Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING MAY 17, 2019
Issue 20-19

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Merger; Crimes of Attempt

Metcalf v. State, A18A1647 (3/13/19)

Appellant was convicted of two counts of criminal attempt to commit aggravated sodomy, three counts of criminal attempt to commit aggravated child molestation, and two counts of computer pornography. The evidence showed that a police detective assigned to a special task force investigating crimes against children on the internet created a fictional profile on an online gay male dating site. Appellant responded to the detective's profile, and the two began corresponding by email. During these conversations, appellant and the detective engaged in graphic discussions about meeting in person to have anal and oral sex with 12-year-old and 5-year-old brothers. The detective stated in an email that the brothers were his girlfriend's children whom he already had sexually molested. The girlfriend and children referenced in the detective's emails were fictional. When appellant arrived at the prearranged meeting place, he was arrested.

Appellant contended that the trial court erred by merging his criminal attempt to commit aggravated sodomy into his criminal attempt to commit aggravated child molestation instead of the other way around.

The Court noted that its research revealed no case addressing the merger of *attempted* aggravated child molestation and *attempted* aggravated sodomy. It therefore began its analysis with the required evidence test. In applying this test, the important question is not the number of acts involved, or whether the crimes have overlapping elements, but whether, looking at the evidence required to prove each crime, one of the crimes was established by proof of the same or less than all the facts required to establish the commission of the other crime charged. And here, the Court found, each crime requires proof of at least one additional element which the other does not. Attempt to commit aggravated child molestation requires proof that appellant took a substantial step with the intent to arouse or satisfy the sexual desires of either the child or himself, while attempted aggravated sodomy does not. Attempted aggravated sodomy requires proof that appellant took a substantial step to commit an act of sodomy with a victim under the age of ten, while attempted aggravated child molestation does not. Thus, the two crimes do not meet the required evidence test.

Next, the Court looked at whether the crimes merge under OCGA § 16-1-7 (a) (2). This Code provision requires merger where the crimes differ only in that one is defined to prohibit a designated kind of conduct *generally* and the other to

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prohibit a *specific* instance of such conduct. The Court found that it could not say that attempted aggravated sodomy differs from aggravated child molestation "*only* in that one is *defined* to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct." (Emphasis supplied.) OCGA § 16-1-7 (a) (2). From the plain language of the statute, it is clear that merger under this subsection is determined solely by examining the statutory definitions of each crime. In this case, both counts are concerned with the same crime, attempt, which criminalizes performance of a substantial step taken "with intent to commit a *specific* crime." (Emphasis supplied.) OCGA § 16-4-1. Therefore, the Court stated, it could not say that one attempt crime prohibits general conduct while the other prohibits specific conduct; they both require intent to commit a specific crime.

With regard to the third type of merger, grounded upon a "less culpable mental state," OCGA § 16-1-6 (1), the Court stated that our courts examine the mens rea element of the crimes at issue. And here, the Court again stated that it could not say that either attempt crime "is established by … a less culpable mental state than is required to establish the commission" of the other. OCGA § 16-1-6 (1). Both crimes required that a substantial step be taken "with intent to commit a specific crime." OCGA § 16-4-1.

The Court then looked at whether the crimes merged under OCGA § 16-1-6 (2). Under this provision, a crime is included "when [i]t differs from the crime charged *only* in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission." (Emphasis supplied.) OCGA § 16-1-6 (2). Accordingly, when the crimes involve injury to a different property or public interest, the crimes do not merge under this Code section. Based on the Court's review of OCGA § 16-1-6 (2) and the body of case law governing it, the Court concluded that attempted aggravated child molestation and attempted aggravated sodomy are equally serious, and one cannot be considered a less culpable offense or one that poses less serious risk of injury.

Therefore, the Court concluded, there was no merit to appellant's argument that the trial court erred by merging attempted aggravated sodomy into attempted aggravated child molestation rather than the other way around. In fact, the Court stated, the trial court erred by merging these two crimes in any direction. However, because the State not only failed to file a cross-appeal, but also maintained both in the trial court and on appeal that the attempted aggravated sodomy verdicts merge into the attempted aggravated child molestation verdicts, in light of *Dixon v. State*, 302 Ga. 691 (2017) the Court declined to exercise its discretion to correct the trial court's merger error sua sponte.

Search & Seizure; BOLOs

State v. Perry, A18A2110 (3/13/19)

Perry was charged with two counts of DUI and failure to maintain lane. The evidence showed that an off-duty police officer reported a possible drunk driver, and a sheriff's deputy was dispatched to the area where the driver was last seen. Dispatch instructed the deputy to be on the lookout ("BOLO") for a white male and white female in a white SUV with a particular license plate number. The deputy encountered Perry in a white SUV with a plate number matching the BOLO, and the deputy started following Perry. The deputy did not immediately pull Perry over in response to the BOLO because he believed that he did not yet have justification to effectuate a traffic stop. The deputy testified that he pulled Perry over when he witnessed Perry "weaving over the roadway."

Perry filed a motion to suppress, arguing that he did not fail to maintain his lane, and thus the deputy did not have reasonable articulable suspicion for the stop. The deputy's pursuit of Perry was captured on his dash cam, and the video was played for the trial court at the hearing on Perry's motion to suppress. After reviewing the video, the trial court stated that it believed Perry operated his vehicle smoothly and indicated that it would grant Perry's motion. The State appealed.

The Court stated that particularized alerts issued by police officers for specifically described vehicles possibly involved in criminal activity have long served as a legitimate basis for investigatory stops. A dispatcher's report of a suspected intoxicated driver, containing details about the driver, the driver's vehicle, the driver's behavior, and the location where the behavior occurred, provides articulable suspicion authorizing a responding officer to detain the driver, even if the source of the report is a citizen or unidentified informant. Accordingly, the Court held, the BOLO provided the deputy with reasonable articulable suspicion to effectuate the traffic stop of Perry.

Moreover, the Court held, the fact that the deputy testified that he did not believe the BOLO, by itself, gave him justification for the stop was of no consequence. An officer's subjective belief that he lacks authority to stop an individual does not control where the facts objectively show the officer had such authority. The pertinent inquiry is based upon the objective facts known to the officer at the time of the encounter, not his post-hoc characterizations or opinions concerning those facts given at the suppression hearing. Thus, given that the BOLO objectively provided reasonable articulable suspicion to stop Perry, the Court stated that it need not address whether Perry failed to maintain his lane for purposes of reviewing the motion to suppress. Even viewing the evidence in the light most favorable to the trial court's judgment, the trial court erred in suppressing the evidence.

Conspiracy; Sufficiency of the Evidence

Frazier v. State, A18A1852 (3/14/19)

Appellant was convicted on one count of conspiracy to commit aggravated assault on a police officer but acquitted on four other counts. The evidence showed that in the early morning hours of August 23, 2011, an officer responded to a call reporting shots fired. When the officer arrived on the scene, he saw approximately eight to ten males on the street, and after he shone his spotlight on them, they fled. A short time later, while the officer was still on the scene, someone shot at his police car multiple times, with what he said sounded like an automatic weapon, striking the body of the car and shooting out the car's rear window.

Appellant was indicted, along with six other individuals. Count 1 of the indictment charged that appellant "did … conspire with [his other co-indictees] to commit the crime of aggravated assault on a peace officer, and in furtherance of such conspiracy [they] did the following overt acts, to wit: A) Roger Farmer retrieved a rifle from the trunk of his vehicle; B) Roger Farmer did give said rifle to [appellant]; C) [appellant] instructed [his co-indictees] to run when he shot at [the officer's] vehicle; [and] D) [appellant] did shoot [the officer's] vehicle."

The Court noted that in order to establish the conspiracy as charged in this case, the State was required to prove both an agreement between appellant and someone else to commit an aggravated assault against the officer and at least one overt act in furtherance of that agreement. Such agreement need not be express, nor does it require a "meeting of the minds" to the same degree necessary to form a contract; all that is required is a tacit mutual understanding between persons to pursue

a common criminal objective. This tacit understanding may be proved by circumstantial evidence, inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances.

Here, the Court found, there was a plethora of evidence from which the jury could have found that appellant shot at the officer's car, but the jury acquitted him of the charges relating to that action and instead found that he had formed a conspiracy to shoot at the officer. Having reviewed the record, however, the Court found that the State failed to show an agreement between appellant and any of his co-indictees, tacit or otherwise, to commit aggravated assault on the officer, because there was no evidence showing a mutual understanding between appellant and anyone else to pursue the common criminal objective of shooting the officer.

Viewing the evidence in the light most favorable to the verdict, the following facts were established at trial: (1) the individuals were together that night after leaving a club; (2) an altercation broke out over David Stephens' girlfriend and Davis shot a gun in the air to break it up; (3) Farmer had the AK-47 before appellant; (4) when the officer appeared on the scene to investigate the report of shots being fired, appellant said that he was going to shoot him; (5) the others told appellant not to shoot him, or ran away, or both; and (6) appellant shot at the officer. Although appellant and Michael Stephens originally told police that Roger Farmer had the gun first, there was no evidence that Farmer took it out of his car trunk and handed it to appellant, as alleged in the indictment, nor was there any other evidence presented about how appellant obtained the weapon from Farmer. And even though appellant told the others to run after he announced that he was going to shoot the officer, and they did, this evidence was insufficient to establish a conspiracy to commit aggravated assault on the officer. Running from the area where appellant intended to shoot, at his direction or otherwise, may reflect an understanding that the crime was about to happen, but that it is not sufficient, in and of itself, to establish beyond a reasonable doubt any tacit mutual agreement among the co-indictees to commit the crime. Accordingly, the Court reversed appellant's conviction for conspiracy to shoot a peace officer.

Search & Seizure; Search Warrant Affidavits

State v. Perez, A18A1866 (3/14/19)

Perez was charged with drug trafficking. The State appealed the trial court's grant of a motion to suppress all of the evidence seized at a residence pursuant to two search warrants. The Court reversed.

The Court initially noted that because the magistrate only considered the evidence in the warrant applications in issuing the search warrants, its analysis was confined to the four corners of those documents. The evidence showed that on October 20, 2016, a Lawrenceville County Police Investigator (the "Investigator") assigned to the Gwinnett Metro Task Force ("GMTF") applied for Warrant No. 16X-01433 (the "First Warrant") on the grounds that there was probable cause to believe that the crime of trafficking in methamphetamine (more than 28 grams, less than 200 grams) was being or had been committed at an apartment in Duluth, Georgia. After setting out his experience and qualifications, the Investigator averred that a named Homeland Security ("HS") investigator had received information from a confidential reliable informant ("CI") that there were drugs and guns at the apartment. In response to this information, HS investigators set up surveillance of the apartment and observed an automobile there matching the CI's description of a car belonging to unnamed suspects. These investigators observed Richard Pineda leave the apartment carrying a bag and drive away in that car, which they determined was registered to him, to another address in Lawrenceville, Georgia. GMTF and HS

investigators set up surveillance at the Lawrenceville address and sometime later observed two suspects enter that location, stay a short time, and then leave; each of these suspects was later stopped and methamphetamine was located in their possession.

The affidavit further provided that HS and GMTF investigators served a search warrant at the Lawrenceville address, where Pineda was the only individual inside, and "located handguns, cellular telephones, [a] large amount of suspected cocaine and [a] large amount of suspected Methamphetamine, and US Currency." A crime analyst conducted a background search on Pineda and determined that one of the addresses listed for him was the apartment in Duluth. The Investigator averred that he sought the First Warrant to search that apartment in order to find U.S. currency, ledgers, and documents relating to the transportation and distribution of illegal narcotics, cell phones, plastic bags, cellophane wrap, photographs, and tools consistent with counting and weighing. The magistrate issued this warrant, and it was executed on the Duluth apartment.

The Investigator submitted the application for a second warrant a short time later, asserting he had probable cause to believe that the offenses of trafficking in methamphetamine (more than 28 grams, less than 200 grams) and possession of gun during the commission of that crime were being or had been committed. In the supporting affidavit, the Investigator cited the same facts used to support the First Warrant and additionally averred that during the execution of the First Warrant at the apartment, GMTF and HS investigators had located a substance "which field tested positive for Methamphetamine, weapons[,] and [a] large amount of cash."

The Court noted that although the affidavits supporting the Warrants (hereinafter collectively the "Affidavits") appeared to be based almost entirely on hearsay, as the Investigator never indicated that he had any personal involvement in gathering the facts contained therein, hearsay and even hearsay upon hearsay may be sufficient to furnish probable cause if the magistrate was given a substantial basis for crediting such hearsay. Therefore, an affidavit must contain sufficient facts to allow a magistrate to make an independent determination of probable cause based on facts, and wholly conclusory statements will not suffice.

The Court found that the trial court correctly concluded that the information initially provided by the CI was insufficient in and of itself to support probable cause to search the apartment as the Affidavits provided no further information about this source to allow the magistrate to make an independent determination regarding his reliability. Moreover, with regard to the apartment, the CI stated only that there were drugs and guns there, and an unvarnished statement that the informant has seen drugs in someone's house cannot establish probable cause to search. Nevertheless, the Court stated, in a case such as this, where the Affidavits failed to provide the magistrate with an independent basis for determining that a CI was credible or reliable, his tip may be considered trustworthy if portions of it are sufficiently corroborated by the police.

And here, the Court found, the Affidavits cited CI's description of the "suspects' vehicle" as a "silver Toyota with a drive out tag." HS investigators identified a vehicle matching that description at the apartment and determined that it was registered to Pineda. Pineda traveled in that car from the apartment to the Lawrenceville address, where investigators set up surveillance and observed actions by two suspects consistent with a drug buy. Traffic stops were later initiated, and both stops resulted in the discovery of a substance that field-tested as methamphetamine. A subsequent search of the Lawrenceville address pursuant to a separate warrant found Pineda inside with large amounts of cocaine and methamphetamine, evidence that the Investigator cited to establish probable cause of trafficking in methamphetamine. The Affidavits connected the drug activity from the Lawrenceville address back to the Apartment based on a background

check conducted by a crime analyst on Richard Pineda, which revealed that "one of the addresses for him was listed as [the apartment]." And Pineda had just been observed leaving the apartment with a bag and traveling to the Lawrenceville address.

Accordingly, the Court found that the evidence in the Affidavits sufficiently corroborated the information received from the CI and established a nexus between the apartment and the Lawrenceville address. Therefore, based on the totality of the circumstances, the Court concluded that the Warrants were supported by probable cause. Consequently, the Court reversed the grant of the motion to suppress.

Search & Seizure; Temporary Protective Orders

State v. Burgess, A18A1495, A18A1496 (3/14/19)

Burgess was indicted on possession of methamphetamine with intent to distribute, possession of a Schedule II controlled substance, and two counts of unlawful possession of explosive devices. After a hearing on Burgess's motion to suppress, the trial court entered an order granting in part and denying in part the motion. Both parties appealed.

The facts, very briefly stated, showed that A. S. and Burgess were living in Burgess's home with their child. They had a tumultuous relationship and A. S. moved out after Burgess physically abused her and threatened to kill her. While living in a safe house, she filed for a TPO petition. A. S. appeared before a superior court judge and testified under oath about the incidents with Burgess; the judge later contacted an investigator from the district attorney's office to interview A. S. after the hearing. A. S. also told the judge about threats and other incidents, and that Burgess had multiple guns and explosives in their home. The judge granted the petition and as a part of the TPO, ordered "that [the]…Sheriff remove all firearms and explosives from the resid[dence] and secure the same."

Later that same day, a GBI agent interviewed A. S. about any knowledge she may have about homicides allegedly committed by Burgess and his possession and sale of methamphetamine. A. S. described various events that led her to believe Burgess committed a homicide, alleged that Burgess was selling methamphetamine, which she stated could be found at the residence, and described the location of the explosives and firearms. Two days later, the agent and sheriff's officers served the TPO on Burgess. Explosives were found in the bathroom closet, where A. S. described them as being stored. Simultaneous to the search of the house, the officers searched the exterior of the grounds around the house and an outbuilding/garage about 25 feet from the back porch, where they discovered a small amount of methamphetamine.

Burgess argued that the TPO did not constitute a valid search warrant and was not a substitute for a search warrant authorizing entry to the home. The Court agreed. The Court noted that the trial court found that the TPO statute allowed the superior court judge to issue the TPO including the directive to officers to enter Burgess's home and seize explosives and firearms because the TPO statute authorized the entry of "any" protective order, and thus, it was a "valid order" authorizing the search. However, the Court stated, neither briefing nor independent research revealed a case in which the courts of this State have approved the use of a TPO in place of a search warrant issued according to the procedure in OCGA § 17-5-20.

The Court stated that the TPO statute requires sworn testimony, application of a probable cause standard, and issuance by a judicial officer, all of which are safeguards central to the protections in the warrant statute. However, the procedure to obtain a TPO does not contain all the safeguards codified in this State's warrant statute (specifically, application by a law enforcement officer), and the Court declined to hold that, under these circumstances, issuance of the TPO under this statutory scheme met the "warrant and probable cause standard" of the Fourth Amendment and OCGA § 17-5-20, obviating the need for officers to first obtain a warrant to enter Burgess's property. This conclusion is reinforced by the explicit prohibition in OCGA § 17-5-20 (b) against issuing warrants on application by a private citizen. Accordingly, the Court held, the trial court erred by finding that the TPO authorized the search of Burgess's home.

Nevertheless, the State contended, even if the search was not authorized, Burgess and A. S. separately consented to the search and the trial court erred by finding otherwise. The Court disagreed. As to Burgess, the State contended that Burgess signed a waiver form. The Court found that the State failed to present evidence that Burgess freely and voluntarily consented to the search, even after being presented with and signing the waiver form. There was no testimony that officers provided Burgess with the opportunity to refuse to consent to the search when the agents served the TPO, and by the time that the waiver form was presented to Burgess, officers already had discovered some methamphetamine, the explosives, and many firearms. Thus, the Court found, the record supported the trial court's conclusion that Burgess merely acquiesced to the authority of law enforcement rather than voluntarily consenting to the search of his home.

As to A. S., the State contended that her off-premises consent to search was valid to justify the officer's actions. The Court again disagreed. Based on the trial court's finding that Burgess, who was physically present at the house when officers arrived, was (1) not given the opportunity to refuse the search during the initial service of the TPO; and (2) did not freely or voluntarily execute the waiver mid-search, the trial court did not err by finding that A. S.'s pre-search, off-site consent authorized the search.

Next, the State argued that this is not a case in which the exclusionary rule should apply. The Court stated that "[a]lthough this case presents a close question as to this issue, we agree with Burgess that the exclusionary rule applies to the search as a whole, and we affirm the trial court's determination that the exclusionary rule applied to the search of the outbuilding/garage." The Court stated that this was not a case in which the officers were merely serving the TPO and providing support for a petitioner's enforcement of her right to her property or to ensure her safety. Instead, officers were engaged in a full-blown search of the entire premises without a warrant and without any exigencies of circumstance to support a determination that a warrantless search was reasonable under the circumstances or that a reasonable officer would believe that she could effectuate the search without first obtaining a warrant.

Finally, the State argued that the good faith exception found in *United States v. Leon*, 468 U. S. 897 (104 SCt 3405, 82 LE2d 677) (1984) should apply. However, the Court stated, it was bound by the Supreme Court's decision in *Gary v. State*, 262 Ga. 573 (1992) which declined to adopt the Leon good-faith exception.

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Immunity; OCGA § 16-13-5

State v. Mercier, A18A1676 (3/15/19)

Mercier was accused of one count each of possession of hydrocodone and possession of clonazepam. The evidence showed that at least three passersby telephoned 911 to report a man lying unconscious on the roadway next to a white car. It was undisputed that none of these passersby suggested that the man was suffering from a drug overdose; rather, the callers thought the man was the victim of a hit-and-run. Upon arrival, a first responder suspected that Mercier may have overdosed. In addition, a responding police officer testified that he looked in the center console of Mercier's vehicle for identification and found a plastic bag with four yellow pills and one white pill.

Because he was suffering from a drug overdose when he was found by police officers following multiple 911 telephone calls, Mercier filed a motion for immunity pursuant to OCGA § 16-13-5 (the "Georgia 9-1-1 Medical Amnesty Law"; see Ga. L. 2014, p. 683, § 1-1 (not codified)). Following a hearing, the trial court granted Mercier's motion. The State appealed.

The State contended that the trial court erred in granting Mercier's request for immunity "[b]ecause the emergency call was for a suspected hit and run and not a drug overdose. …" The Court noted that OCGA § 16-13-5 (b), provides, in pertinent part, "Any person who in good faith seeks medical assistance for a person experiencing or believed to be experiencing a drug overdose shall not be arrested, charged, or prosecuted for a drug violation if the evidence for the arrest, charge, or prosecution of such drug violation resulted solely from seeking such medical assistance. *Any person who is experiencing a drug overdose and, in good faith, seeks medical assistance for himself or herself or is the subject of such shall not be arrested, charged, or prosecuted for a drug violation if the evidence for the arrest, charge, or prosecution of such drug violation resulted solely from seeking such medical assistance.* …" (Emphasis supplied).

The Court stated that nothing in the statute requires the caller to subjectively conclude that the subject of the call is experiencing a drug overdose in order for the statute's protections to apply. And here, the Court found, Mercier was a person experiencing a drug overdose. He became the subject of a request for medical assistance when three people called 911 to report he was lying in the street next to his car. One of those callers believed he may have been hit by a car and the other two did not offer their belief as to how he came to be lying in the street. Emergency responders were dispatched on the basis of the calls. Without the calls from bystanders, no emergency responders, including law enforcement officers, would have been on the scene. Law enforcement officers were present solely because the bystanders called for medical assistance to Mercier. While on the scene, a law enforcement officer searched Mercier's car and found the pills that became the evidence in support of the prosecution. Thus, the Court concluded, on these facts, the statute provides protection from prosecution to Mercier. Therefore, based upon the plain language of OCGA § 16-13-5, Mercier qualified for immunity because his prosecution was the result of being the subject of a request for medical assistance while he was experiencing a drug overdose.