Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING APRIL 26, 2019
Issue 17-19

THIS WEEK:

- **Ineffective Assistance of Counsel; General Demurrers**
- **Record Restriction; Nolle Prossed Offenses**
- **Right to Counsel; Structural Errors**
- **Sentencing; Judicial Authority**
- **General Demurrers; Loitering in a School Zone**
- **Obstruction; Sufficiency of the Evidence**
- **Search & Seizure; Co-Tenant's Consent to Search**

Ineffective Assistance of Counsel; General Demurrers

Heath v. State, A18A2112 (3/4/19)

Appellant was convicted of homicide by vehicle in the first degree, homicide by vehicle in the second degree, five counts of serious injury by vehicle, and failure to stop for a stop sign. She argued that her trial counsel was ineffective for failing to file a general demurrer to the felony counts of the indictment. The Court agreed.

The Court stated that a general demurrer challenges the sufficiency of the substance of an indictment. The true test of the sufficiency of an indictment to withstand a general demurrer is found in the answer to the question: Can the defendant admit the charge as made and still be innocent? If he can, the indictment is fatally defective. To withstand a general demurrer, an indictment must: (1) recite the language of the statute that sets out all the elements of the offense charged, or (2) allege the facts necessary to establish a violation of a criminal statute. If either of these requisites is met, then the accused cannot admit the allegations of the indictment and yet be not guilty of the crime charged. However, an indictment which omits an essential element of the predicate offense in a count charging a compound offense, such as vehicular homicide and serious injury by vehicle, can nonetheless satisfy the requirements of due process as long as the indictment charges the predicate offense completely in a separate count. An indictment alleging merely that the accused's acts were in violation of a specified criminal Code section is defective.

As to the count charging first degree vehicular homicide based on reckless driving, the indictment, in relevant part, alleged as follows: "[Appellant]… did without malice aforethought, cause the death of [the victim], a human being, through a violation of Official Code of Georgia Annotated Section 40-6-390, Reckless Driving, in that said accused, while operating a motor vehicle with six passengers and while distracted by events taking place in the vehicle, failed to stop for a stop sign and entered an intersection at a high rate of speed resulting in a collision with another vehicle, contrary to the laws of said State, the good order, peace and dignity thereof." The Court found that this count failed to include the crucial language that appellant drove with reckless disregard for the safety of persons or property. The indictment was therefore substantively defective; appellant could admit all the allegations of the indictment and still be innocent of reckless driving because there would be no admission that she recklessly disregarded the safety of persons or property.

1590 Adamson Parkway, Fourth Floor, Morrow, Georgia 30260 ▪ (770) 282-6300 ▪ www.pacga.org ▪
Facebook: https://www.facebook.com/GAProsecutingAttorneys
LinkedIn: https://www.linkedin.com/company/prosecuting-attorneys-council-georgia/

The count in the indictment charging first degree vehicular homicide based on driving under the influence of alcohol alleged, in relevant part, that appellant: "did without malice aforethought, cause the death of [the victim], a human being, through a violation of Official Code of Georgia Annotated Section 40-6-391, Driving Under the Influence of Alcohol, contrary to the laws of said State, the good order, peace and dignity thereof." The Court found that the indictment neither recited the language of the statute that sets out all the elements of the driving-under-the-influence offense — that appellant was under the influence of alcohol to the extent that it was less safe for her to drive or that her alcohol concentration was 0.08 or more — nor alleged the facts necessary to establish a violation of the DUI statute. Because neither of these requisites was met, appellant could admit the allegations of the indictment and yet not be guilty of driving under the influence. And because the indictment omitted an essential element of the predicate offense, the count charging a compound offense based on this predicate offense was void.

Similarly, for the same reasons, the following counts of the indictment charging serious injury by vehicle based on both reckless driving and driving under the influence, were void: "[Appellant]…. did without malice, cause bodily harm to [the victims,] human being[s], by rendering a member of [their] bod[ies] … useless through a violation of the Official Code of Georgia Annotated Section 40-6-390, Reckless Driving and Section 40-6-391, Driving Under the Influence of Alcohol, in that [the victims were injured in a described manner], contrary to the laws of said State, the good order, peace and dignity thereof."

Accordingly, the Court found, appellant's trial counsel rendered ineffective assistance because had counsel filed a general demurrer, these counts would have been dismissed. The Court also noted that because the statute of limitation had run, appellant could not be re-indicted.

Record Restriction; Nolle Prossed Offenses

Ledbetter v. State, A18A2090 (3/5/19)

Appellant, proceeding pro se, appealed an order from state court denying his motion to restrict a criminal record under OCGA § 35-3-37. The facts, very briefly stated, showed that in June, 2016, the State nolle prossed an accusation charging appellant with one count of family-violence battery and one count of simple battery. In 2018, appellant filed in state court a motion to restrict his records from the 2016 case, citing OCGA § 35-3-37, and directed at the magistrate and state court clerks and "[a]ny other 'Entity' as defined by [OCGA] § 35-3-37 (a) (2), having custody or control of any information pertinent" to the 2016 case." The trial court, without holding a hearing, issued an order denying appellant's motion, noting that his 2016 charges were "nolle prossed for unrestrictable reasons."

First, the Court reviewed the order as it relates to the Georgia Crime Information Center, which is a division of the Georgia Bureau of Investigation (hereinafter collectively as "GCIC"). The Court noted that the Code provides that "[a]ccess to an individual's criminal history record information, including any fingerprints or photographs of the individual taken in conjunction with the arrest, *shall be restricted by the center*" when, inter alia, "[a]fter indictment or accusation[,]" and "[e]xcept as provided in subsection (i)," the charges against the individual "were *dismissed or nolle prossed*[.] OCGA § 35-3-37 (h) (2) (A) (emphasis supplied). If the nolle prosequi falls within subsection (i), the individual's criminal history record "shall *not* be restricted[.] OCGA § 35-3-37 (i) (emphasis supplied).

Here, the Court found, although the trial court's order states that appellant's 2016 case was nolle prossed by the State "for unrestrictable reasons," the State's motion to nolle prosse does not support this conclusion. Indeed, the State's motion gave no grounds to support its request to nolle prosse, only checking the "other" box to specify that appellant was to have no contact with the victim. Thus, appellant's 2016 case was subject to *automatic* record restriction. And consequently, to the extent the trial court denied appellant's motion as to GCIC, the Court affirmed because the GCIC was required to automatically restrict appellant's record. Moreover, the Court noted, even if the record was not subject to automatic restriction, nothing in the statute permits the state court to order GCIC to restrict a record that is not subject to automatic restriction.

Next, the Court reviewed the order as it relates to law enforcement agencies. The Court noted that under the Code, "Entity" is defined as "the arresting law enforcement agency, including county and municipal jails and detention centers." OCGA § 35-3-37 (a) (2). Because the criminal history record information related to appellant's charges was subject to automatic restriction, not only was the GCIC required to provide notification of the restriction to the appropriate "entity," but if he wished to do so, appellant was required to direct his own request for restriction "to the appropriate county or municipal jail or detention center." OCGA § 35-3-37 (k) (2). Then, only if the entity declined to restrict access could appellant "file a civil action in the superior court where the entity is located." OCGA § 35-3-37 (l) Thereafter, the entity's decision may only be upheld if the court determines "by clear and convincing evidence that the individual did not meet the criteria" for automatic record restriction under subsections (h) and (j) of OCGA § 35-3-37.

Accordingly, the Court found that the trial court's denial of appellant's motion as it pertained to the sheriff's office, the police department, and any other "Entity" having custody or control of any information pertinent was appropriate because nothing in the record showed that appellant followed the proper procedure by first making a request of the appropriate entity. Additionally, even if appellant had first made such a request, OCGA § 35-3-37 (l) requires a civil action that follows the entity's denial of the request to be filed in *superior* court, and the order was issued by the state court.

Finally, the Court reviewed the order as it relates to the respective clerk of the magistrate and state courts. The Court noted that when a record is automatically restricted under OCGA § 35-3-37, the individual, pursuant to subsection (m), "may petition the court with original jurisdiction over the charges in the county where the clerk of court is located for an order to seal all criminal history record information maintained by the clerk of court for such individual's charge." And after such a petition is received, the court must order that the information in the clerk of court's custody be "restricted and unavailable to the public" only if the court finds, by a preponderance of the evidence, that "[t]he criminal history record information has been restricted pursuant to this Code section; and … [t]he harm otherwise resulting to the privacy of the individual clearly outweighs the public interest in the criminal history record information being publicly available."

Thus, the Court concluded, because the trial court's order as written left open the possibility that an exception under OCGA § 35-3-37 (i) (1) applies, the trial court's order as it relates to the county clerks of court was vacated and remanded for additional proceedings, if necessary, as well as the entry of a new order that (1) provides a more thorough explanation of the reasons for the denial of appellant's petition, and (2) is made under the standards set forth in OCGA § 35-3-37. In this regard, if appellant's 2016 charges were subject to automatic restriction, the trial court must only order the clerk of court to restrict those records if the court also finds that "[t]he harm otherwise resulting to the privacy of the individual clearly outweighs the public interest in the criminal history record information being publicly available."

Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING APRIL 26, 2019
Issue 17-19

Right to Counsel; Structural Errors

Black v. State, A18A1697 (3/5/19)

Appellant was convicted of aggravated sexual battery and child molestation. He argued that the trial court abused its discretion by failing to require retained counsel to properly withdraw from the case and forcing him to trial with unprepared counsel. Specifically, appellant argued that the trial court's actions violated his Sixth Amendment right to effective assistance of counsel and to competent counsel of his choice. The Court agreed and reversed.

The record evidence, very briefly stated, showed that appellant appeared at a Monday trial calendar call without counsel, and without notice that on the previous Thursday his retained counsel had filed an untimely motion to withdraw. After appellant notified the assigned judge that retained counsel had just told him in the hall that he would not be representing appellant at trial, and without the court addressing retained counsel's motion to withdraw or considering its merits, the assigned judge told appellant that he should hire counsel or be prepared to conduct the trial pro se the following Monday.

Later that day appellant obtained appointed counsel, who on the same day notified the court that he would be representing appellant. When he did so, the same judge, who appeared still to be angry at appellant, instructed appointed counsel that no request for a continuance would be granted and the case would be tried the following Monday. One week later, despite trying two felony cases in the interim, appointed counsel stood in court and announced ready to defend appellant from the serious charges facing him. One day after that, appellant was found guilty, taken into custody, and eventually sentenced to life (to serve 25 years) on one of the two charges against him.

First, appellant argued that the trial court abused its discretion at the trial calendar call when it impliedly granted retained counsel's motion to withdraw without consideration of the merits of the motion. The Court agreed. Here, the Court noted, the motion was untimely, was flawed in various ways and contained obvious discrepancies. Yet, the assigned judge simply instructed appellant that his trial would occur the following week and that he had to either obtain different counsel or be prepared to proceed pro se. In so doing, the judge failed to properly exercise her discretion—or indeed, exercise any discretion—with respect to retained counsel's motion to withdraw.

Appellant next argued that the trial court abused its discretion by sua sponte refusing to consider any motion for a continuance by appointed counsel. The Court again agreed. A myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. A court should not impede the request for a continuance; rather, the trial judge, in the exercise of his discretion to grant or refuse a continuance, has to consider the facts and circumstances of each case to determine what the ends of justice require. Here, by refusing to consider a continuance, the assigned judge wholly failed to consider the factors that could justify delaying the trial, and failed to take into account whether prejudice would result to appellant, including that retained counsel asserted in the motion for withdrawal that "the state has no objection to withdrawal and a continuance from this trial calendar to allow defendant to obtain new counsel." Accordingly, the Court held, the assigned judge again abused her discretion.

Thus, the Court concluded, the assigned judge deprived appellant of counsel of his choice by implicitly granting retained counsel's flawed motion for withdrawal and by refusing any request for a continuance, all without exercising any discretion. The assigned judge therefore wholly failed to balance appellant's right to counsel of choice against the demands of her

calendar, resulting in a structural error that forced appellant to trial with ill-prepared appointed counsel. Accordingly, the Court reversed his convictions, but, because the evidence was sufficient to support the verdict, the State is allowed to retry appellant.

Sentencing; Judicial Authority

Evans v. State, A18A1895 (3/5/19)

Appellant was convicted of DUI and operating a motor vehicle with defective or no headlights. The trial court sentenced him to consecutive terms of 12 months' imprisonment, for a total sentence of 24 months. The trial court ordered that appellant serve the sentence "day-for-day" and "sit in jail for two years," and that if he were to be released from prison before the expiration of the 24-month term, he would be required to serve the remainder on probation.

Appellant contended, and the State conceded, that the trial court erred in requiring that he serve his sentence "day-for-day." The Court held that the trial court's requirement that appellant serve his 24-month sentence "day-for-day" was erroneous because it usurps the authority of the custodian of a county inmate under OCGA § 42-4-7 (b) to grant earned-time allowances.

Appellant also argued that under *Hutchins v. State*, 243 Ga. App. 261 (2000), the trial court erred in ordering him to be placed on probation if he were to be released before the end of his 24-month sentence. The State conceded the validity of this argument under *Hutchins*, but relied upon the dissent in *Hutchins* to claim the case was wrongly decided because the majority relied upon *Johns v. State*, 160 Ga. App. 535 (287 SE2d 617) (1981), which involved a felony, not a misdemeanor, sentence. The Court agreed with appellant.

The Court stated that under *Johns* and *Hutchins* the requirement that appellant be placed on probation if he is released prior to the end of his prison term is erroneous, as it usurps the authority of his custodian under OCGA § 42-4-7 (b) to award him earned-time credit. The holding in *Hutchins* is not subject to attack on the basis that it relied on *Johns*, as both holdings are based upon the authority of the custodian of an inmate to award earned-time credit and the inability of a trial court to interfere with that authority. Whether the sentences in those cases were for felony or misdemeanor offenses is immaterial.

Consequently, the Court concluded, the trial court erred in ordering that appellant serve his sentence "day-for-day" and that he be placed on probation if released before the end of his sentence. Accordingly, the Court reversed the sentence and remanded so the trial court can remove these provisions from the sentence.

General Demurrers; Loitering in a School Zone

State v. Freeman, A18A1489 (3/5/19)

Freeman was accused of loitering upon school premises, in violation of OCGA § 20-2-1180. The trial court granted Freeman's general and special demurrer because the accusation failed to allege either OCGA Section 20-2-1180 (b) (l) or (b) (2) was violated. The State appealed.

In a single count, the accusation charged Freeman "with the offense of Loitering upon school premises, for that the said accused in the County aforesaid, on or about the 11th day of January, 2017, did, without having a legitimate cause thereon, to wit: for the purpose of contacting a [s]tudent and obtaining his personal information, remain in the school safety zone of ….Middle School, after having been told not to do so by law enforcement on a previous occasion where he had entered or attempted to enter school property, to wit: a …. [c]ounty school bus, for the same purpose, in violation of OCGA [§] 20-2-1180"

The State contended that the trial court erred in granting Freeman's motion because the accusation sufficiently tracked the language of OCGA § 20-2-1180 (b) (1), and therefore the State's failure to specifically cite that subsection did not render the accusation invalid. However, the Court stated, pretermitting this issue, the accusation was nevertheless subject to a general demurrer because it did not allege facts constituting Freeman's violation of a criminal statute.

OCGA § 20-2-1180 (b) provides: "Any person who: (1) [i]s present in or on any school safety zone in this state and willfully fails to *remove himself or herself* from such school safety zone *after the principal or designee of such school requests him or her to do so*; or (2) [f]ails to check in at the designated location … shall be guilty of a misdemeanor of a high and aggravated nature." Here, the State alleged that Freeman "remain[ed]" in the school safety zone of the middle school, despite being told not to do so on a "previous occasion," i.e., while he either entered or attempted to enter a county school bus. But, in considering the ordinary meaning of the term "remove," and reading the statute in its most natural and reasonable way, the Court found that it is clear that a person charged with loitering under OCGA § 20-2-1180 (b) (1) must have been "present" in the school safety zone, then instructed to leave by the principal or school designee, and then willfully failed to comply with that instruction. Indeed, a principal or school designee can only determine that a person "does not have a legitimate need or cause to be present" in a school safety zone when the person actually goes there, and not at an untold time before.

Here, however, the State based the loitering charge on an instruction from law enforcement that Freeman allegedly received on a "previous occasion," before he even went to the middle school on the date in the accusation. This is insufficient to allege a crime under OCGA § 20-2-1180 (b) (1). The Court surmised that if it were to interpret the statute otherwise, it would mean that an individual could be accused of "loitering" in a school safety zone based on an instruction received years before actually going there, and without ever being told to leave while he or she is on the premises.

Finally, the Court stated, although it was not entirely clear that the trial court relied on statutory interpretation when it granted the general demurrer, nevertheless, a person cannot be lawfully convicted on an invalid indictment. Thus, the Court stated, to the extent that its reasoning differs from that of the trial court, the trial court's grant of the general demurrer is affirmed under the right-for-any-reason rule.

Obstruction; Sufficiency of the Evidence

Taylor v. State, A18A2006 (3/6/19)

Appellant was convicted of misdemeanor obstruction of an officer. Specifically, "by disobeying [Deputy Richardson's] lawful command to open his mouth, in violation of OCGA § 16-10-24 (a)". The facts, briefly stated, showed that Deputy Richardson stopped appellant's vehicle for a broken tail light. The officer noticed a strong smell of marijuana coming from

inside the vehicle and noticed appellant chewing something. The officer asked appellant to walk back to his patrol car. Once there, the officer attempted to pat appellant down. A struggle ensued. The officer radioed for assistance. Deputy Peppers arrived. Richardson suspected appellant may have swallowed contraband. He eventually looked in appellant's mouth and observed a green, leafy substance that he believed to be marijuana. Peppers testified that he did not ask appellant to open his mouth.

Appellant argued that the evidence was insufficient to sustain his conviction for obstructing a law enforcement officer. The Court agreed.

The essential elements of OCGA § 16-10-24 (a) obstructing or hindering law enforcement officers are: that the act constituting obstruction or hindering was knowing and willful and that the officer was lawfully discharging his official duties. Appellant was accused of obstructing an officer by failing to open his mouth in response to a lawful command to do so. But, the Court found, while there was evidence that appellant's mouth was closed, and that he made "chewing motions," there was simply no evidence that any of the officers *commanded* appellant to open his mouth. In the absence of this evidence, the State failed to establish that appellant knowingly or willfully failed to submit to lawful authority by disobeying a command to open his mouth. And, the evidence that appellant did not open his mouth, without evidence that such refusal or failure contravened a directive from Richardson or Peppers, or any other officer, was insufficient to support his conviction for obstruction. Accordingly, appellant's conviction for obstruction was reversed.

Search & Seizure; Co-Tenant's Consent to Search

State v. Lee, A18A1869 (3/6/19)

Appellant was charged with possession of a firearm by a convicted felon. He filed a motion to suppress which the court granted. The State appealed.

The facts showed appellant has an outstanding arrest warrant for terroristic threats. The officers arrived at appellant's home that he shared with a woman and her two children. Appellant and the woman stepped out onto the porch. Appellant was immediately arrested without incident and placed in a patrol car. The officers asked the woman if there were any guns in the home. She said that there was a .22 rifle inside the home and gave the officers permission to enter the residence while she retrieved the firearm. Once inside the home, an officer saw a rifle in plain view that was propped against a wall next to a window in the main living quarters of the residence. Richardson confirmed that it was the rifle she described and handed it over to law enforcement to be collected as evidence.

The State first argued that the trial court misapplied the Court's holding in *Preston v. State*, 296 Ga. App. 655, 658 (2009). The Court agreed. Unlike *Preston*, in this case, law enforcement did not arrive at appellant's residence to execute a search based upon a non-present co-occupant's consent, but instead arrived at the residence to arrest appellant on a separate charge. Although appellant was in police custody near the residence when officers asked his co-occupant for permission to enter the residence, nothing in the record suggested that law enforcement placed appellant in a patrol car prior to entry in order to avoid a possible objection from him. Thus, appellant's co-occupant's consent gave law enforcement the legal authority to enter the common area of the residence whereupon law enforcement observed the rifle.

The State next contended that the trial court erred in finding that the police executed an illegal search. The Court again disagreed. It was undisputed from the record that the weapon seized was in plain view of law enforcement upon their lawful entry into the main living quarters of the residence. Where what is accomplished is nothing more than such a plain view seizure, there is no search at all. Thus, the Court held, the weapon was immediately apparent to law enforcement so that the plain view doctrine was fully applicable; and consequently the trial court erred by concluding that a search had occurred and applying legal principles that are applicable to searches.

Finally, the Court disagreed with the trial court's conclusion that law enforcement should have given appellant an opportunity to object. Police officers are not required to find a potentially objecting co-tenant before acting on the permission they had already received.