, the Lortab® dispensed for Morgado on November 28, 2011; Count 2, the Lortab® dispensed for appellant on that date; Count 3, the Ambien® dispensed for Morgado on that date; Count 5, the Xanax® dispensed for Morgado on that date; and Count 8, the Lortab® dispensed for Morgado on December 8.

Appellant contended that the offenses charged in the five counts all involved just a single act of fraud, that is, Morgado's November 28 telephone call to the pharmacy posing as someone with authority. Therefore, she contended, the offenses merged, and that the trial court erred in imposing a separate sentence as to each count.

The Court stated that O.C.G.A. § 16-1-7 prohibits multiple convictions if "[o]ne crime is included in the other." Under the express terms of that statute, however, the rule prohibiting more than one conviction if one crime is included in the other does not apply unless the same conduct of the accused establishes the commission of multiple crimes. If the same conduct established the commission of both offenses, it is generally necessary to take the next step in the analysis by applying the "required evidence" test for determining when one offense is included in another: a single act may constitute an offense which violates more than one statute, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

As to the different controlled substances, the Court found that although Morgado's conduct in fraudulently representing to the pharmacist that she had a doctor's authority to call in the prescriptions occurred in a single telephone call on November 28, appellant's conduct of acquiring possession of the several different controlled substances was not the same conduct for the purpose of deciding whether the offenses merged. That is, acquiring possession of Lortab® is not the same conduct as acquiring possession of Ambien®, and neither are the same as acquiring possession of Xanax®. Accordingly, Count 3 (Ambien®) did not merge with Counts 1, 2, or 8 (Lortab®) or with Count 5 (Xanax®). Likewise, Count 5 (Xanax®) did not merge with Counts 1, 2, or 8 (Lortab®) or with Count 3 (Ambien®).

As to the same controlled substances, but different dates and act of acquisition, the Court found that although Morgado's conduct in fraudulently representing to the pharmacist that she had a doctor's authority to call in the prescriptions for Lortab® occurred in a single telephone call on November 28, appellant's conduct of acquiring possession of Lortab® by going to the pharmacy to pick up the prescriptions on that date and on a sepa-

rate occasion ten days later was not the same conduct for the purpose of deciding whether the offenses merged. Accordingly, Count 8 (Lortab® acquired on December 8) did not merge with Counts 1 or 2 (Lortab® acquired on November 28).

As to the same controlled substances, same date and act of acquisition, but different putative patients, the Court found they did merge. Although the prescriptions for Lortab that appellant picked up on November 28 were purportedly for two different patients, appellant's single act of going to the pharmacy to pick up Lortab on that date was the same conduct for the purpose of deciding whether the offenses merged. Accordingly, Counts 1 and 2 merged, and the trial court erred in imposing separate sentences as to those counts.