Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JULY 12, 2019
Issue 28-19

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Appearance Bonds; Procedure for Forfeiture

Anytime Bail Bonding v. State, A19A0413 (5/28/19)

Appellant, a bonding company, appealed from an order granting the State's motion for forfeiture of an appearance bond insured by appellant. The record showed that arraignment for the defendant was scheduled for Oct. 10, 2017. He did not appear and a second arraignment date was set for Nov. 14. The defendant again did not appear. On Nov. 27, the court issued a bench warrant for his arrest. The next day, the State filed a motion to forfeit the defendant's appearance bond, and the trial court entered an order forfeiting the bond and scheduling an execution hearing. It was undisputed that, at the earliest, notice of the forfeiture was mailed to appellant the same day, November 28. After a hearing, the court granted the State's motion.

Appellant argued that pursuant to OCGA § 17-6-71 (a), the notice of the execution hearing was untimely. The Court agreed. Here, pretermitting whether the defendant's failure to appear at his October 10, 2017 arraignment was cured by the rescheduled arraignment on November 14, 2017, it was undisputed that he failed to appear at the November 14, 2017 arraignment. Thus, the statute directed the trial court to "at the end of the court day . . . forfeit the bond, issue a bench warrant for [the defendant]'s arrest, and order an execution hearing. . . ." Further, the statute required the court to notify appellant of the execution hearing within ten days of the defendant's failure to appear, i.e., by Monday, November 27, 2017, which accounted for the intervening Thanksgiving holiday.

And here, the Court found, it was undisputed that notice was not sent to appellant until November 28, 2017, at the earliest - one day after the expiration of the statutory deadline. The Court further found that the trial court's explanation that the defendant's failure to appear was not legally cognizable until the court adjudicated him as having failed to appear ignores the plain language of the statute: the "ten-day notice shall be adhered to strictly." To hold otherwise, trial courts could wait until some indefinite time to formally adjudicate a defendant as having failed to appear, which would render meaningless the ten-day deadline required by OCGA § 17-6-71 (a). Accordingly, the Court concluded that the trial court

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erred by denying appellant's motion to dismiss the bond forfeiture proceedings and concluding that appellant was liable for the bond.

Aggravated Assault with a Deadly Weapon; Jury Charges

Gonzalez v. State, A19A0684 (5/29/19)

Appellant was convicted of aggravated assault, false imprisonment, and possession of less than one ounce of marijuana. The evidence, briefly stated, showed that the victim agreed to sell marijuana to appellant and his co-defendant brother. But, instead of paying the victim, they tried to rob him and in the process, beat the victim in the head with a handgun.

The indictment charged appellant with aggravated assault by assaulting the victim "with a handgun, a deadly weapon, by hitting [the victim] in the head with a handgun[.]" In its charge to the jury, the court stated that "[a] firearm, when used as such, is a deadly weapon as a matter of law. Appellant argued that the jury charge was erroneous because the firearm was alleged to have been used as an object to hit the victim, not used as a firearm is ordinarily used. Thus, he contended, the language amounted to a mandatory presumption and removed from the jury the determination of whether the firearm was a deadly weapon.

First, the Court stated, since appellant did not object at trial, its review was limited to whether the charge amounted to plain error. The Court found that it did not. Relying on *Howell v. State*, 330 Ga. App.
668 (2015), and distinguishing *Byrd v. State*, 325 Ga. App. 24 (2013), the Court found that the jury was told that the State must prove that the assault was made with a deadly weapon and that a firearm, when used as such, is a deadly weapon as a matter of law. The jury was free to decide that a firearm, when not used as such, is not a deadly weapon. As in *Howell*, there was overwhelming evidence to establish that the handgun constituted a deadly weapon. The evidence was undisputed that the victim was struck several times in the head with the handgun, which resulted in open, bleeding wounds. The victim's sister described his head as being "split open" where she "could see inside and everything." After being taken to the hospital, the victim received numerous staples in his head. One of the responding officers observed a puddle of blood on the ground and described the victim as being "dazed from his injuries."

Thus, the Court found, even if the jury instruction was erroneous, appellant failed to demonstrate that any error probably affected the outcome of the trial. Specifically, appellant failed to show that, had the correct charges been given, the jury probably would have acquitted him of the aggravated assault charge. Moreover, in light of the overwhelming evidence that the handgun constituted a deadly weapon under the circumstances of this case, the Court found that any error in the charge did not seriously affect the fairness, integrity, or public reputation of the proceedings. Thus, the Court concluded, since appellant failed to satisfy the third and fourth prongs of the plain error analysis, there was no reversible error.

Kidnapping; Sufficiency of the Evidence

Walker v. State, A19A0774 (5/30/19)

Appellant was convicted of armed robbery, kidnapping, and possession of a firearm during the commission of a crime. He contended that the evidence was insufficient to support his conviction for kidnapping. Specifically, that there was insufficient evidence of asportation. A divided panel of the Court agreed.

The evidence, briefly stated, showed that the victim was getting out of his car on the street when he noticed two men walking in the middle of the street. They approached him as he began walking. One asked for a cigarette and then the other man, later identified as appellant, who was behind the first assailant, pulled down a mask and demanded money. The victim complied by giving them his wallet. The first man then grabbed the victim and told appellant to "cap him, man; he saw me; cap him." The first man and the victim struggled with the first man attempting to pull the victim off the street and toward the trees and "the shadows." The victim broke free and escaped. The entire incident lasted no more than 30 seconds. Appellant and his accomplice were arrested a short time later.

The Court stated that *Garza v. State*, 284 Ga. 696 (2008) requires courts to consider four factors to determine whether the movement of an alleged kidnapping victim is sufficient to establish the essential element of asportation: 1) the duration of the movement; 2) whether the movement occurred during the commission of a separate offense; 3) whether such movement was an inherent part of that separate offense; and 4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. The purpose of the *Garza* test is to determine whether the movement in question is in the nature of the evil the kidnapping statute was originally intended to address - i. e., movement serving to substantially isolate the victim from protection or rescue - or merely a criminologically insignificant circumstance attendant to some other crime.

Here, the Court found, the victim's movement was minimal in duration and distance - it happened quickly and was limited to a few feet. While the victim may have been dragged a couple of feet toward a darker area of a public place, that scant distance did not place the victim in more danger than he was already in or isolate him from protection or rescue. Even though the movement took place *after* the armed robbery was complete and was arguably not an inherent part of that offense, satisfaction of some factors of the *Garza* test does not mandate a finding that the State presented sufficient evidence of asportation. Thus, based upon the short distance the victim was moved in a public street, the Court concluded that the State failed to present evidence of asportation sufficient to support appellant's kidnapping conviction.

First Offender; Reinstatement of Probation

Kinsey v. State, A19A0312 (6/3/19)

In 2013, appellant pled guilty to one count of theft by taking and was sentenced as a First Offender and given 10 years of probation. In 2014, the State and appellant entered into a consent order in which appellant agreed to pay $38,906.09 in restitution over the course of her probation. The trial court also ruled that her probation may be suspended and the case terminated upon payment of the full amount of restitution, as long as appellant complied with the other terms of her probation.

On December 5, 2017, appellant's probation officer filed a petition for termination of probation pursuant to OCGA §§ 42-8-37 (d) and 42-8-60 (e), asserting that appellant was "in compliance [and] owe[d] no restitution[.]" The trial court entered an order, filed on December 14, 2017, terminating the appellant's probation and discharging her sentence. During the subsequent term of court, on February 7, 2018, the trial court entered a consent order to seal appellant's criminal records and related documents. However, on May 9, 2018, the State filed a motion to void the order terminating the appellant's probation, arguing that the order was a nullity because the petition for termination of the probation erroneously

stated that appellant had fulfilled the conditions set forth in OCGA § 42-8-37 and that she did not owe restitution, when in fact, appellant had paid none of the restitution. After a hearing, the trial court, relying on *Pestana v. State*, 328 Ga. App. 454 (2014), granted the State's motion and reinstated appellant's probation.

The Court reversed, finding that *Pestana* was clearly distinguishable. Here, the trial court terminated appellant's probation on December 14, 2017. Pursuant to OCGA § 15-6-3 (3), that term of court expired on December 31, 2017. The State did not file its motion to void the order terminating the appellant's probation until May 9, 2018, three terms of court after the termination order was entered. Thus, unlike in *Pestana*, the trial court no longer possessed the inherent power to modify or correct its order discharging appellant.

Nevertheless, the State argued, the trial court could not have learned of the error until it was outside the term of court. But, the Court noted, the State did not argue that it did not receive timely notice of the trial court's order entered December 14, 2017, nor that it lacked the ability to file a motion to address the termination of appellant's probation within that term of court, i.e., prior to the first Monday in January 2018. The record also showed that during the next term of court, on February 7, 2018, the State and appellant entered into a consent order to seal appellant's criminal records and related documents in this case, pursuant to OCGA § 35-3-37 (m). In the consent order, the parties acknowledged that "[t]he final disposition of this case was by FIRST OFFENDER ACT dated FEBRUARY 3, 2011."

The Court also rejected the State's argument that appellant induced the error resulting in her probation termination. There was no evidence in the record showing the status of the restitution payments, and at the hearing, the State failed to introduce any evidence of the amount of restitution paid, if any.

Moreover, the Court held, the discharge order did not impose an illegal sentence. Finally, the trial court's reliance on *Pestana* for a finding that the order was void is inapposite, because the *Pestana* Court did not find that the order in *Pestana* was void, but that it contained an error that could be corrected during the same term of court. Accordingly, the Court concluded, based on the unique circumstances in this case, the trial court erred in rescinding the termination of appellant's probation outside the term of court because under the first offender statute, appellant had been discharged as a matter of law and the trial court lacked jurisdiction to modify, correct, or rescind the valid discharge order.

Right to Trial Transcripts; Government Expense

Thrailkill v. State, A19A0662 (6/4/19)

In 2017, appellant entered a negotiated plea to multiple counts of child molestation. He did not file a direct appeal from his guilty plea or motion for an out of time appeal. In 2018, he filed a motion for his trial transcript at government expense. He contended that "the requested trial transcript is essential and necessary in order to obtain habeas corpus relief from the judgment of conviction and sentence in the above-captioned case." However, he provided no evidence that such a habeas case had been filed. The trial court denied the motion.

The Court stated that while an indigent is entitled to a copy of his trial transcript for a direct appeal of his conviction, such is not the case in collateral post-conviction proceedings. After the time for appeal has expired, there is no due process or equal protection right to a free copy of one's court records absent a showing of necessity or justification. This showing of

necessity or justification can be proved via an affidavit setting forth certain facts, one of which is that a habeas corpus petition has been filed. Also, the affidavit should have the petition attached to it.

And here, the Court found, appellant was well outside the time for an appeal, and he failed to make any showing of necessity or justification because he failed to attach an affidavit or copy of the pending habeas petition. Accordingly, the Court held, the trial court did not err in denying his motion.

Other Acts Evidence; Intrinsic Evidence

Smith v. State, A19A0246 (6/4/19)

Appellant was convicted of robbery by force and possession of a firearm during the commission of a crime. The evidence showed that appellant, co-defendant Lonon, and others called in an order of Chinese food from a local restaurant and then robbed the delivery driver.

Appellant argued that the trial court erred in allowing the State, over objection, to elicit testimony from Lonon about a prior incident where the group had planned on robbing a delivery driver from the same Chinese food restaurant. Appellant contended that this testimony was inadmissible, without prior advance notice, under OCGA § 24-4-404 (b) as a prior bad act. The Court disagreed.

The Court stated that all of the facts and circumstances surrounding the crime for which the accused is charged are admissible as "intrinsic" despite the fact that the evidence may incidentally reflect poorly on the accused's character. Evidence is admissible as intrinsic evidence when it is (1) an uncharged offense arising from the same transaction or series of transactions as the charged offense; (2) necessary to complete the story of the crime; or (3) inextricably intertwined with the evidence regarding the charged offense.

Here, the Court noted, Lonon described an incident two weeks earlier where appellant, Lonon and others attempted to rob the same deliveryman from the same Chinese food restaurant, but were not able to complete the crime because the driver became suspicious. When the crime charged is part of a crime spree or pattern of criminal activity, the entire chain of crimes can be proved at trial, even if they were not all charged, as they were all intrinsic to the offense. The Court found that the earlier attempted robbery involved the same group of people, including appellant and Lonon, the same phone number, and the plot to rob the same deliveryman from the same Chinese food restaurant in the same neighborhood. Because evidence of the earlier robbery was necessary to complete the story of the crimes, the Court concluded that it was intrinsic evidence to the charged crimes and therefore, not covered by OCGA § 24-4-404 (b). Furthermore, the Court held, even though the trial court's order denying appellant's motion for a new trial did not specifically note that this was intrinsic evidence, the Court nevertheless affirmed its judgment under the "right for any reason" rationale.

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Identity; Emailed Notices

Adams v. State, A19A0577 (6/4/19)

Appellant was convicted of multiple sexual offenses including rape, aggravated child molestation, incest, and electronically furnishing obscene materials to a minor. He contended that he received ineffective assistance of counsel because his counsel failed to investigate his real name. The Court disagreed.

The record showed that appellant was indicted as "David Lewis Adams, Jr., AKA Junior." At the hearing on the motion for new trial, appellant presented evidence that the name on his birth certificate was "Lewis Junior David Adams."

The Court agreed with appellant that identity is an essential element of the crime, and the State must prove identity beyond a reasonable doubt. However, the Court found, the State presented evidence from which the jury could find beyond a reasonable doubt that appellant, the accused, committed the crimes. Specifically, appellant was positively identified at trial by various witnesses as "David Adams," as the victim's father, and as the perpetrator of the charged crimes. Also, the Court noted, the names on the birth certificate and the indictment consist of the same four names, though listed in different order.

Moreover, the Court stated, where an accused is known by different names, it is lawful for an indictment to identify the accused by such names as aliases, and an indictment can cite a name by which an accused is generally called. Here, the Court found, appellant failed to show that he was never known by the names under which he was indicted, including the alias "Junior." Thus, appellant failed to show either a deficiency or that the outcome of the trial would have been different had counsel investigated or attempted to remedy the purported name discrepancy.

Appellant also argued that his counsel rendered ineffective assistance because counsel received improper notice pursuant to OCGA § 24-8-820 and should have objected. The Court again disagreed. The record showed that the State sent an email to trial counsel on February 12, 2017 at 2:11 a.m. stating that although trial counsel "probably know[s]" already, "there will be child hearsay testimony offered in the trial of this case." Trial counsel testified at the hearing on the motion for new trial that he received the email.

The Court noted that appellant did not explain how the notice was improper, other than noting that trial counsel "usually receive[s] a formal notice" instead of an email. But, the Court held, the State's notice, supplied approximately two weeks before trial, complied with the statute's notice requirement. Thus, an attorney's failure to make a meritless objection cannot serve as grounds for an ineffective assistance of counsel claim.

Search & Seizure; Government Buildings

Day v. State, A19A0079 (6/4/19)

Appellant was convicted of misdemeanor possession of marijuana. She contended that the trial court erred in denying her motion to suppress. The evidence showed that appellant was a felony probationer and reported to a Georgia Department of Community Supervision (GDCS) facility for intake and a probation appointment. Upon entering the facility, she was instructed to walk through a metal detector and to place her personal belongings onto a table before undergoing a pat-

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down search. Notices posted on the walls inform those entering the facility that anything on the person is subject to search. During the probation officer's initial search of appellant's personal items, the officer found "a leafy substance" inside her purse. A subsequent search of appellant's wallet revealed a "clear baggy" containing marijuana.

The Court stated that the Fourth Amendment proscribes all unreasonable searches and seizures, and searches conducted without prior judicial approval are per se unreasonable, subject to specifically established and well-delineated exceptions. Cases sustaining limited searches of persons seeking to enter sensitive facilities recognize an exception to the general requirement of the Fourth Amendment that searches are proper only if conducted pursuant to a lawful warrant. Such limited searches at sensitive facilities fall under the category of "administrative searches," or the "special needs" exception to the Fourth Amendment's warrant and probable cause requirements. Airports, governmental buildings, and detention facilities have all been considered "sensitive facilities" in this context. When faced with such special needs, a court must balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context. This reasonableness inquiry is a balancing test that weighs the need for the search, including its likely effectiveness in averting potential harm to the public, against the degree and nature of the intrusion into a citizen's privacy interests.

In making this balance, the Court noted that it is well-settled that the government has a compelling interest in protecting the public and its employees inside government buildings. Where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as reasonable. The Court noted that the probation officer testified during the suppression hearing that each person arriving for a probation or parole appointment is required to walk through a metal detector, empty his or her pockets, place his or her personal belongings on a table, and undergo a pat-down search. This is standard procedure. This protocol serves the purpose of keeping contraband such as "weapons, box cutter[s], matches" out of the facility and protecting everyone involved from a real danger of violence. Thus, the Court concluded, this is a legitimate governmental interest justifying the use of the limited search procedure in this case, especially given the nature of this facility.

But, the Court stated, it must also consider the privacy interest of the person who enters the governmental facility. Courts have found that by presenting oneself at a sensitive facility's security checkpoint, one implicitly consents to the screening and search of one's belongings. Those presenting themselves at a security checkpoint consent automatically to a search, and may not revoke that consent if the authorities elect to conduct a search. This is especially true where multiple signs clearly warn the person of this trade-off. Thus, the amount of privacy appellant could reasonably expect upon entering the GDCS facility was diminished by the presence of signs warning those reporting for a parole or probation appointment that they and their personal belongings are subject to search.

Moreover, the Court noted, appellant was not just an ordinary citizen entering the facility — she was a convicted offender reporting to a probation appointment. While the right to be free from unreasonable searches and seizures extends to all persons, including probationers, a defendant's status as a probationer is a factor to be considered in determining whether a search and seizure by a probation officer is unreasonable. And, the supervision of probationers that is necessary to operate a probation system presents special needs that may justify departures from the usual warrant and probable-cause requirements. Therefore, while the State failed to show that appellant agreed to a limitation on her Fourth Amendment rights as part of her probation, her probationary status alone is yet another factor supporting the conclusion that appellant had a diminished expectation of privacy in the contents of her purse when she arrived at the GDCS facility for an

appointment with her probation officer. According, the Court concluded, under these circumstances, the search of appellant's purse and wallet was not unreasonable and did not violate the Fourth Amendment.

Jury Charges; Merger

Cooper v. State, A19A0208 (6/10/19)

Appellant was convicted of one count of aggravated battery, one count of felony obstruction of an officer, and two counts of misdemeanor obstruction of an officer. He contended that the trial court erred in failing to instruct the jury on justification because that was his sole defense to felony obstruction of an officer. The Court found the issue to be moot.

The Court stated that where neither party properly raises and argues a merger issue, it has no duty to scour the record searching for merger issues. However, if the Court notices a merger issue in a direct appeal, it will regularly resolve that issue, even where it was not raised in the trial court and not enumerated as error on appeal.

The Court found that in count 1, the State charged appellant with felony aggravated battery by "knowingly and maliciously caus[ing] bodily harm to a correctional officer, to-wit: Phillip Young, while said officer was engaged in the performance of his official duties, by rendering useless a member of his body, to-wit: right ankle, in violation of O.C.G.A. § 16-5-24." In count 2 the State charged that appellant committed felony obstruction of an officer by "knowingly and willfully oppos[ing] Phillip Young, a correctional officer in the lawful discharge of his official duties, by doing violence to such officer in violation of O.C.G.A. § 16-10-24."

The evidence showed that appellant entered a fight at the county jail and tackled officer Young thereby injuring his ankle. This evidence was sufficient to satisfy both the aggravated battery and felony obstruction of an officer counts as charged. To prove the aggravated battery count, the State had to show that Officer Young was engaged in his official duties, and that appellant injured Officer Young's ankle. To prove the felony obstruction charge, the State was required to show that Officer Young was engaged in his official duties, and that appellant "did violence" to Officer Young.

Thus, the Court found, because injuring another's ankle amounts to "doing violence", these convictions must merge. The same evidence (injuring Officer Young's ankle while he was engaged in official duties) was used to support both the obstruction and the aggravated battery charges as they were set forth in the indictment. The felony obstruction count was therefore included in the aggravated battery count as charged. Accordingly, the Court held, based on its determination that the felony obstruction count merged into aggravated battery count in this instance, appellant's enumeration regarding the lack of jury instruction on his sole defense was rendered moot.