Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JANUARY 3, 2020
Issue 1-20

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Search & Seizure; Curtilage

State v. Newsome, A19A1623 (10/24/19)

Newsome was charged with theft by receiving stolen property and numerous drug-related offenses after law enforcement found stolen property and evidence of a methamphetamine laboratory during a search of Newsome's apartment. The trial court granted Newsome's motion to suppress the evidence from the search, concluding that the information upon which the search warrants were based was obtained by an unlawful intrusion into the home's curtilage. The State appealed.

The facts, very briefly stated, showed that Investigator Mathews went to Newsome's apartment to do a "knock and talk" concerning the stolen property. Newsome's apartment is located on the second floor of a quadplex, a building which includes three other apartments. The front door of the apartment is accessible by walking through a common area. The back yard of the apartment is not connected to the front of the apartment by a sidewalk or driveway, and is accessible only by walking through the grass. Newsome's rear door is located on a second-floor deck, which is surrounded by railing, and separated from the adjacent apartment by a wooden privacy partition. The deck can be reached by climbing a flight of stairs which leads to Newsome's apartment only.

When the investigator did not receive a response after knocking on the front door. He went around to the back door. The rear doors are made of glass and by looking inside, the investigator could see what he believed was some of the stolen property. He took a picture through the glass door, confirmed with the victim that the property looked like the victim's and then obtained a search warrant based on this information.

The State did not contest that the back door and deck areas of Newsome's apartment are part of the home's curtilage. And the State did not disputed that Mathews did not have a search warrant when he approached Newsome's residence. Rather, the State contended that Mathews was lawfully on the back deck (as a prerequisite to his plain view observation of the stolen tools) as part of his knock and talk investigation after receiving no response at the front door. Therefore, the State argued, the trial court erred in granting Newsome's motion to suppress. The Court disagreed.

Police may approach a side or rear door of a residence under certain circumstances, such as where access to the front door is blocked, or where the finder of fact could have concluded that the rear door was used as a public means of access. And

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here, the Court found, the record supported the trial court's conclusion that Mathews did not have an implied license to enter the back deck area. There was no evidence that the front door was inaccessible, or that Newsome treated the back door as a public entryway. Nor was there evidence that the back door and deck area were visible or in plain view from the street or from anywhere the officers were authorized to be upon arriving at the home. The absence of a fence enclosing Newsome's yard was not conclusive, particularly since he rented the property, and his lack of exclusive control over the land did not eliminate his expectation of privacy. The back door and deck area are surrounded by railing, and a wooden privacy partition separates Newsome's deck from the adjacent property. The back deck and door were not visible from the street in front of the house, and there was no sidewalk or driveway connecting the front and back of the apartment. The only means of access to and egress from the second-story rear door was via a staircase leading only to Newsome's apartment. Under these circumstances, the Court held, the trial court did not err in concluding that Newsome had a reasonable expectation of privacy in the back door of his residence.

Additionally, the Court stated, the trial court's conclusion that the officer's approach to the rear door, after receiving no response at the front door, was unreasonable given the small size of the apartment and the lack of evidence that it was occupied at the time Mathews attempted to question Newsome, was not clearly erroneous. Therefore, the trial court was authorized to conclude that the officer was not entitled to enter the curtilage in the manner in which he did, and that he was not in a place that he was authorized to be when he viewed the stolen tools. Accordingly, the trial court did not err in granting Newsome's motion to suppress.

Obstruction; Conservation Rangers

Thornton v. State, A19A1237 (10/25/19)

Appellant was convicted of felony and misdemeanor obstruction and driving without a license. The evidence, briefly stated, showed that a Georgia Department of Natural Resources conservation ranger stopped at a convenience store to fill up his work truck with gas. His work truck was a gray F-150 pickup, four wheel drive, marked on the side with the words "Georgia Department of Natural Resources, Wildlife Resource Division" in large block lettering, along with an "outline of the State of Georgia" and a seal. While it had blue lights "in the tail lights and inside the cab," they were concealed, rather than being located on the top of the vehicle. The ranger was wearing a long-sleeve polo shirt with an embroidered badge stating "State of Georgia," green pants, black boots, and a clip-on badge on his duty belt. His duty belt included pepper spray, a baton, handcuffs, and a firearm.

When he got out of his truck to fill up his truck with gas, he heard "extremely loud music" coming from a black Honda parked at the pump adjacent to him. The ranger described the music as "very loud, it had a definite thumping, you know, whomp, whomp, whomp, you know, like rattling the car, maybe the speakers were rattling." The lyrics were profane and included the words "dick," "asses," and "pussy." The ranger approached appellant, who was standing outside his car, identified himself and asked appellant to turn down the music. Appellant refused. The ranger asked a few more times, and appellant got belligerent.

The ranger then "instructed" appellant to remain outside the car, explaining that he did so "from a personal safety standpoint" because he "did not know if he had a knife or gun in the vehicle." The ranger then walked to his truck to retrieve his radio to call for police backup and to explain the city noise ordinance. When he turned to look, appellant "had

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gotten in the car," and as the ranger approached appellant's car, "the music appeared to get louder." The ranger asked appellant to step out of the vehicle. Appellant replied that he was not going back to jail. The ranger asked for identification. Appellant flipped open and closed his wallet. When the ranger reached inside appellant's vehicle to take the wallet, appellant closed the window, and started driving away, dragging the ranger. The ranger, while ordering appellant to stop his vehicle, was able to free his arm and appellant drove off. Appellant was arrested by a city police officer shortly thereafter.

Appellant contended that insufficient evidence supported his obstruction convictions because the State failed to prove that the ranger was in the lawful discharge of his official duties. Specifically, he contended that the ranger's conduct fell outside the scope of his duties with the Department of Natural Resources, as outlined in OCGA §§ 27-1-16; 27-1-18; 27-1-19; and 27-1-20. The Court disagreed.

The Court noted that OCGA § 40-13-30 provides as follows: "Officers of the Georgia State Patrol and any other officer of this state or of any county or municipality thereof having authority to arrest for a criminal offense of the grade of misdemeanor shall have authority to prefer charges and bring offenders to trial under this article." OCGA § 40-13-30 provides authority for officers, other than a municipal officer, to enforce traffic offenses outside of their ordinary jurisdiction. Thus, the Court found, since Department of Natural Resources conservation rangers have authority to arrest for misdemeanor criminal offenses, and the ranger was authorized to enforce traffic offenses under Title 40, the State presented sufficient evidence that the ranger was acting within the lawful discharge of his official duties when he asked appellant to turn down the music. Likewise, a reasonable jury could conclude that the order for appellant to provide identification and remain outside of his vehicle for the ranger's safety were also lawful commands. Finally, the trier of fact could also find from the evidence that the ranger's order for appellant to stop the vehicle was also within the lawful discharge of his official duties. Accordingly, the Court found no merit in appellant's claim that the State presented insufficient evidence that the ranger was acting within the lawful discharge of his official duties.

Bad Character Evidence; Rule 404 (b)

Holt v. State, A19A0814 (10/25/19)

Appellant was convicted of armed robbery, aggravated battery, and possession of a firearm during the commission of a felony. The evidence showed that after appellant and the victim met, appellant stated that he had no place to live, so the victim let appellant move into his apartment with him. The two did drugs together. A few weeks later, appellant armed-robbed the victim in the victim's apartment. At trial, appellant claimed the victim attacked him, he shot the victim in self-defense, and that he took no money from the victim.

Appellant contended that the trial court erred by allowing evidence of appellant's bad character over his objection. The record showed that at trial, the State introduced evidence of an unsent text message on appellant's cell phone, dated eight days before the robbery, which was construed at trial as an attempt to defraud an apartment complex. The message stated the following: "Okay look. Dis da move. Ima get a two bedroom. Me u tyesha johnny. It's gone take to[o] long time to get apt in [the victim's apartment complex]. I'm just gone try Venetian. *Just gotta buy check stubs*. Tomorrow tell Johnny have the whip. Y'all two coming with me to pick that up. First thing first, WE are going shopping. . . ." (Emphasis supplied.) Appellant objected to the evidence on the grounds that the whole message was not relevant and that the emphasized sentence amounted to improper character evidence in that it suggested that appellant would use fraud to apply

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for an apartment. The court allowed the evidence on the ground that it corroborated that appellant was looking for an apartment.

The Court held that because appellant did not testify as to his own character; the character trait was not an essential element of a charge, claim, or defense; and the text introduced a specific bad act, possible fraud, the evidence was not allowed under Rule 404 (a) and (b).

Furthermore, the Court held, the trial court erred by holding that the evidence was intrinsic to the alleged crimes. Evidence is intrinsic to the charged offense if it (1) arose out of the same transaction or series of transactions as the charged offense; (2) is necessary to complete the story of the crime; or (3) is inextricably intertwined with the evidence regarding the charged offense. But the fact that appellant may have attempted to defraud an apartment complex a week earlier did not arise out of the same transaction as his robbery of the victim, nor was it necessary to complete the story of the crime or inextricably intertwined with the evidence of the crime. And the check-stub information could have been redacted from the text message before it was introduced into evidence.

Next, the Court addressed whether the evidence prejudiced appellant's case. The Court found that it did. First, the record showed that the State strongly attacked appellant's character in its closing, in large part by arguing that appellant had to "buy a paystub to apply to an apartment complex" In addition, the case presented to the jury amounted to a credibility contest. Appellant and the victim testified to much of the same basic circumstances, with the material variations being who started the altercation that led to the shooting, whether the victim had any cash, and whether appellant took it. The physical evidence somewhat supported the victim's story that appellant dragged him around the apartment after the shooting, leaving multiple bloodstains. But a neighbor testified that the shooting followed, rather than preceded, the argument between the two men. Further, the victim admitted that he stayed up all night smoking crack cocaine and was "high, high, high" at the time of the incident and "kind of out of his mind." The victim also admitted that he had used an alias; that he had a past cocaine habit, which he had apparently recently resumed; that he had ceased going to work very recently; and that he had not paid his October rent bill on time. The victim also contradicted himself on several elements of the encounter, including on how much money was in his pocket. Finally, appellant was only 5'6" and 105 lbs, at the time, and the victim was about 5' 11" and 190-200 lbs, suggesting that the victim could have attempted to overpower appellant.

Therefore, the Court concluded, it could not say that it was highly probable that the error did not contribute to the verdict. Accordingly, appellant's conviction was reversed. But, because the evidence was sufficient to sustain the verdict, appellant may be retried.

Ineffective Assistance of Counsel; Appellate Counsel

Bradshaw v. State, A19A0983 (10/28/19)

Appellant entered a non-negotiated *Alford* plea to aggravated child molestation and a non-negotiated guilty plea to child molestation and possession of drug-related objects. After he was sentenced, appellant contacted his plea counsel to file a motion to withdraw his plea. Plea counsel testified at the motion hearing that appellant accused her of being "involved with all the controversy going on with the sheriff…" According to plea counsel, appellant had indicated a lot of concern

about the sheriff's office being corrupt and about setting him up. First appellate counsel did not investigate the issue of sheriff's office corruption further or add any information about the Sheriff apparently eavesdropping on attorney-client meetings into the record.

Appellant contended that he received ineffective assistance of first appellate counsel, who failed to make a record regarding the effect, if any, of the local law enforcement eavesdropping and recording of Appellant's conversations with his plea counsel.

The Court noted that, as the State conceded, this case was affected by the sheriff's department actions of eavesdropping on jailed defendants while those defendants were speaking with counsel. Although it was unclear how much of this information was known by plea counsel or first appellate counsel, it was clear that first appellate counsel failed to develop the record to determine whether appellant was recorded illegally and if those recordings had any effect on the district attorney's prosecution of, or negotiations with, appellant. Based on this unusual circumstance and in an abundance of caution, therefore, the Court vacated the trial court's denial of appellant's motion and remanded the case to the trial court in order to develop the record regarding his claim of first appellate counsel's ineffectiveness, after which appellant may appeal any denial of that motion.

Sufficiency of the Evidence; Child Molestation

Butler v. State, A19A1056 (10/28/19)

Appellant was convicted of incest, child molestation, and statutory rape against his 14 year old stepdaughter. He contended that the evidence was insufficient to support his child molestation conviction. The Court agreed.

The child molestation count pertinently alleged that appellant "…did commit an immoral and indecent act to [S. W.], a child under the age of 16 years, with the intent to arouse and satisfy the sexual desires of himself *by using his hands to grab victim's buttocks and by using his hands to rub said victim's vagina and buttocks*." As to this count, the victim testified that appellant inserted his penis into her, stated that it "was just penis sex" and specifically denied appellant inserted his fingers in her or licked her vagina. Thus, the Court found, nothing in the victim's testimony authorized the jury to convict him on the child molestation count.

Nevertheless, the State argued, it proved that appellant used his hands to molest the victim as alleged in the count through testimony given by the police investigator. But, the Court found, the transcript confirmed that the prosecutor elicited no testimony from the investigator as to the evidentiary basis for the child molestation count. Furthermore, while the transcript showed that the three police investigator's interviews of the victim were recorded, no such recording was presented to the jury. Notably, at one point during the presentment of evidence, the court specifically asked the lawyers whether any recording of the victim's interviews would be presented to the jury; the prosecutor answered no. Consequently, the Court stated, the State's assertion was unavailing.

Next, the State argued that that the jury was authorized to infer that "sex is commonly preceded by foreplay and conclude that [appellant] grabbed the victim's butt and fondle[d] her genitals…" However, the Court stated, it does not engage in conjecture or speculation, and does not consider possibilities or inferences based on conjecture or speculation. Moreover,

it is well settled in Georgia that averments in an indictment as to the specific manner in which a crime was committed are not mere surplusage, and such averments must be proved as stated, or the failure to prove the same will amount to a fatal variance and a violation of the defendant's right to due process of law. Thus, the Court concluded, because the evidence fell short of authorizing any rational trier of fact to find beyond a reasonable doubt essential elements of the contested count of child molestation, the Court reversed the conviction.

Statute of Limitations; Tolling Provisions

Batten v. State, A19A0997 (10/29/19)

Appellant was arrested on November 19, 2011 for offenses occurring the previous day. The State indicted appellant on September 29, 2015. However, because of an unqualified grand juror, the State nolle prossed the indictment and re-indicted him on the same charges on January 29, 2016. Although the second indictment was filed outside the statute of limitations period, the State alleged that the first indictment was filed before the statute of limitation expired, and pursuant to OCGA § 17-3-1, the nolle prosequi of the original indictment extended the limitation period for six months. Appellant unsuccessfully challenged the second indictment.

Appellant, relying on *State v. Dempsey*, 290 Ga. 763, 764 (1 (2012) and *Crawford v. Crow*, 114 Ga. 282, 284, (40 SE 286) (1901), argued that the incompetency of the grand juror sitting on the first indictment rendered the indictment void and thus, there was no tolling of the statute of limitations by the first indictment and the second indictment was therefore outside the statute of limitations. The Court disagreed. The Court found that the rule described in *Dempsey* was superceded by statute to the extent that a grand juror's incompetency is based on OCGA § 15-12-60 (c). The Court found that OCGA § 15-12-60 (d) provides that "[i]f an indictment is returned, and a grand juror was ineligible to serve as a grand juror pursuant to subsection (c) of this Code section, such indictment shall not be quashed solely as a result of such ineligibility." Thus, the Court stated, a determination by this Court that the participation of an ineligible grand juror, as defined by subsection (c) of the code section, renders an indictment void would be logically inconsistent with the purpose and language of OCGA § 15-12-60 (d).

Nevertheless, appellant contended, OCGA § 15-12-60 (d) did not apply to this case because it became effective July 2015, which was after the offenses were alleged to have occurred, and would therefore have to be applied retroactively. However, the Court stated, the crucial date is the date the original indictment was filed, not the date of the offenses. Therefore, because OCGA § 15-12-60 (d) took effect before appellant's first indictment was issued on September 29, 2015, applying the statute to appellant's case would not be retroactive.