Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 5, 2014

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THIS WEEK:

Out-of-time Appeals

Pineda v. State, A14A1256 (8/7/14)

In 2011, appellant pled guilty to two counts of trafficking. In 2013, he filed a motion for an out-of-time appeal which was denied.

The Court stated that where, as here, a defendant seeks an out-of-time appeal from a conviction entered on a guilty plea, the Court must consider whether the issues that the defendant seeks to appeal can be resolved by reference to the existing record. If the issues that the defendant seeks to appeal cannot be resolved from the record, he had no right to file a direct appeal, and therefore he has no right to file an out-of-time appeal. If the defendant raises issues that can be determined from the existing record, he then must show that his counsel was ineffective in not filing a timely appeal. However, if the claims that the defendant wants to raise in the out-of-time appeal can be resolved against him on the face of the record, so that even a timely appeal would have been unsuccessful, then plea counsel's failure to advise the defendant to file such an appeal was not professionally deficient, nor did any prejudice result.

The Court noted that appellant sought to raise two claims: a challenge to the sufficiency of the indictment underlying his convictions, and a challenge to the effectiveness of his trial counsel. As to the first claim, the Court found that it could be resolved against him on the face of the record. Appellant argued that the indictment was deficient because it did not sufficiently apprise him of the date of the offense. However, the Court stated, when a defendant pleads guilty, the defendant waives all defense except that the indictment charged no crime at all. Thus, because appellant waived this defense, a timely appeal on this ground would have been unsuccessful, and the trial court did not err in denying his motion for an out-of-time appeal as to this claim.

Appellant also claimed that that his trial counsel was ineffective by failing to engage in pretrial discovery, failing to file a demurrer to his indictment, and failing to inform appellant of his right to withdraw his guilty plea before sentencing. But, the Court found, because these claims were not developed by way of a post-plea hearing, they cannot be resolved on the state of the record.

Therefore, appellant's remedy is habeas corpus. Accordingly, the trial court did not err in denying the motion for out-of-time appeal as to this claim either.

Merger; Sentencing

Lucas v. State, A14A0539 (7/16/14)

Appellant was convicted of two counts of burglary, criminal damage to property (second degree), theft by taking, and possession of tools for the commission of a crime. He contended that the trial court erred by sentencing him for two burglary counts instead of only

one. Specifically, that the charged burglary offenses merged because they were committed at the same time and place, were part of a continuous criminal act, and were inspired by the same criminal intent. The Court agreed.

Count 1 of the indictment alleged that appellant committed burglary when, on March 28, 2012, without authority and with intent to commit a theft therein, he entered and remained within a building of another (to wit: a Huddle House restaurant at a specified location). Count 5 alleged that appellant committed burglary when, on the same date, without authority and with intent to commit a theft therein, he entered and remained within that same building (the Huddle House restaurant). The indictment stated that the offense alleged in Count 1 was "separate and apart from the offense alleged in Count 5" of the indictment, and that the offense alleged in Count 5 was "separate and apart from the offense alleged in Count 1."

A surveillance video taken from the restaurant's cameras and entered into evidence showed the glass on the front door break and a person enter the building. The person attempted to open the cash register, but could not. He left, and returned between five and twenty minutes later. When he returned, he broke into the office with "some sort of metal thing," dragged a safe out of the office, put the safe in a vehicle, then left. A detective recognized appellant as the person in the video.

Under Georgia law, offenses merge and multiple punishments are prohibited if one offense is included in the other as a matter of law or fact. For separate offenses charged in one indictment to carry separate punishments, they must rest on distinct criminal acts. If they were committed at the same time and place and were part of a continuous criminal act, and inspired by the same criminal intent, they are susceptible of only one punishment. Whether offenses merge is a legal question.

The version of OCGA § 16-7-1 (a) in effect in when the offenses were committed (March 2012) provided, in pertinent part, that "[a] person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains . . . within any . . . . building . . . or any room or any part thereof." Thus, the Court stated, the question presented was whether appellant's acts of entering, exiting, and reentering the same restaurant twice within a five to twenty-minute period for the purpose of committing theft can be punished as two "separate units of prosecution" under the burglary statute. The Court found that both burglary counts charged appellant with entering the same building on the same date with the intent to commit the same crime—theft. And the evidence showed that the acts were committed at the same location, were inspired by the same criminal intent (to commit theft in the Huddle House restaurant building), and were part of a continuous criminal act spanning a matter of minutes. The criminal acts were not separated by a meaningful interval of time or with distinct intentions. The interval of minutes between the acts did not signal the completion of a separate criminal act but signified only the temporary failure to accomplish the one intentional criminal transaction. The criminal conduct constituted a single course of conduct, not separate offenses. Furthermore, the Court stated, without evidence of a legislative intent to allow multiple punishments for the same course of conduct, acts that constitute a continuing criminal course of conduct are not punishable separately; there was no evidence of such legislative intent regarding the burglary statute. Thus, the Court concluded, the trial court erred by failing to merge the two counts. Accordingly, the Court vacated the conviction and sentence on one of the burglary counts, and remanded the case to the trial court for resentencing.

Search & Seizure

State v. Allen, A14A0297 (7/16/14)

Scott and Allen were indicted for felony possession of marijuana. The Court granted their motion to suppress and the State appealed. In a 4-3 en banc opinion, the Court affirmed.

The evidence showed that an officer was stationed in the median of an interstate to monitor traffic. He noticed a vehicle cross the center lane and decided to follow. After observing a second lane violation, he decided to stop the vehicle. The officer advised Scott, the driver, that he would be writing him a courtesy warning for the lane infractions. The officer obtained from Scott his driver's license and obtained from Allen a South Carolina identification card. The officer perceived that Scott and Allen were nervous. Because of the lane infractions, the officer wanted to "see how [Scott] was on his feet" to "make sure he wasn't intoxicated." The officer asked Scott to exit the vehicle; Scott got out of the vehicle and walked to the location designated by the officer. The officer stated that, when Scott complied with his directive to step outside the vehicle, Scott continued to appear nervous, but showed "no signs of being intoxicated or impaired." The officer conducted a pat-down search of Scott; after finding no weapon, the officer "engaged in general conversation with [Scott]" while he wrote the courtesy warning. Once the warning was complete, the officer did not thereupon hand it (along with the identifications) to Scott, who was standing beside him. Instead, he asked dispatch to check the driver's licenses of Scott and Allen. While waiting on returns from GCIC to come back, the officer asked Scott for consent to search his vehicle. Scott did not consent or deny consent; he responded only that "you already got me stopped." The officer then took his drug dog out of the car and conducted a free-air search. The dog alerted and marijuana was found in the trunk.

The Court found that the trial court explicitly included in its order the pertinent finding: "the officer did not begin this inquiry [the computer check at issue] until . . . the point when the officer had finished writing a warning citation for the traffic offense" and that this finding must be accepted because there was evidence to support it. Thus, construed most favorably to the upholding of the trial court's findings and grant of the suppression motion, the evidence showed that, before initiating the computer check, the officer had concluded the tasks related to the investigation of the lane infractions, including a determination that the driver Scott was not intoxicated. The officer, therefore, lacked articulable suspicion of any drug (or other) crime, as the officer's perception that Scott and Allen were nervous did not support a finding of reasonable, articulable suspicion that would have justified prolonging the detention.

The Court stated that as a general rule, an investigatory stop is not unreasonably prolonged by the time necessary to run a computer check. But it does not necessarily follow that an officer may *initiate* a computer check *after* completing the investigation into the basis for the traffic stop. Further, a police officer may check for outstanding warrants or criminal histories on the occupants of a vehicle at a valid traffic stop based upon concerns for of-

ficer safety as long as under the circumstances they do not unreasonably prolong the stop. But once the tasks related to the investigation of the traffic violation and processing of the traffic citation have been accomplished, an officer cannot continue to detain an individual without articulable suspicion.

A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time to complete that mission. The officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning. Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention. Accordingly, the Court found, the evidence here showed that the officer—having accomplished the tasks related to his investigation into lane infractions and having no reasonable, articulable suspicion of criminal activity aside from the traffic violation—unreasonably prolonged the duration of the traffic stop when he initiated the computer check.

However, the Court stated, citing *Rodriguez v. State*, __ Ga. __ (2014) (Case No. S13G1167, decided June 30), in some cases, a detention is prolonged beyond the conclusion of the investigation that warranted the detention in the first place, and in those cases, the courts generally have concluded that such a prolongation—even a short one—is unreasonable, unless, of course, good cause has appeared in the meantime to justify a continuation of the detention to pursue a *different* investigation. But here, there was no evidence that any good cause appeared in the meantime to justify a continuation of the detention in order to pursue a different investigation that began when the computer check at issue was initiated. Accordingly, the trial court's grant of the motion to suppress was affirmed.

Recidivist Sentencing

Bell v. State, A14A0869 (8/13/14)

Appellant was convicted of shoplifting. At the sentencing hearing, the State introduced certified copies of guilty pleas that appellant had entered in four prior shoplifting cases for purposes of recidivist punishment under OCGA §16-8-14 (b) (1) (C). Appellant argued that the trial court erred in sentencing him as a recidivist because the State failed to sufficiently establish that he had waived his right to counsel in two of the prior shoplifting convictions.

The Court stated that in recidivist sentencing, the State bears the burden of showing both the existence of the prior guilty pleas and that the defendant was represented by counsel when he entered the pleas. If the defendant was not represented by counsel at the time of the guilty pleas, the State can satisfy its burden by showing that the defendant had waived his right to counsel. The State can do this by introducing a transcript of the plea hearing, a docket entry or another document affirmatively showing that the right to counsel was waived. When the State is able to show that the defendant waived his right to counsel, a "presumption of regularity" attaches to the plea proceedings and the burden then shifts to the defendant to show any irregularities in the proceedings.

Appellant contended that the State should have the additional burden of proving that he knowingly and voluntarily waived his right to counsel. Specifically, he argued, the State must prove that he was aware at the time of the waiver that his guilty pleas could later be considered for recidivist sentencing purposes if he committed future shoplifting offenses. However, the Court found, the presumption of regularity which final judgments enjoy necessitates that the State only be required to show evidence that the defendant waived his right to counsel. Once such evidence is shown, it is presumed that the defendant waived his right knowingly and intelligently and that the plea would not have been accepted by the trial court otherwise.

With respect to the two pleas at issue here, the Court noted that the State introduced documents showing that appellant had waived his right to counsel. Those documents were sufficient to meet the State's initial burden, whereupon the burden shifted to appellant to produce evidence that the pleas were invalid. A defendant can attempt to meet his burden by relying on a plea transcript or by providing testimony or other affirmative evidence regarding the taking of the plea. But, a silent record or the mere naked assertion by an accused that his prior plea was not made knowingly and intelligently is insufficient. And here, the Court found, appellant offered no evidence to show that the pleas were invalid. Therefore, since appellant failed to satisfy his burden, the trial court was authorized to rely on the guilty pleas at issue for the purpose of sentencing him as a recidivist.

Jury Charges; Defense of Habitation

Watson v. State, A14A1039 (8/15/14)

Appellant was convicted of two counts of felony obstruction of a law enforcement officer. The evidence showed that two officers went to arrest appellant's girlfriend at the home she and appellant shared. They had an arrest warrant for her and when they entered the house, even though they were not in uniform, they announced that the fact that they were police officers. Appellant nevertheless interceded on her behalf and fought with the officers. Both appellant and his girlfriend testified at trial.

Appellant argued that the trial court erred in not giving his requested written charge on misdemeanor obstruction. The Court disagreed. Misdemeanor obstruction requires proof that the defendant knowingly and wilfully obstructed or hindered a law enforcement officer in the lawful discharge of his official duties. To establish that the obstruction was done "knowingly and wilfully," there must be proof that the defendant knew that the person he was obstructing was a law enforcement officer. Felony obstruction has the same elements that must be proven as misdemeanor obstruction, plus one more element—that the defendant obstructed the officer "by offering or doing violence to the person of such officer." OCGA § 16-10-24 (b). Thus, misdemeanor obstruction clearly is a lesser included offense of felony obstruction, and a written request to charge a lesser included offense must always be given if there is any evidence that the defendant is guilty of the lesser included offense.

However, the Court found, under the alternative versions of what transpired to which appellant and his girlfriend testified, appellant was guilty of no crime whatsoever. Accordingly, because the evidence showed that appellant either committed felony obstruction or no offense at all, the trial court did not err in declining to charge on misdemeanor obstruction.

Appellant also argued that the trial court erred in excluding evidence that he was attacked by a third party during a previous home invasion, which he sought to introduce

to support an affirmative defense that he was justified in using force to defend his habitation. Again, the Court disagreed. "A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to prevent or terminate such other's unlawful entry into or attack upon a habitation." OCGA § 16-3-23. Because justification defenses are predicated on a reasonable person standard rather than the subjective fears of a particular defendant, it is inadmissible to support a justification defense with evidence of violent acts or abuse committed against a defendant by someone other than the victim. Consequently, appellant could not support a justification defense with evidence of a prior home invasion by a third party, and therefore, the trial court did not abuse its discretion by the excluding such evidence.

Obstruction of License Plates; OCGA § 40-2-41

Worlds v. State, A14A1112 (8/14/14)

Appellant was charged with VGCSA. She argued that the trial court erred in denying her motion to suppress the stop. Specifically, the trial court's finding that a trailer hitch ball installed on the bumper of her vehicle in front of the rear license plate "obstructs or hinders the clear display and legibility of a license plate" within the meaning of OCGA § 40-2-41. The evidence showed that the trailer hitch ball on her vehicle obscured the officer's vision of one of the digits on her license plate.

Appellant contended that a single, partially obscured digit on a license plate does not violate the law. The Court disagreed. OCGA § 40-2-41 provides as follows: "Unless otherwise permitted under this chapter, every vehicle required to be registered under this chapter, which is in use upon the highways, shall at all times display the license plate issued to the owner for such vehicle, and the plate shall be fastened to the rear of the vehicle in a position so as not to swing and shall be at all times *plainly visible*. No person shall display on the rear of a motor vehicle any temporary or permanent plate or tag not issued by the State of Georgia which is intended to resemble a license plate which is issued by the State of Georgia. The commissioner is authorized to adopt rules and regulations so as to permit the display of a license plate on the front of certain vehicles. *It shall be the duty of the operator of any vehicle to keep the license plate legible at all times*. No license plate shall be covered with any material unless the material is colorless and transparent. *No apparatus that obstructs or hinders the clear display and legibility of a license plate shall be attached to the rear of any motor vehicle required to be registered in the state*. Any person who violates any provision of this Code section shall be guilty of a misdemeanor." (Emphasis supplied.) Thus, the Court found, the fact that the plate was only partially obstructed does not change the fact that the hitch "hindered" the "clear display" of the plate and that part of it was not "legible."

Appellant also argued that OCGA § 40-2-41 applies only to items such as a plate cover that are attached to the license plate itself, not to other items attached to the motor vehicle, such as a trailer hitch attached directly to the bumper. The Court noted that OCGA §40-2-41 provides in pertinent part that the license plate "shall be at all times plainly visible," that "[i]t shall be the duty of the operator of any vehicle to keep the license plate legible at all times," and that "[n]o apparatus that obstructs or hinders the clear display and legibility of a license plate shall be attached to the rear of any motor vehicle required to be registered in the state." Georgia decisions have interpreted this Code section to forbid license plate frames and covers that obscure portions of the plate. But, the Court noted, the question of whether the statute forbids items other than those attached to the license plate itself is a question of first impression.

The Court looked to the law in other states and found that they have determined that a bumper hitch that obscures part of a license plate violates a statute requiring that a plate be "plainly visible" or "legible." Using these cases as guidance, the Court stated that the plain wording of OCGA § 40-2-41 does not limit its prohibition to items attached to the license plate itself, but includes any "apparatus" that is "*attached to the rear of any motor vehicle*" (emphasis supplied), such as the bumper hitch at issue in this case. The Court noted that it is not clear whether a distinction can be made between an attachment that obscures the license plate and is more or less permanent—such as a trailer ball bolted to the vehicle itself—and a temporary attachment such as a separate, removable trailer hitch inserted into a receiver welded to the vehicle frame, a bicycle rack whether loaded or unloaded, or a hitch tray or step folded in an upright position against the rear of the vehicle or piled high with luggage. "But that is not a question that need be answered here, although the General Assembly would be the proper body to clarify the point."