Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JANUARY 10, 2020
Issue 2-20

THIS WEEK:

- **Search & Seizure; Motels and Hotels**
- **Indictments; Merger**
- **Jury Rule; *Ricks***
- **Conditional Discharge Statute; Perjury**
- **Double Jeopardy; Crimes Spanning Multiple Counties**
- **Cell Phone Recordings; OCGA § 16-11-62**

Search & Seizure; Motels and Hotels

Lindsey v. State, A19A1123 (10/29/19)

Appellant was convicted of possession of methamphetamine with intent to distribute, possession of less than one ounce of marijuana, two counts of possession of a firearm during the commission of a felony, and three counts of possession of drug related objects. The evidence, briefly stated, showed that appellant had an outstanding arrest warrant and officers received information that he was with a woman named "Raeanna Higginbotham" in Room 201 of a certain motel. A motel clerk confirmed that Higginbotham had rented Room 201. According to the clerk, the appellant was in Room 201 with Higginbotham, and, because Higginbotham had not renewed the room rental for another night, they both had to be out of the room by 11:00 a.m. that day. The clerk stated that the motel's normal protocol was "to give the room occupants [until] the allotted time, which is eleven a.m., to either come check out or call and re-[rent] the room for another night." Then, if the occupants had not contacted the motel's clerk or rented the room for another night by 11:00 a.m., the staff would go up to the room and check to see if the occupants were still in the room.

When 11:00 a.m. came, and neither Higginbotham nor appellant had contacted the clerk or rented the room for another night, a motel employee, accompanied by law enforcement officers, went to Room 201. Higginbotham opened the door and law enforcement could see appellant. When Higginbotham attempted to close the door, the officers pushed their way in. Drugs were seen in plain view. A search warrant was secured and after the search, appellant was arrested.

Appellant contended that the trial court erred in denying his motion to suppress. Specifically, he contended because he had stayed in Room 201 overnight, he had a reasonable expectation of privacy that was violated when the officers illegally entered the room without a warrant, probable cause, or consent. The Court disagreed.

The Court noted that OCGA § 43-21-1 (1) defines the term "guest" as "a person who pays a fee to the keeper of an inn for the purpose of entertainment at that inn." And here, the motel's registration form that showed Higginbotham's payment for Room 201 stated, in bold text near her signature, "Check-in time: 3:00 PM" and "Check-out time: 11:00 AM[.]" Thus, pretermitting whether appellant was ever a "guest" of the motel under OCGA § 43-21-1 (1), under the plain terms of the registration contract, neither appellant nor Higginbotham was a "guest" after 11:00 a.m. due to their failure to pay for another night's stay. At that point, control over Room 201 reverted back to the motel, and the motel was within its rights to evict appellant and Higginbotham from Room 201 without notice. Thus, the Court found, appellant had no legal possession or control of Room 201 after 11:00

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a.m. so any expectation of privacy he may have claimed prior to that time had terminated and he had no standing to contest the officers' entry into and search of the room. Accordingly, the Court concluded, the trial court did not err in denying appellant's motion to suppress.

Indictments; Merger

Thomas v. State, A19A1195 (10/29/19)

Appellant was convicted of two counts of possession of a firearm by a first offender probationer. The Court sentenced appellant to five years on each count, to run consecutively. Appellant contended that the two counts should have merged for sentencing purposes. The Court agreed.

The record showed that in Counts 5 and 7, the State charged appellant with two instances of the same crime using identical language except for the date. In Count 5, appellant was charged with "the offense of POSSESSION OF FIREARM BY FIRST OFFENDER PROBATIONER in violation of O.C.G.A. 16-11-131(b) for the said accused person, … **on or about the 3rd day of March, 2016**, did knowingly and without lawful authority, possess a handgun, a firearm; while on probation as a felony first offender…." (Emphasis in original.) In Count 7, appellant was charged with the identical language and emphasis, with the only change being that the date was alleged as "**on or about the 5th day of March, 2016**." (Emphasis in original). The facts showed that on March 3rd, appellant had in his possession a handgun and that on March 5th, he had in his possession a revolver.

At trial, the jury sent a note to the court, which the court described as follows: "Please confirm this is correct: Charge 5, possession of firearm by F.O.P. due to handgun." (Emphasis in original). "Charge 7, possession of firearm by F.O.P. due to revolver." (Emphasis in original). When asked to clarify the question, the jury responded, "What is the difference between charge 5 and 7?" The court eventually replied to the jury, "the dates of the alleged offenses."

The Court stated that it is a long-standing principle of Georgia law that a date or range of dates alleged in an indictment, without more, is not a material allegation of the indictment, and, consequently, unless the indictment specifically states that the alleged dates are material, the State may prove that the alleged crime was committed on any date within the statute of limitations. To make such dates a material allegation, the indictment must specifically allege that the date of the offense is material. Accordingly, if the counts in the indictment are identical except for the dates alleged, and the dates were not made essential averments, only one conviction can stand.

And here the Court found, Counts 5 and 7 were identical except for the date, which was not alleged to be material. Nothing in the two charges particularized the two dates, such as by alleging that the guns or locations were different on each occasion, or that the guns were found in different places. Thus, the State was authorized to prove either count based on any incident occurring within the statute of limitations. And nothing in the court's jury instructions informed the jury that the dates should be treated as material. Moreover, the day of each crime was alleged as being "on or about" the specified dates, which were only two days apart. And the court's answer to the jury's question that the difference between the two counts was simply "the dates of the alleged offenses" said nothing more than the indictments themselves; the answer also failed to instruct the jury to ignore the "on or about" language and require proof of the crimes on the specific dates alleged. Thus, based on the indictments as alleged and the jury instructions, the jury could have found appellant guilty of both Counts 5 and 7 based on the facts related to either incident alone. Accordingly, the Court concluded that the trial court erred by not merging Counts 5 and 7 and remanded to vacate one of the sentences on the two counts.

Nevertheless, in so holding, the Court noted that there is a line of contrary authority beginning with *Hamilton v. State*, 167 Ga. App. 370, 371 (1983) continuing with *Salley v. State*, 199 Ga. App. 358, 362 (4) (1991), and *Byrd v. State*, 344 Ga. App. 780, 788 (3) (2018). The Court overruled them. It also overruled *Williams v. State*, 130 Ga. App. 418 (1) (1973), which apparently has similar language concerning dates being material allegations.

Jury Rule; *Ricks*

Cooper v. State, A19A1289 (10/30/19)

Appellant was convicted of trafficking a controlled substance. Citing *Ricks v. State*, 301 Ga. 171, 173-174 (1) (2017), he argued that the trial court erred in denying his challenge to the county's method of jury selection. Specifically, appellant contended that the county failed to comply with the Georgia Supreme Court's Jury Composition Rule (the "Jury Rule") in the following three ways: (1) the clerk/vendor made no effort to check the addresses for undeliverable returned summonses; (2) the clerk improperly removed jurors from the venire; and (3) the vendor/clerk operated under an outdated local order.

As to the contention that the county violated the Jury Rule by not making more of an effort to find the correct address for those summonses that are returned as undeliverable, the Court noted that appellant failed to identify what effort the Jury Rule requires on the part of a county clerk when a summons is returned as undeliverable. Section 5 (h) of the Jury Rule provides that "[a] clerk may subject the county master list, or lists of jurors selected for summoning, to processing performed by an authorized United States Postal Service ("USPS") National Change of Address ("NCOA") service provider." However, there is no requirement that the county clerk do so or that failure to do so is tantamount to a violation of the Jury Rule.

The Court found that at the evidentiary hearing, the county clerk testified that after he receives the list of undeliverable summonses from the vendor, Bennett, he takes those names off the list for that trial week only and keeps a record of them in his office. Even though he stated that he had not submitted the names of the undeliverable summonses as part of the county exemption list to Bennett as of the date of the hearing, the Jury Rule does not specify a time frame for which this task must be done. Although *Ricks* states that the county may inactivate names on the annual county master jury list based on actual summons mail that is returned as undeliverable, where reasonable subsequent efforts fail to reveal a correct address, neither the Supreme Court nor the Jury Rule explain what effort the county must expend to reveal a correct address. Thus, the Court found, aside from submitting those names in the county exception list to the Council, it does not appear the Jury Rule requires additional action. Accordingly, the Court found no error.

Next, the Court found that appellant's contention that the county clerk improperly removed jurors from the venire was belied by the record. At the evidentiary hearing, Bennett testified that jurors are temporarily inactivated from the master jury list when jury services notifies his company that the juror is a felon, has moved out of the county, the summons was returned undeliverable, the juror files an over 70 affidavit, the juror is a student, or the juror has an illness that will prevent jury service. Inactivated jurors are not deleted from the master jury list, but their information is provided to the Council who then determines the status of the juror. Bennett testified that all of the county's temporary inactivations were based on exemptions allowable under OCGA § 15-12-1.1. The Court found that unlike *Ricks*, where the vendor would inactivate names based on its submission of addresses to the National Change of Address database without following the specific protocol outlined in the Jury Rule, here the process of inactivating names from the jury lists complied with the guidelines expressed in the rule. Thus, there was no error.

Finally, appellant argued that the county failed to comply with the Jury Rule because it operated under an outdated local order. The Court disagreed. At the evidentiary hearing, Bennett testified that the county's procedures for maintaining its master jury

list were in full compliance with the Jury Rule, and that prior to the Jury Rule's existence, the procedures the county used as early as the year 2000 were compliant with the current Rule. Bennett stated that the local order the county operated under did not change the county's procedures that were being used prior to the local order issued in June 2017, and that the June 2017 local order only clarified the county's procedures following the *Ricks* case, because there "became a need in the counties to put it in writing and clarify, you know, what we're doing. [The local order] didn't change anything that we were doing, you know, prior to that. … That [local order] was more of a clarification order than anything else." Accordingly, the Court again found no error.

Conditional Discharge Statute; Perjury

Whipkey v. State, A19A0897 (10/30/19)

In 2010, appellant pled guilty to charges (a theft and three counts of VGCSA) under the Conditional Discharge Statute, OCGA § 16-13-2. During the plea hearing, appellant testified under oath that he had never pled guilty to a drug offense. The court sentence appellant to three years of probation and on March 20, 2014, entered an order of discharge after appellant completed his probation.

However, in September, 2014, the State filed a motion seeking to have appellant's discharge set aside and to have appellant adjudicated guilty of the previously charged crimes. The State contended that appellant was not eligible for discharge under OCGA § 16-13-2 because he previously had been convicted of drug possession and his testimony to the contrary at the plea hearing constituted perjury. The court found that because appellant had not been eligible for conditional discharge under OCGA § 16-13-2, his discharge was analogous to a void sentence and therefore could be set aside outside the term of court in which it was entered.

Appellant contended that the trial court erred in setting aside his discharge. The Court agreed. As a general rule, a trial court lacks jurisdiction to modify any judgment — including a defendant's sentence — outside the term of court in which that judgment was entered. However, the State argued, under OCGA § 17-9-4, a sentencing court retains jurisdiction to correct a void sentence at any time.

The Court found the State's argument flawed for several reasons. First, the rule that a void sentence can be corrected at any time has been applied only where a defendant is still serving the sentence in question — i.e., while the defendant is still subject to the jurisdiction of the trial court. The Court found no law to support the proposition that the State is authorized to seek modification of an allegedly void sentence after the defendant has satisfied the terms of his probation and been discharged. Second, the Court noted that the State provided no cogent argument for why the post-discharge modification of a sentence would not violate the Double Jeopardy Clause of the United States and Georgia Constitutions.

Furthermore, the Court found, the trial court's reasoning failed to acknowledge or apply the relevant statutory language. The unambiguous language makes clear that only one of two things can happen to a defendant being adjudicated under the statute: that person is either exonerated of guilt and stands discharged as a matter of law upon completion of the term of probation … or is adjudicated guilty in a petition *filed prior to the expiration of the probationary term*. Accordingly, under either the First Offender or the Conditional Discharge Statute, unless the defendant's probation is revoked while he is serving that probation, there can be no conviction and, therefore, there can be no sentence.

Accordingly, the Court held, given that there can be no conviction or sentence under OCGA § 16-13-2 in the absence of a probation revocation, the order of discharge was not a sentencing order and it was not subject to modification as such. Instead,

it was an order discharging appellant from probation and dismissing the case against him. Thus, the trial court was without jurisdiction to set aside the discharge order under the guise of sentence modification, and it erred in finding to the contrary.

Nevertheless, the Court stated, because the State asserted that the discharge order resulted from perjury, the trial court had jurisdiction to decide the State's motion. Under OCGA § 17-1-4, "[a]ny judgment, verdict, rule, or order of court which may have been obtained or entered shall be set aside and be of no effect if it appears that the same was entered in consequence of corrupt and willful perjury." To be entitled to have an order or judgment set aside under this statute, however, the party seeking relief must show that the person providing the perjured testimony has been convicted of perjury as a result of his testimony. OCGA § 17-1-4. Here, however, the Court found that the State came forward with no evidence showing that it had convicted appellant of perjury as a result of his testimony at the plea hearing. Accordingly, the Court concluded that the trial court erred when it granted the State's motion to set aside the discharge order.

Double Jeopardy; Crimes Spanning Multiple Counties

Arnold v. State, A19A1227 (10/30/19)

Appellant was indicted in May 2016 in Clayton County for the July 3, 2015 attempted rape, kidnapping, false imprisonment, aggravated assault, and family violence battery against the victim. The offenses allegedly occurred while the victim was in a moving car between Fulton County and Clayton County. Appellant entered a negotiated plea agreement in October 2016 and pleaded guilty to family violence battery, disorderly conduct (reduced from false imprisonment), and family violence simple assault (reduced from aggravated assault). The State nolle prossed the attempted rape and kidnapping charges and the trial court imposed a total sentence of 3 years on probation. Subsequently, on June 23, 2017, a Fulton County grand jury indicted appellant for kidnapping, attempted rape, and false imprisonment based on acts appellant allegedly committed against the same victim in Fulton County also on July 3, 2015. Appellant filed a plea in bar and motion to dismiss the Fulton County charges on the grounds that they are barred by the constitutional prohibitions on double jeopardy and OCGA § 16-1-8, claiming the charges in the Clayton County case were based on the same material facts. The trial court denied the motion.

Appellant contended that the trial court erred in denying his plea in bar and motion to dismiss based on double jeopardy where the same charges, arising out of the same incident, were nolle prossed by a court of the same state as part of a plea agreement. The Court stated that the contention conflated two distinct theories of law: double jeopardy as a bar to subsequent prosecution and a negotiated plea agreement as a bar to subsequent prosecution.

As to double jeopardy, the Court found that appellant's prosecution for kidnapping was not barred by double jeopardy because there had been no conviction or acquittal in the former prosecution of that charge. In so holding, the Court found that the trial court's reasoning of the right of Fulton County, as a separate sovereign from Clayton County, allowed the prosecution. The Court held that two counties prosecuting crimes in the same state are not "separate sovereigns." Prosecutions of the same defendant in different counties of the same state must be viewed as acts of a single sovereign under the Double Jeopardy Clause. Therefore, the State as one sovereign may not circumvent the clear rule barring it from proceeding in one county by simply reindicting a defendant in another.

Nevertheless, the Court found, while the State was not barred from reindicting appellant on statutory double jeopardy grounds, it was barred from reindicting appellant based on its prior agreement with him. It is well established in Georgia that the end result of a negotiated plea agreement is, in essence, a contract between a defendant and the State. As such, in many circumstances it is appropriate to view the final negotiated plea agreement as a package deal, the terms of which should not be treated in isolation

from one another but rather as a cohesive whole. This principle is rendered meaningless if the State may circumvent any such prohibition by reindicting appellant for kidnapping and false imprisonment in Fulton County simply because, on the current factual posture of this case, that charge apparently could have been brought in either county.

Furthermore, the Court found that the trial court erred in determining that the prosecution for false imprisonment in Fulton County was "distinct" from those crimes to which appellant pled in Clayton County so as not to be barred by OCGA § 16-1-7. The Court found that the false imprisonment charge came about as a result of the initial kidnapping of the victim from the parking lot of a business located in Fulton County. By crossing the county line into Clayton County, a new crime was not committed against the victim, but was a continuation of a crime that had begun in Fulton County. Accordingly, the Court concluded that the Fulton County prosecution for kidnapping and false imprisonment was barred by the State's agreement with the accused to enter a nolle prosequi of the charges against him in exchange for his agreement to plead guilty to other charges.

Cell Phone Recordings; OCGA § 16-11-62

Weintraub v. State, A19A1284 (10/31/19)

Appellant was charged with a single count of family violence-simple battery of his wife. The relevant evidence, very briefly stated, showed that Kenneth Jeter was temporarily staying with Weintraub and the victim, appellant's pregnant wife, in the Weintraubs' two-bedroom apartment. Jeter had been staying with the Weintraubs for the three weeks leading up to the incident at issue while he looked for a place of his own. During this period, Jeter slept at the residence nightly and kept the belongings he "had on [him]" there, including bags of clothing, toiletries, and other possessions that he kept by the couch. Jeter was not named on the lease for the Weintraub apartment, did not pay rent or utilities, did not receive his mail there, and did not have any furniture in the home. Jeter did not have his own room; rather, he slept on the couch in the living room.

On the night in question, Jeter was sitting on the couch in the living room and texting with his girlfriend on his cell phone. Weintraub and his wife, who were also in the living room, began arguing. At some point, Jeter decided to record portions of the argument between the Weintraubs. Jeter called 911 later that night to report that the victim appeared to be experiencing labor pains. He then called the police the following morning and met with them to show them the videos he had captured on the cell phone.

Appellant filed a motion in limine to preclude the State from tendering a cell phone recording of the dispute he had with his pregnant wife, arguing that the recording was inadmissible under OCGA § 16-11-62, Georgia's Eavesdropping Statute. The trial court denied the motion, but granted an interlocutory appeal which the Court accepted.

The Court noted that the admissibility of a cell phone recording pursuant to OCGA § 16-11-62 appears to be one of first impression in Georgia. Under OCGA § 16-11-62 (1), it is unlawful for "[a]ny person in a clandestine manner intentionally to overhear, transmit, or record or attempt to overhear, transmit, or record the private conversation of another which shall originate in any private place[.]" Next, with respect to video recordings, OCGA § 16-11-62 (2) precludes persons from observing, photographing, or recording "the activities of another which occur in any private place and out of public view[.]" There are four exceptions to the prohibition under OCGA § 16-11-62 (2), including recordings made: (1) in a correctional facility; (2) by the owner or occupier of real property for security purposes and crime prevention; (3) within the curtilage of a residence of the person using such device for security or crime prevention purposes; and (4) by law enforcement in the performance of official duty. See OCGA § 16-11-62 (2) (A)-(D).

The Court stated that its analysis of the admissibility of both the audio and video portions of the cell phone recording necessarily begins with a determination of whether the recording occurred "in a private place." But here, the trial court failed to make specific findings addressing whether Jeter's recording of the Weintraubs on his cell phone took place in a "private place" with respect to both the audio and video portions of the recording. First, as to the audio recording, the trial court rested its conclusion solely on whether Jeter's recording was done "in a clandestine manner" under OCGA § 16-11-62 (1), without first addressing whether the recording occurred in a "private place." Similarly, the trial court jumped to whether the video portion of the recording fell within an exception listed in OCGA § 16-11-62 (2) (A)-(D) without first analyzing the threshold issue of whether the recording took place in a "private place." Thus, the Court remanded the case back to the trial court for findings of fact regarding this issue.

Nevertheless, the Court also took issue with the trial court's finding that the recording with an exposed smartphone (known to be capable of recording, among numerous other functions) does not constitute recording "in a clandestine manner." The Court noted that it was undisputed that Jeter's smartphone itself, as the trial court concluded, was viewable and not clandestine. However, the statute does not hinge upon whether the recording device was clandestine, but rather whether the "record[ing]" was done "in a clandestine manner." OCGA § 16-11-62 (1). For instance, under the facts of this case, could Jeter's act in switching from texting with his girlfriend to recording the couple's interaction on his smartphone be considered "clandestine?" Thus, the Court stated, on remand, if necessary to address this issue, the trial court should consider whether any of the facts of this case, including Jeter's act of switching modes on his cell phone while holding his phone as if he were still texting, is of significance with respect to whether the recording was done in "a clandestine manner." If the court needs supplemental evidence to determine these issues, it may hold another hearing.