

THIS WEEK:

- Search & Seizure; Sentencing
- Evidence of Co-Defendant's Prior Arrest; Discovery
- Consent; Lesser Included Offenses
- Speed Detection Devices; Merger
- DUI; Roadblocks

Search & Seizure; Sentencing

Miller v. State, A19A0990 (9/9/19)

Appellant was convicted of one count of theft by taking, four counts of aggravated assault, one count of aggravated battery, one count of reckless conduct, two counts of obstruction of a law-enforcement officer, one count of fleeing from a law-enforcement officer, and one count of theft by receiving. The evidence showed that appellant stole a vehicle and then used that vehicle to assault a person attempting to thwart that theft. Then, a week later, appellant—driving yet another stolen vehicle—nearly struck three separate law-enforcement officers, who were attempting to arrest him.

He contended that the evidence was insufficient to support his convictions of aggravated assault upon the three officers, obstruction of two officers, and fleeing from an officer. Appellant conceded that he committed the acts alleged in the indictment but, nonetheless, contended that the evidence was insufficient because the officers were not lawfully discharging their duties at the time he committed those acts. The Court disagreed.

The Court found that on the night in question which led to the charges, the officers had an arrest warrant for a person known by the nickname "Bull" and reliable information that this person was currently at an abandoned home. When they arrived, in uniform and marked patrol vehicles, they saw appellant, who generally fit the description of the warrant's subject, and, therefore, they were authorized in their attempt to detain him pending his identification. And while appellant argued that detaining him was unreasonable because he did not match the description in the warrant, the description in the warrant was based on the witnesses' accounts of the theft from the impound lot, as well as surveillance photos. Thus, to the extent there were any inconsistencies in those descriptions, it was up to the jury to resolve them. Accordingly, the Court held, appellant's contention that the evidence was insufficient to conclude that the officers lawfully discharged their duties lacked merit.

Appellant also argued that he received ineffective assistance counsel during sentencing. The Court noted that the trial court imposed four separate 20-year sentences upon appellant for each of his four aggravated-assault convictions and ordered that those sentences be served consecutively. Appellant contended that his counsel should have challenged the sentence he received as cruel and unusual punishment because the sentence effective amount to 100 years. Again the Court disagreed.

Here, it was undisputed that the 20-year sentence for each separate aggravated assault falls within the statutory range. And appellant failed to demonstrate that this punishment was so excessive in proportion to the offenses as to shock the conscience. And while it was undeniable that the trial court lengthened appellant's cumulative imprisonment by imposing consecutive sentences, there is no constitutionally cognizable right to concurrent, rather than consecutive, sentences. Accordingly, the Court concluded, appellant failed to show either deficient performance by trial counsel or a reasonable probability that the outcome would have been different if the constitutional challenge to his sentence had been timely raised.

Evidence of Co-Defendant's Prior Arrest; Discovery

Irving v. State, A19A1204 (9/9/19)

Appellant was convicted of armed robbery, of multiple counts of aggravated assault, of making terroristic threats, of possession of a firearm during the commission of a felony, and of theft by taking of the firearm used in the robbery. The evidence, very briefly stated, showed that appellant, Blackwell, Ezell and one other man drove out of Atlanta to Carrollton in two cars. There, Ezell and the other man got into one car, drove to a bank and robbed it. After leaving the bank, the men drove to a nearby road, abandoned their car, rejoined Irving and Blackwell, and returned to Atlanta.

Appellant argued that the trial court erred in allowing the State to cross-examine his co-defendant, Blackwell, about Blackwell's prior armed robbery arrest. The Court stated that in deciding Blackwell's appeal, it held that the trial court abused its discretion in this ruling and determined that Blackwell, was harmed by the improper admission of character evidence concerning his prior armed robbery arrest. *Blackwell*, ___ Ga. App. at ___ (2) (b).

However, the Court stated, the same cannot be said for appellant. The evidence of Blackwell's prior arrest was less prejudicial to appellant than to Blackwell because it was less probative of appellant's character than it was of Blackwell's character. And there was significantly more evidence of appellant's guilt than of Blackwell's guilt. The accomplice, Ezell, was familiar with appellant and had known him for several years before the bank robbery, so there was no question regarding his identification of appellant as one of the men who planned and participated in the bank robbery. Cf. *Blackwell*, ___ Ga. App. at ___ (2) (b) (Ezell had not known Blackwell before the bank robbery, initially was unable to identify Blackwell in court, and was unsure whether appellant's references to "Chris" meant Blackwell or another person). Ezell testified about appellant's efforts to recruit him to rob the bank and appellant's efforts to prevent him from cooperating with the State after he was arrested. Moreover, there was evidence that the gun used in the bank robbery was in appellant's possession the next day. Given this evidence of appellant's guilt, the Court concluded it is highly probable that the trial court's error in admitting evidence of his co-defendant's prior arrest did not contribute to the verdict against appellant.

Appellant also argued that the trial court should have excluded certain evidence because the State violated requirements to provide the evidence to him under Georgia's statutory reciprocal discovery rules. Specifically, he contended that two categories of evidence should have been excluded: the testimony of Blackwell's former girlfriend, because the State failed to provide him a recording of that witness's entire interview with law enforcement; and evidence of a bench warrant against appellant, because the State did not provide it to him until after the trial had begun.

As to the witness interview, the Court held that the record did not compel a finding that a recording of the entire interview ever existed. Instead, the record showed that the State provided appellant with a recording of a brief portion of the witness's interview and represented to the trial court that no other portion of that interview was recorded, apparently due to an equipment malfunction. The trial court accepted the state's representation. And, the Court stated, although appellant argued that the trial court should not have credited the representation, in the absence of anything but speculation to the contrary, it could not say that the court's finding that there was no recording of the entire witness interview was clearly erroneous.

Next, as to appellant's bench warrant, the State represented that it had obtained that document from *public records* after the trial had begun. Thus, the Court stated, premitting whether the reciprocal discovery rules apply to this document at all, the record showed that the State presented a copy of the bench warrant to appellant's trial counsel and the court on the same day that it obtained the document from the public records. The trial court gave appellant's counsel the opportunity to review the document overnight. Under these circumstances, the Court concluded that the trial court did not abuse his discretion in finding that the statutory requirements were met and in declining to exclude the evidence. Moreover, the Court found no merit in appellant's suggestion that the State should have realized the relevance of the bench warrant evidence and obtained that evidence earlier, because the State was not required to affirmatively seek out the evidence.

Consent; Lesser Included Offenses

O'Shields v. State, A19A0899 (9/11/19)

Appellant was convicted of two counts of homicide by vehicle in the first degree, two counts of DUI (less safe), and one count of possession of methamphetamine. He contended that the trial court erred in denying his motion to suppress. The Court disagreed.

The evidence showed appellant rear-ended a fire truck that was stopped on the expressway due to a previous, unrelated accident. The passenger in appellant's car was killed and appellant was injured in the accident. Appellant was taken to the hospital, where Georgia State Patrol troopers interviewed him while he was awaiting surgery. The Court found that the officer's testimony established that appellant was aware of the accident, understood the request for consent, and gave consistent and appropriate responses to the officer's questions. Moreover, there was no evidence or testimony that appellant was threatened or intimidated into giving consent or that he changed his mind after initially giving consent.

Furthermore, the Court stated, the fact that appellant may have been under the influence of drugs at the time would not automatically negate his consent. Nor does the absence of the implied consent notice change the outcome. Even assuming that the officers should have given appellant the implied consent notice, such notice does not equate with voluntary consent. Thus, the Court concluded, in the absence of evidence of record *demanding* a finding contrary to the judge's determination, it will not reverse the trial court's ruling. Accordingly, viewing the evidence most favorably to the trial court's order, the Court affirmed the denial of the motion to suppress.

Appellant also argued that the trial court erred in failing to give his requested instruction on the lesser included offense of the vehicular homicide charge. He contended that there was evidence of other traffic offenses that the jury could have

found to be the cause of the accident and, therefore, the alternative charge was warranted. The Court stated that it was “constrained to agree.”

The Court stated that where there is some evidence — no matter how slight — that there could be another traffic violation that caused the accident, the defendant is entitled to a jury instruction on the lesser included offense of second degree vehicular homicide. And here, the evidence here showed that appellant tested positive for methamphetamine, amphetamine, and alprazolam after the accident. But, the testimony also showed that, at the time of the accident, appellant was traveling 74 miles per hour in a 65-mile-per-hour zone and that he had his foot on the brake. Additionally, there was evidence that the officer initially obtained arrest warrants for appellant after the crash for DUI, vehicular homicide, and following too closely. Thus, the Court held, because there was some testimony that appellant was speeding and following too closely at the time of the accident, the jury could have found these less culpable offenses caused the accident, rather than the DUI. As a result, the trial court erred in denying the requested jury instruction on the lesser included offense.

In so holding, the Court rejected the State’s argument that the error was harmless. However, because the evidence was sufficient to support the convictions, the State may retry appellant if it chooses.

Speed Detection Devices; Merger

Brown v. State, A19A0796 (9/12/19)

Appellant was convicted of two counts of speeding. The evidence showed that an officer observed appellant’s vehicle on I-285 travelling at a speed greater than the posted 65 MPH. The officer trained a laser speed detection device on the vehicle and obtained a reading of 95 miles per hour.

Appellant argued that the trial court should not have admitted the laser detection evidence without proof that the officer tested the laser device at the beginning and end of his “duty tour” as required by OCGA § 40-14-5. The Court disagreed. The Court stated that even assuming that this statute applies to laser detection devices, the State presented such proof in the form of the officer’s testimony during trial. Specifically, the officer testified that he tests the device at the beginning and end of each “duty tour” and keeps a log of this testing. While the logs were not introduced into evidence, nothing in the language of the statute or in Georgia’s case law requires this. OCGA § 40-14-5 (c) (1) provides that an officer’s log of testing the device “shall be admissible in any court proceeding for a violation issued pursuant to Code Section 40-14-18,” but does not dictate that only such a record can supply evidence meeting the requirements of OCGA § 40-14-5.

Nevertheless, the Court noted, it was required to consider whether counts merge for sentencing purposes even though appellant failed to raise the claim in the trial court, or to challenge the sentence on appeal. Based on the Court’s holding in *Frasard v. State*, 322 Ga. App. 468, 470 (2) (b) (2013), and the Supreme Court of Georgia’s recent holding in *Scott v. State*, S18G1644 (2019), the Court concluded that the trial court erred when it failed to merge the two speeding counts for sentencing purposes. It therefore vacated the trial court’s judgment of conviction and remanded for resentencing.

DUI; Roadblocks

Turner v. State, A19A1028 (9/12/19)

Appellant was convicted of DUI. He contended that the trial court erred in denying his motion to suppress. The Court disagreed.

The evidence showed that appellant was initially stopped at a roadblock that was authorized by Corporal Baxley of the GSP. However, because Baxley did not testify at the motion to suppress, appellant contended that the evidence failed to show that he authorized the checkpoint. But, the Court noted, appellant cited no authority for the proposition that the supervising officer must testify as to his status at such a hearing. On the contrary, a trial court is bound to consider all evidence concerning a document's admissibility, including that introduced over a hearsay objection, because such evidence is always admissible at such a hearing. And here, the approval form introduced into evidence at the hearing on appellant's motion to suppress, which was signed by Corporal Baxley, stated that he "serve[d] in a supervisory capacity and [was] authorized to direct and establish lawful roadblocks." The testifying trooper's testimony was to the same effect. The Court held that this evidence was sufficient to authorize the trial court to conclude that Corporal Baxley was authorized to set up the roadblock at issue. Also, in so holding, the Court noted that appellant cited no authority for his suggestion that Corporal Baxley was obligated to hold a briefing before implementing the roadblock.