

THIS WEEK:

- Rule 404 (b); Rule 403
- Competency to Stand Trial; OCGA § 17-7-130
- Possession of Drug-Related Objects; Sufficiency of the Evidence
- Search & Seizure; Theft by Receiving
- Constitutional Right to Speedy Trial
- Cross-Examination; Rule 621
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- Search & Seizure; *Terry* Stops
- Homeless Sexual Offenders; Sufficiency of the Evidence
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Rule 404 (b); Rule 403

Arrington v. State, A18A0829 (6/4/20)

Appellant was convicted of armed robbery, aggravated assault, kidnapping with bodily injury, and possession of a firearm by a convicted felon. The Court affirmed his conviction, finding in relevant part, that the trial court did not abuse its discretion in admitting the other acts evidence under OCGA § 24-4-404 (b) ("Rule 404 (b)"). *Arrington v. State*, 347 Ga. App. 750, 754 (2019) (physical precedent only). The Supreme Court vacated the decision, and remanded the case for reconsideration in light of its subsequent decision in *Jackson v. State*, 306 Ga. 69, 74-81 (2) (2019).

Appellant conceded that the evidence of his prior convictions was relevant to the issue of intent under the first prong of the test, and he did not challenge that the State established that he committed the prior crimes under the third prong. Rather, appellant argued that the State failed to prove the second prong of the test-- that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice under Rule 403. The Court agreed.

The Court stated that elements to be considered in determining the probative value of the other act evidence offered to prove intent include its overall similarity to the charged crime, the prosecutorial need for it, and its temporal remoteness. Here, as in *Jackson*, the State addressed the similarity factor by generally pointing out that, in both prior acts and the charged offense, appellant used either a gun or what appeared to be a gun to take money from the victim. However, and again, not unlike in *Jackson*, the State failed to acknowledge the differences between the prior acts and the charged offense--differences which significantly diminish the probative value of the extrinsic evidence. Both of appellant's prior armed robberies were crimes involving very little, if any, planning, and were committed by appellant, acting alone. In contrast, the evidence in the instant case showed that the charged offense involved at least two perpetrators who committed the crime after a certain degree of planning with apparent inside information. The only similarities between the prior acts and

the current offense was the use of a handgun to take money, whereas the marked dissimilarities diminish the probative value of the extrinsic evidence

Furthermore, the court found, the probative value of this evidence was further diminished by the lack of prosecutorial need for it. Appellant conceded that intent was not at issue in this case, and thus any evidence of intent was minimal. The current case does not present a situation where appellant either was present at the crime but claims that he did not participate, or that the other perpetrators lacked intention to commit the crime. Rather, appellant contended he simply was not one of the perpetrators. In this regard, the prosecutorial need for the other acts evidence, as in *Jackson*, was low as to the purpose of showing any of the elements for which it was offered and admitted-- motive, opportunity, intent, knowledge, modus operandi, and absence of mistake.

Moreover, consideration of the temporal remoteness of the prior convictions likewise weighed against their admission. The Court found that because the convictions occurred some 23 years prior, their admission appeared to be solely for the purpose to show appellant's propensity for committing such crimes. Accordingly, the Court concluded that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice under Rule 403.

Nevertheless, the Stated contended, the admission of the other acts evidence was harmless error. The Court again disagreed.

As appellant argued, the evidence against him was not overwhelming and was entirely circumstantial. There was no direct evidence placing appellant at the scene of the crime. No eyewitness identified him, and no DNA was discovered at the scene. Based on the lack of overwhelming evidence against appellant as to the charged crime, the Court could not say that it was highly probable the admission of the extrinsic evidence did not contribute to the verdict and was harmless. Accordingly, the Court concluded that the trial court abused its discretion in admitting the other acts evidence, and reversed the trial court's denial of appellant's motion for new trial. Because appellant did not challenge the sufficiency of the evidence supporting his convictions, the State may retry him.

Competency to Stand Trial; OCGA § 17-7-130

Crawford v. State, A20A0187 (6/5/20)

Appellant was convicted of aggravated battery, rape, and aggravated sodomy. He argued that the trial court erred by not conducting a competency hearing under OCGA § 17-7-130 (d) and by not conducting an inquiry into his competency to stand trial. The Court agreed.

Prior to trial, the State filed a motion for involuntary commitment pursuant to OCGA §§ 17-7-130 and 37-3-81.1. The motion noted that appellant had previously been found incompetent to stand trial in other criminal proceedings against him. On the same day, the trial court issued an order of commitment, declaring appellant "incapable of participating in the defense of his case to a meaningful degree, and that rehabilitative steps should be undertaken to bring [him] to the point of competency[.]" The Georgia Department of Behavioral Health & Developmental Disabilities ("DBHDD") then performed a 90-day competency evaluation on appellant. The report noted that appellant's "self-report was considered to be unreliable due to his current and previous behaviors indicating efforts to make himself appear more psychologically impaired than we observed." The report concluded that, although appellant was uncooperative during the evaluation, he

was competent to stand trial because he "did not demonstrate an inability to understand the nature and object of the proceedings relating to the charges against him, he appeared to comprehend his own condition in reference to the proceedings, and he behaved as if able to render counsel assistance in providing a proper defense if he considered it would be to his advantage." Appellant did not file a special plea alleging that he was mentally incompetent to stand trial. The trial court then proceeded to hold a jury trial.

The Court found that the trial court properly followed this procedure to the extent that it declared appellant incompetent to stand trial in its initial order, and ordered appellant into the custody of DBHDD for a determination of competency. However, after the DBHDD evaluation holding that appellant was competent, the trial court failed to follow the procedure set forth in OCGA § 17-7-130 (d), which provides, in relevant part, if the DBHDD's "physician or licensed psychologist determines at any time that the accused is mentally competent to stand trial[,] . . . the court *shall* hold a bench trial to determine the accused's mental competency to stand trial within 45 days of receiving the department's evaluation or, if demanded[.]" (Emphasis supplied.) OCGA § 17-7-130 (d). Thus, the Court held, because the statutory procedures of OCGA § 17-7-130 were triggered by the trial court's entry of the order directing appellant's evaluation, the court was bound to implement the remaining dictates of the statutory scheme. This should have been completed by the court prior to proceeding to trial.

Nevertheless, the State argued, appellant's failure to file a special plea of incompetence waived this issue. The Court disagreed. While it is true that because appellant did not file a special plea of incompetence to stand trial pursuant to OCGA § 17-7-139, he waived his right to a special jury on the issue of his competency. However, even where no special plea is filed, where a question about a defendant's competence is raised, the trial court must hold an adequate hearing on the issue. And here, counsel for appellant informed the trial court that appellant, who had a long history of psychotic episodes, could not communicate with counsel in complete sentences or otherwise. Under these circumstances, the trial court erred when it did not hold a hearing on appellant's competency to stand trial.

Accordingly, the Court remanded the case to the trial court to conduct the required procedure under OCGA § 17-7-130 (d) (1), but did not require a new trial on guilt or innocence at this time. The case was remanded for the trial court to conduct a hearing to determine the competency issues. Upon completion of the proceedings on remand, the judgment may be subject to a right of appeal from the rulings and findings then made.

Possession of Drug-Related Objects; Sufficiency of the Evidence

Wright v. State, A20A0740 (6/5/20)

Appellant was granted a discretionary appeal from the trial court's order revoking his probation based on the new offense of possession of a drug-related object in violation of OCGA § 16-13-32.2 (a). The evidence of the new offense showed that a police sergeant was investigating the burglary at a cell phone tower. The sergeant went to the tower and saw signs of illegal entry into a storage trailer and footprints at the scene. He took pictures of the trailer and footprints. The victims provided the sergeant with a list of the missing items and their corresponding serial numbers. The victims also had a description of the vehicle used to take the items, and the sergeant put out a be-on-the-lookout ("BOLO") for the vehicle. The victims, however, did not testify at the hearing.

The sergeant received a response to his BOLO in a neighboring county. He proceeded to the residence and found appellant had been arrested on an unrelated charge, and was sitting handcuffed in the backseat of a patrol vehicle. The sergeant observed that the truck in the driveway fit the description of the BOLO. He executed a search warrant and found that the equipment in the truck matched the serial numbers from the list given by the victims. He also found a "meth pipe" in the truck. The sergeant later interviewed appellant after his arrest and observed that appellant's shoe matched the impression at the crime scene.

Appellant did not own the residence where the sergeant located the truck. The truck's registration did not match appellant either. When the sergeant started to testify that he ran the truck's tag and that it matched appellant, defense counsel objected on hearsay grounds, and the trial court sustained the objection. Defense counsel also objected on hearsay grounds to testimony that the items were stolen, because the victims did not testify at the hearing. The court overruled this objection, but ultimately only revoked appellant's probation "based on the meth pipe[.]"

The Court stated that where, as here, there was no evidence that the defendant was in actual possession of contraband, the State must present evidence showing the defendant's constructive possession. To prove constructive possession, the State was required to show some connection between appellant and the contraband other than spatial proximity. Thus, while the State's burden of proof is lower in a probation revocation case, a probationer's mere presence in the area where contraband is found will not justify a revocation based on possession of contraband, even under the more relaxed preponderance of the evidence standard.

And here, the Court found, there was no admissible evidence showing that appellant possessed the methamphetamine pipe. Appellant was in the back of a patrol car when the sergeant arrived at the residence, and no non-hearsay evidence showed that appellant owned the truck. Therefore, the Court concluded, the trial court abused its discretion in revoking appellant's probation based on possession of the pipe.

Search & Seizure; Theft by Receiving

McMurray v. State, A20A0744 (6/5/20)

Appellant was convicted of possession of a controlled substance with intent to distribute, possession of marijuana with intent to distribute, theft by receiving stolen property, and possession of a firearm by a convicted felon. He contended that the trial court erred in denying his motion to suppress. The Court disagreed.

The search warrant affidavit contained the following assertions: Officers responded to a complaint from the hotel manager that the room's occupant, appellant, was selling drugs out of the room. The manager told officers that she observed numerous people coming and going from the room; the room smelled of marijuana; and that she believed marijuana was being sold out of the room. The responding officers could smell the odor of unburnt marijuana coming from the room. The manager opened the door to the room, and the responding officers noticed an even stronger odor of marijuana. The officers did not enter the room, but observed rolled marijuana cigarettes in plain view. After departing, one of the responding officers relayed this information to the affiant, who then ran a criminal history check on appellant and discovered he was a convicted felon with various drug and firearm related charges. The affiant then went to the hotel and determined that the odor of marijuana was coming from room 121 and not any other room on the floor. The affiant spoke

with a hotel employee who confirmed what the manager had reported. The following day, the affiant again went to the hotel and smelled a heavy marijuana odor emanating from room 121, but no other rooms on the floor. The affiant observed a black male he did not believe to be appellant exit room 121. The male smelled like marijuana. The affiant is a P.O.S.T.-certified police officer who graduated from basic investigator school and numerous drug-related classes.

Appellant argued that material facts set forth in the affidavit were "flatly contradicted at trial by the very witnesses cited by [the affiant] as sources of his averments" because both the responding officer who testified at trial and the hotel manager denied seeing any kind of drugs, blunts, or marijuana cigarettes in plain view in the room. However, the Court stated, even if it considers the information regarding the marijuana blunts in plain view as false and thus omits it, the affidavit nonetheless provided probable cause to issue the warrant. The affidavit set forth other information relayed to the investigator by the responding officer, including the complaint by the hotel manager, who was required to call police based on the hotel's protocol. The investigator was entitled to credit the hotel manager's report as well as the information relayed by the responding officer.

Appellant also argued that although the affidavit stated that the responding officers smelled the odor of marijuana emanating from room 121, the affidavit stated nothing in regard to those officers' training in recognizing and detecting the odor of marijuana. But, the Court found, the investigator averred that he was "a graduate of . . . numerous drug related classes." And, premitting whether this information was sufficient for the magistrate to conclude that the investigator was qualified to recognize the odor of marijuana, the presence of the odor was not the sole basis for the issuance of the search warrant in this case. Rather, the affidavit set forth further facts to show probable cause, including the information from the hotel manager and staff as well as the responding officers. Thus, the Court concluded, the information presented in the affidavit — even with the omission of the reference to "marijuana cigarettes" in plain view — provided a sufficient basis for concluding that, based on practical common sense, there was a fair probability that contraband would be found in appellant's hotel room.

Appellant next argued that the State presented insufficient evidence showing that he knew the firearm in his possession to be stolen. The Court agreed.

The Court found that the only evidence presented of the offense was that the stolen firearm was recovered from appellant's hotel room along with two other firearms. The owner testified that he had kept the firearm in his truck console, and only noticed that it was missing when he cleaned out his truck. The owner reported the gun missing two months before it was found in appellant's possession. When asked by the investigator if the firearm was stolen, appellant responded "No — well, I don't know, man. I just bought it from some guy and I don't know his name." The Court concluded that this evidence failed to show that appellant knew or should have known that the firearm was stolen. Thus, the conviction of theft by receiving stolen property was not supported by the evidence and was reversed.

Constitutional Right to Speedy Trial

Durham v. State, A20A0356 (6/8/20)

Appellant was convicted in 2016 of rape and child molestation. He contended that the trial court erred in denying his plea in bar based on his constitutional right to a speedy trial. The Court disagreed.

The procedural facts, very briefly stated, showed that appellant was arrested in December 2009 for conduct occurring between September 2004 and June 2007. He was indicted in April 2012. In December 2012, appellant announced that he was ready for trial, and the case was placed on the trial calendar. The case was on the jury trial calendar at least five times over the next three years before it was set for another motions/status hearing on January 28, 2016. At this hearing, the trial court inquired why it had taken the State more than six years to bring appellant to trial. The prosecutor stated that he was unsure of the reason for the delay, but he expected the case to be ready for the next trial calendar. The trial court directed appellant to file a speedy trial motion, which appellant did that same day. However, on the morning that the trial was set to begin, the trial court orally denied appellant's plea in bar. A written order denying the plea in bar was entered thereafter.

Initially, the Court determined that the delay from the date of arrest until appellant's trial was over six years, which the trial court properly concluded was presumptively prejudicial. Thus, the trial court properly conducted a balancing test of the four factors found in *Barker v. Wingo*, 407 U.S. 514 (92 SCt 2182, 33 LE2d 101) (1972).

As to the length of the delay, the Court found that the trial court's finding that the case had some complexity warranting a delay, but not enough to absolve the State of responsibility for the six-year delay, was supported by the record. Additionally, the trial court's finding that the State was trying cases older than appellant's in the intervening years also supported its finding that the delay, while uncommonly long, was not exceedingly so. Accordingly, the Court concluded that there was no abuse of discretion in the trial court's weighing the length of the delay moderately against the State.

As to the reasons and responsibility for the delay, the Court found that the trial court did not abuse its discretion in weighing this factor benignly against the State. The State conceded that much of the reason for the delay was due to negligence on its part in bringing the case to trial. Further, staffing turnover within the prosecutor's office and overcrowded dockets also contributed to the delay. However, there was no evidence of any deliberate attempt to delay appellant's trial.

As to the assertion of the right to a speedy trial, the Court stated that announcements that a defendant is ready for trial can mitigate the weight of a late assertion of the speedy trial right. And here, the trial court considered appellant's announcement of ready for trial at his initial status conference in December 2012, but distinguished this status conference from a calendar call, and found that it was common for defendants pleading not guilty to announce "ready for trial" at that stage, and it was not an assertion of appellant's right to a speedy trial. Next, the court found that "merely being present" at multiple trial calendar calls was "not equivalent to announcing ready for trial." The court found that the record did not establish, and appellant did not cite to anything in the record, that appellant actually announced ready for trial at any of these trial dates. Accordingly, the trial court found that "[b]eing present at a trial calendar with the hope that his case would not be reached does not entitle [appellant] to any level of mitigation." Furthermore, appellant did not assert his right to a speedy trial until after being ordered to file a plea in bar by the trial court, and his "last minute assertion showed no urgency or vigor." Thus, the trial court found that appellant's "claim of now wanting a speedy trial is disingenuous[,]" and his right was not asserted in due course. Thus, the Court found, because these findings led the court to the conclusion that appellant was not entitled to mitigation on this factor, and that any potential mitigation from appellant's possible, but unproven, announcements of ready for trial at multiple calendar calls were overwhelmed by the other facts and circumstances, the trial court's determination that this factor weighed heavily against appellant was not an abuse of discretion.

As to prejudice, the Court noted that there was presumed prejudice which occurred simply from the six year delay. However, the trial court found that any presumed prejudice to the defense from the delay was "not sufficient to overcome the lack of any actual prejudice in this case[.]" explaining that the primary evidence against appellant was the testimony of the victims, who had memorialized their accounts of the sexual assault incidents in recorded interviews with police that were available to him throughout the delay. Thus, because any prejudice from the delay was minimized because the victims would be subject to cross-examination based on their statements to police, the trial court found that the prejudice factor weighed "slightly against [appellant]." Accordingly, the Court concluded that the trial court did not abuse its discretion in weighing this factor against appellant, especially as it did so only slightly.

Finally, as to balancing the factors, the Court found that the record authorized the trial court's findings that (a) the delay was uncommonly long, but not exceedingly slow for its particular jurisdiction; (b) the reasons for the delay were benign; (c) appellant did not assert his right to a speedy trial in due course, but instead waited more than four years and did not assert the right until after being ordered to do so by the court mere weeks before the trial; and (d) appellant did not show any particularized prejudice and the circumstances of the case outweighed any presumed prejudice. While two of these factors weighed against each party, the most heavily weighted factor — appellant's failure to assert the right in due course — weighed against him. Under these circumstances, the Court found that the trial court did not abuse its discretion in denying appellant's plea in bar.

Cross-Examination; Rule 621

Sherrod v. State, A20A0703 (6/9/20)

Appellant was convicted of aggravated assault and reckless conduct. The evidence, very briefly stated, showed that appellant was playing basketball in a park and trash talking escalated into a heated argument. Appellant left the game and drove off. But, he returned a few minutes later, brandished a gun, aimed it at the victim, and then fired a few shots in the air before driving off again. Less than a week later, the victim was at a pool hall called Fat Man's Lounge. Appellant showed up and the argument reignited. Appellant drew his handgun and began firing it at the victim and others. The victim was shot in the back.

At trial, appellant called one of his friends, who testified that he was at the basketball court on the day appellant and the victim got into their argument but did not see appellant in possession of a gun. Thereafter, in response to appellant's counsel's questioning, the friend further testified that appellant had previous altercations with the victim and other members of the victim's family. The prosecutor objected, arguing that the witness needed to testify about specific instances and not generalities. Subsequently, the friend recounted an incident when he and appellant were at a pool hall called Tick's. At some point during the evening, the victim and a few members of his family ganged up on appellant, who was forced to defend himself unarmed. On cross-examination, the prosecutor asked if the incident at Tick's to which the friend referred was the same night that appellant allegedly stabbed one of the victim's family members. And in response, the friend stated that he was "not sure."

Subsequently, appellant called a second friend, who testified that he was present on the night of the altercation at Fat Man's Lounge but he, similarly, did not see appellant in possession of a gun. On cross-examination, the prosecutor, after

questioning him about the incident at Fat Man's Lounge, asked if the friend had ever seen appellant with a gun, and he responded that he had not. The prosecutor then asked if he was aware of allegations of appellant "pulling guns on other people," and the friend answered in the affirmative.

Appellant argued that the references to the stabbing of one of the victim's relatives and "pulling guns on other people" constituted improper evidence of his bad character and that the trial court committed plain error by allowing such evidence. The Court disagreed.

The Court stated that the issue was more properly characterized as impeachment by disproving a fact pursuant to OCGA § 24-6-621. Thus, with respect to appellant's friend testifying about the altercation with the victim and his relatives at Tick's, the prosecutor's inquiry as to whether this was the same altercation in which appellant stabbed one of the victim's relatives was warranted as an attempt to disprove that appellant was merely defending himself while unarmed. Similarly, in light of the second friend's testimony that he never saw appellant pull a gun on someone, the prosecutor was allowed to cast doubt on the friend's veracity by asking if he was aware of allegations that appellant engaged in such conduct. Given these circumstances, the trial court did not plainly err in allowing such testimony.

Appellate Jurisdiction; Prisoners

Ebeling v. State, A20A1437 (6/10/20)

After appellant's convictions were affirmed on appeal, he filed a timely "Motion to Reduce/Modify Sentence." After the court denied his motion, appellant filed a timely application for discretionary review of that order. The Court granted appellant's application and pursuant to OCGA § 5-6-35 (g), appellant had ten days to file his notice of appeal, which in this case was February 18, 2020. He was one day late.

Appellant contended that he received the order granting his application on February 10 and posted his notice of appeal on February 12. The Court noted that the postmark on his envelope showed it to have been stamped on February 12. However, the notice of appeal was file-stamped in the trial court clerk's office on February 19. Thus, the record established that, although appellant acted promptly, his filing did not get to the court on time and accordingly, the Court lacked jurisdiction over his appeal.

In so holding, however, the Court "acknowledge[d] that this is a harsh and unfair result....[and] a recurring problem...[which] appears to arise, not from anyone's neglect or misconduct, but from ordinary delay in mail delivery and from necessary security precautions in our correctional facilities."

Search & Seizure; Terry Stops

Mullins v. State, A20A0365 (6/10/20)

Appellant was charged with possession with intent to distribute a controlled substance, theft by receiving stolen property, and possession of tools for the commission of a crime. He contended that the trial court erred in denying his motion to suppress. The Court agreed.

Prosecuting Attorneys' Council of Georgia **CaseLaw** UPDATE

WEEK ENDING JULY 24, 2020

Issue 30-20

The evidence showed that a license plate reader ("LPR") identified a car that was involved in a vehicle break-in involving three black males the previous day. The officer initiated a traffic stop of the car, and appellant — the driver, who was one of three black males in the car — stopped the car immediately, and produced his driver's license, which the officer found to be valid, with no outstanding warrants. When the officer returned to the car, the front passenger advised that his sister's boyfriend had rented it the day before, although he did not have the rental agreement. Appellant told the officer that he "got the vehicle earlier that day" to take the front passenger to traffic court and that he had just picked up the front passenger from court, after which he had picked up the back seat passenger. Approximately five or six minutes after the traffic stop began, appellant turned off the car and gave the officer his car keys, at the officer's request. The officer checked the passengers' identities and found no outstanding warrants. According to the officer, appellant and the other two men were "being detained" at that time and were not free to leave.

An investigator who responded approximately 38 minutes after the traffic stop began also questioned the three occupants. Following that questioning, the investigator sent yet another officer to watch a surveillance video recording of the prior day's vehicle break-in to determine whether the faces of the perpetrators were visible. The investigator advised the initial officer that if the video did not show the faces of the suspects, police would not have probable cause to arrest appellant and the other two men being detained. Approximately 20 minutes later, that officer reported that no faces could be seen in the video recording, although one of the men in the recording was wearing grey pants and white shoes, which purportedly matched clothing worn by the back seat passenger. When the occupants denied consent to search the car, the investigator told them that if they did not consent, they would have to wait while she tried to obtain a search warrant.

The officer testified that the investigator subsequently contacted an unidentified representative of the car rental company, who "advised" the investigator to impound the vehicle because none of its occupants was an authorized driver on the rental agreement. As a result, approximately one hour and 52 minutes after the traffic stop began, the investigator told other officers at the scene to impound the vehicle. The three occupants were then removed from the car and placed in handcuffs, although, according to the officer who testified at the hearing, they were not yet under arrest. Officers then conducted an inventory search of the car, during which they found, among other things, four Xanax pills and several items that had been reported as stolen from another car earlier that day. At that point, police considered the car's occupants to be "in custody" and advised the men of their *Miranda* rights and further questioned them. No search warrant ever was obtained. The officer who testified did not personally attempt to contact any of the drivers authorized by the rental agreement, nor did he know if any other officers did so.

The Court stated that assuming that the initial traffic stop was justified by the LPR alert, the State failed to meet its burden of showing that officers reasonably and diligently sought to confirm or dispel their suspicions as to the purpose for the initial stop, which was premised on a vehicle break-in the day before. In particular, during the suppression hearing, the State failed to establish why it was reasonable for appellant to be detained for more than 38 minutes before anyone endeavored to review the surveillance video of the prior day's break-in — which took yet another 20 minutes — and, after that, for another 54 minutes before a decision was made to impound the car and handcuff its occupants.

Furthermore, to the extent that the trial court found that the officers had probable cause to arrest appellant and the other occupants *before* the inventory search, that finding was not supported by the evidence from the suppression hearing, including the testimony of the officer. According to police, they did not have probable cause to arrest the occupants of the car, and after determining that they could not identify the suspects' faces from the video almost an hour into the stop, they

detained them further only to either obtain a search warrant or find an unrelated reason to impound the vehicle. But, given the length of appellant's detention and the State's failure to establish diligence by the officers during that detention, appellant effectively was under arrest well before the search occurred. Even assuming that the generalized clothing match between one of the men in the video recording and the back seat passenger potentially may have warranted further investigation at the time it was discovered, that fact did not become known until 58 minutes after the traffic stop began, at which point officers already had prolonged the traffic stop unreasonably.

Thus, the Court concluded, because the police lacked objective facts and circumstances to believe appellant had committed a crime, they lacked probable cause to detain him beyond that authorized by *Terry*. The police discovered the evidence in the car after appellant had been illegally detained. This evidence was discovered by exploitation of the violation of appellant's Fourth Amendment rights and was therefore inadmissible as the "fruit of the poisonous tree." Accordingly, the trial court erred by denying appellant's motion to suppress.

Homeless Sexual Offenders; Sufficiency of the Evidence

Young v. State, A20A0612 (6/11/20)

Appellant was convicted for failing to register as a sex offender. He contended that the evidence was insufficient to support his conviction. The Court agreed.

The evidence from both appellant's probation revocation hearing and his bench trial, briefly stated, showed that appellant was a homeless sex offender. On July 11, 2017 he completed a form in the Sheriff's office reflecting that his new sleeping location to be a blue Chevrolet Cobalt parked in a driveway on Flat Shoals Road. A deputy performed a residence check on August 1, 2017, but appellant was not there. Instead the blue Chevrolet Cobalt was parked at a different house located in another town. Appellant was arrested on Aug. 3.

The Court noted that pursuant to OCGA § 41-1-12 (f) (5), appellant was indicted for "on or about the 1st day of August, 2017, . . . failing to notify the . . . Sheriff's Office of a change in sleeping location, after registering as homeless, within 72 hours of changing his sleeping location[.]" But here, appellant testified that on August 1, 2017, a friend advised that the sheriff's office was looking for him. As a result, he went to the sheriff's office on August 2, 2017, with the intent of updating his address to a new sleeping location that he had just found—the same place he slept on the night of July 31, 2017; but the office was closed. Appellant claimed he then returned the following day (i.e., on August 3) during business hours and was immediately arrested upon arrival. The State conceded that appellant was indeed arrested on August 3, 2017 and there was no testimony other than appellant's as to when he was arrested.

Thus, the Court found, when appellant slept at an address other than the one he registered on the night of July 31, 2017, he had 72 hours to register that temporary sleeping location with the sheriff's office, giving him until the night of August 3, 2017. But the evidence at trial did not show that appellant was given 72 hours to comply with OCGA § 41-1-12 (f) (5) when he was arrested upon his arrival at the sheriff's office during business hours on August 3, 2017. Therefore, because there was no evidence that 72 hours elapsed prior to appellant's arrest, the State failed to present sufficient evidence to sustain his conviction.

Nevertheless, the State contended, the evidence was sufficient to support his convictions for failing to register between the nights of July 11, 2017 and July 31, 2017. The Court again disagreed.

Appellant, by testifying that on occasions prior to July 31, 2017, he temporarily slept at other locations without later registering those sleeping addresses because he was "never gone . . . more than 72 hours," confessed to the State's interpretation of the statute—i.e., being a registered sex offender who failed to register temporary sleeping locations within 72 hours. OCGA § 24-8-823 provides in relevant part that "[a] confession alone, uncorroborated by any other evidence, shall not justify a conviction." But here, the State did not present any evidence to corroborate anything other than an alleged failure to register a temporary sleeping location within 72 hours of the night of July 31, 2017, nor did it argue that it corroborated anything other than testimony as to this occasion. Accordingly, in the absence of such corroboration, the Court held that appellant's testimony could not form the sole basis of a conviction for alleged statutory violations other than a 72-hour period after the night of July 31, 2017. Accordingly, the Court reversed appellant's conviction.

Jury Charges; Lesser Included Offenses

Hunter v. State, A20A0491 (6/15/20)

Appellant was convicted of conspiracy to purchase marijuana. He contended that the trial court committed plain error by failing to instruct the jury on possession of marijuana as a lesser-included offense of conspiracy to purchase marijuana.

The Court stated that under OCGA § 16-1-6 (1), a crime is included in the other where it is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the other crime. Under the "required evidence" test, the applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

And under this test, the Court held that the offense of possession of marijuana is not a lesser-included offense of conspiracy to purchase marijuana, as the facts necessary to prove each offense are different. Specifically, possession of marijuana does not require proof of a conspiracy or a purchase, and conspiracy to purchase marijuana does not require proof of possession. Thus, because each of the crimes contains mutually exclusive elements - i. e., each crime requires proof of a fact not required to establish the other crime - one crime was not included in the other. Therefore, appellant was not entitled to a charge on possession of marijuana, and the trial court did not err by failing to give such an instruction.