Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
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Issue 49-20

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Insufficiency of the Evidence; Determinate Sentencing

McCulloch v. State, A20A1498 (10/7/20)

Appellant was convicted of twenty counts of second-degree burglary. The evidence showed that he entered a self-storage facility and stole property out of twenty different storage units.

He contended that the evidence was insufficient to support his twenty convictions. The Court disagreed except for Count 6. The indictment alleged in Count 6 that appellant broke into a storage unit leased to Steven Wesley Schild. The State instead presented testimony and a lease agreement showing that the unit in question belonged to Bethany Schild. The State did not present any evidence at trial showing that Steven Schild was in some way related to Bethany Schild or that Steven Schild was ever involved with the storage facility or leased a unit that was unlawfully entered. Without any evidence presented as to Steven Schild's possible relationship to the incident, the State could not rely on the evidence as to the burglary of Bethany Schild's unit to support this conviction because if the victim named in the indictment and proven at trial are two different people, then a fatal variance has occurred, Accordingly, the Court concluded that the State failed to carry its burden to support Count 6.

Appellant also argued that that the trial court erred when it failed to give a determinate sentence on each count at trial and instead directed the State to prepare the details of the sentence. Initially, the Court noted that, although appellant did not object to his sentence in the trial court on these grounds, the issue was nevertheless preserved for review because Georgia law recognizes that a sentence which is not allowed by law is void and its illegality may not be waived.

The Court stated that sentences for criminal offenses should be certain, definite, and free from ambiguity; and, where the contrary is the case, the benefit of the doubt should be given to the accused. Here, the Court found, the trial court stated to appellant the following at sentencing: "I'm going to sentence you to serve a period of twenty years, however after eight service in the Department of Corrections I will allow you to serve the remainder on probation. . . . And, [prosecution], I want you to draw these sentences for me. I'm not going to go through [the] counts."

The Court noted that trial courts are required to enter discrete sentences as to each count of a multi-count indictment. When a trial court fails to impose separate sentences for each count of which a defendant was found guilty, it has not entered a proper judgment. However, the written sentence, not the oral declaration of the sentence, is the sentence of the

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court. And here, the trial court entered a written sentence and judgment the same day as the end of the trial when it announced its oral sentence, and the trial court's written sentence contained a definite and determinate sentence as to each count. Also, there was no evidence showing that appellant started serving the sentence before the written sentence was entered. Therefore, the Court found, there was no error.

Finally, the Court also rejected appellant's argument that the fact that the trial court had the State draft the sentencing sheet somehow rendered the sentence improper. Upon a review of the trial court's oral pronouncement, the trial court did not give any discretion to the State to make any material determinations as to the length of appellant's sentences. Moreover, the trial court signed off on the written sentencing order, so even if the State may have drafted the order, it still represents the order of the trial court, not the order of the State. The Court found that appellant offered nothing beyond mere speculation to show that having the State draft the final sentence sheet caused him harm or prejudice. Thus, the Court concluded, the trial court did not err when it sentenced appellant.

Rule 404 (b); Rule 403

Lofland v. State, A20A0913 (10/13/20)

Appellant was convicted of one count of aggravated assault (family violence) with a deadly weapon. The evidence showed that appellant, believing his wife to have been unfaithful, held a kitchen knife to his wife's abdomen and threatened to cut her in the naval. At trial, the State was permitted to show pursuant to Rule 404 (b) that four months after the knife incident, when appellant came home and saw his wife on the porch of their house with a male friend, he pulled out a handgun and shot them both, but neither wound was fatal.

Appellant contended that the trial court erred by admitting the other acts evidence. Specifically, appellant did not challenge its relevance or the sufficiency of the proof that he committed the act. Rather, he argued that because aggravated assault is a general intent crime, the probative value of the evidence was minimal and was substantially outweighed by its unduly prejudicial impact, such that it should have been excluded under Rule 403. The Court disagreed.

The Court agreed that the crime as charged was a general intent crime, which undoubtedly lessened the State's need for the other acts evidence. Nevertheless, appellant placed his intent at issue by pleading not guilty, and at trial, he denied threatening the victim and attempted to discredit her by asserting that she was the aggressor in the relationship. Thus, the Court agreed with the trial court that the shooting evidence derived some probative value in showing that appellant exhibited "aggressive behavior involved in a domestic relationship" and "an intent to control … [and] influence" the victim.

The Court also found that the overall similarity between the other acts evidence and the charged crime was quite substantial. First and foremost, they both involved the same victim. Second, both events occurred at their marital home, both seemed to have been prompted by appellant's jealousy and suspicion of the victim, both involved an alleged assault with a deadly weapon, and both ceased upon the plea of the victim's teenage daughter. Although there were also dissimilarities — the use of a different weapon, the severity of the alleged assault, the presence of a non-related third party — the similarities between the two events were significant compared to the differences, thus increasing its probative value. And finally, with respect to temporal proximity, the alleged shooting occurred only four months after the charged crime, further increasing its probative value.

Consequently, although the nature of the charged offense lessened the need for the other acts evidence, the other two factors weighed in favor of admitting the evidence. Further, the prejudicial impact of the evidence was mitigated by the trial court's limiting instruction to the jury prior to the admission of the evidence, and again during the jury charge after the close of the evidence. Giving fair consideration to all three factors, although the other acts evidence was undoubtedly prejudicial, the Court held that the trial court did not abuse its discretion in finding that the probative value was not so outweighed by the danger of unfair prejudice.

Constitutional Right to a Speedy Trial; Standing Orders of the Trial Court

Holland v. State, A20A0795 (10/13/20)

Appellant was indicted for VGCSA and other crimes in 2015. The State nolle prossed the case in June 2017 and then reindicted him in July 2017 for the same crimes, this time with two co-defendants. Appellant was released on bond in August 2017, conditioned upon his wearing an ankle monitor at all times and abiding by a curfew from 8:00 p.m. to 6:00 a.m. These bond conditions were continued from the original 2015 indictment. Appellant's bond was revoked in July 2019 for his failure to comply with the rules of the ankle monitoring company, and he was remanded to the custody of the sheriff's office until trial. The case was placed on the trial calendar for the week of September 23, 2019. On September 9, 2019, appellant filed a motion to dismiss the indictment, alleging a violation of his constitutional right to a speedy trial. After a hearing, the trial court denied the motion and the Court granted appellant's application for interlocutory appeal.

The Court noted that the parties did not dispute that the four-year delay between the date of the arrest or indictment and the date on which the speedy trial motion was denied is presumptively prejudicial. Thus, the Court stated, it must review the trial court's findings based on the four-factor analysis of *Barker v. Wingo*. As to the length of the delay, appellant argued that the trial court erred in not weighing the delay heavily against the State. However, the Court stated, there is no particular length of delay that requires the trial court to weigh that factor heavily against the State because the idea of a bright-line rule is anathema to the analysis of speedy trial claims. Thus, the trial court's finding that this factor weighed against the State was not an abuse of discretion.

Appellant did not contest the trial court's conclusion that the delay was attributable to the State and thus should be weighed against the State, but because the delay was not intentionally done to prejudice the defense, it should not be weighed heavily against the State.

As to the third prong, the assertion of the right to a speedy trial, appellant argued that he asserted his speedy trial right in October 2017 by virtue of a 2013 standing order of the superior courts of the circuit, when an attorney with the public defender's office filed an entry of appearance on his behalf in this case. Appellant contended that "[t]his Standing Order states that certain pretrial motions, discovery requests, and demands are deemed to be filed in each case in which the Public Defender's Office makes an Entry of Appearance," and "the Standing Order includes a Demand for a Constitutionally Speedy Trial." The trial court, however, found because appellant made "no individualized or special assertion of his right to a speedy trial," appellant's failure to assert the right separate from the Court's standing order weighed heavily against him. The Court found that because appellant did not insure that a copy of the standing order was included in the record

before the Court, there was insufficient information upon which to review the trial court's ruling regarding this particular factor. Thus, the trial court's findings on this factor must be upheld.

As to the prejudice prong, appellant contended that he suffered undue anxiety. Specifically, his mother testified that appellant suffered stress and anxiety related to his bond conditions, namely paying for ankle monitoring service, missing some of his son's activities due to the curfew, and having difficulties with his employment. However, the Court noted, appellant's mother also testified that appellant was able to visit his son and work for his employer locally. Consequently, the Court found, appellant did not made any sort of "unusual showing" of anxiety that would weigh this element in his favor and therefore, there was no abuse of discretion in the trial court's determination that there was no prejudice.

Finally, the Court concluded that after reviewing the record and the findings of the trial court, the trial court did not abuse its discretion when it determined that there was no violation of appellant's constitutional right to a speedy trial.

Search & Seizure; *Terry* Stops

Valles v. State, A20A1465, A20A1466 (10/15/20)

Appellants were convicted of trafficking in methamphetamine. They argued that the trial court erred in denying their motion to suppress. In a 2-1 decision, the Court agreed.

The evidence, briefly stated, showed that two investigators were at a Walmart shopping center in an unmarked car because there had been a rash of car break-ins in the area. The investigators noticed that a small silver SUV was moving around to different parking spaces, and that the occupants were looking around the parking lot. The investigators watched for 30-40 minutes and observed the vehicle move from parking space to parking space, drive around the backside of Walmart "erratically[,]" drive behind an adjacent business, and that no one entered or exited the SUV during that time. After the vehicle turned around behind another business in the parking lot and began moving, the investigators activated the police vehicle's blue emergency lights, and conducted a traffic stop of the SUV. A consent search revealed the methamphetamine

Appellants argued that the trial court erred in denying their motion to suppress because the stop of their vehicle was not based on reasonable, articulable suspicion. Specifically, both contended that the stop of their vehicle was based on "unparticularized suspicion" or a "hunch[.]" The Court agreed.

Here, the Court found, neither investigator provided the specific, articulable facts that rose to the level of reasonable suspicion of criminal activity. A person's mere presence in a high crime area does not give rise to reasonable suspicion of criminal activity, *even if police observe conduct which they believe consistent with a general pattern of such activity*.

The investigators observed the vehicle travel four different routes around the Walmart parking lot in the span of about 30 minutes in an area where vehicles had been recently entered into illegally. Based on their knowledge and expertise, the investigators believed the behavior of appellants while in the Walmart parking lot appeared to be consistent with the criminal activity of entering autos, but they did not provide a particularized suspicion that reasonably warranted stopping their vehicle. Instead, they merely observed the vehicle containing appellants traveling around a parking lot known for

criminal activity of entering autos and parking in different parking spaces, and that no one entered or exited their vehicle. Further, the silver SUV did not violate any state laws.

Thus, under the totality of circumstances based on the driving pattern of the vehicle, the Court concluded that although the investigators were justified in observing the vehicle, there was insufficient information to indicate that appellants were engaged in illegal activity so as to provide a reasonable, articulable suspicion to justify the stop. Therefore, the motions to suppress evidence uncovered at the traffic stop should have been granted and the trial court erred in denying appellants' motions for new trial.

Search & Seizure; Spousal Privilege

Huerta-Ramirez v. State, A20A1312 (10/15/20)

Appellant was convicted of seven counts of armed robbery, eight counts of aggravated assault, sixteen counts of false imprisonment, three counts of burglary, one count of possession of marijuana with intent to distribute, and three counts of possession of a firearm or knife during the commission of a felony. He contended that the trial court erred in denying his motion to suppress evidence obtained through the warrantless placing of a GPS tracking device on the Tahoe he was driving.

The evidence showed that a detective approached appellant in the parking lot of an apartment complex, while he was standing with two other men next to the Tahoe. Appellant told the detective that he owned the Tahoe, and consented to a search of the vehicle. When the detective discovered three .223 rifle rounds and two .22 caliber rounds in the vehicle, appellant disavowed ownership of the vehicle. The detective also found $4,200 in cash, and zip ties. Appellant told the detective the money was his, but that "he didn't know anything about the zip ties because it wasn't his vehicle." During the suppression hearing, the State introduced into evidence a document from the Georgia Registration and Title Information System, reflecting that the Tahoe was purchased on July 20, 2009, and registered in the name of "Benita Hernandez-Morales." Appellant testified that he purchased the vehicle and it was originally put in his wife's name and then later, it was put in his mother-in-law's name because the insurance got too high under his wife's name.

The Court noted that in *United States v. Jones*, 565 U. S. 400 (132 SCt 945, 181 LE2d 911) (2012), the Supreme Court of the United States held that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search'" under the Fourth Amendment. However, the Fourth Amendment right against unreasonable search and seizure is a personal right and may not be asserted vicariously. Thus, when a defendant disavows ownership of or other legitimate possessory interest in the item searched, he has no legitimate expectation of privacy in that item, and thus a search violates no right. Therefore, the trial court properly exercised its authority to reject appellant's testimony at the suppression hearing that he owned the vehicle and only registered it in his mother-in-law's name for insurance purposes. In this regard, the Court noted that appellant's testimony that he denied ownership of the Tahoe because the detective would have checked the tag and discovered that the vehicle was not registered to him failed to account for the fact that appellant initially told the officer that he owned the vehicle and credibility and weight are matters for the factfinder. Accordingly, the Court concluded, appellant had no expectation of privacy in the Tahoe, and the trial court did not err in denying his motion to suppress evidence obtained from the GPS tracker.

Appellant also contended that the trial court erred in admitting a phone conversation he had with his wife because it was a confidential communication protected by OCGA § 24-5-501 (a) (1). The Court disagreed.

The evidence showed that after his arrest, appellant was read his *Miranda* rights and interviewed by detectives for almost two hours. During the interview, appellant acknowledged that the conversation in the room was being recorded, though he misidentified the recording device, believing he was being recorded on a device held by a detective, and one of the detectives advised appellant that he was being recorded. Toward the end of the interview, appellant borrowed a detective's cellphone to call his wife, and had a thirty-minute phone conversation with her; only appellant's side of the conversation could be heard on the recording. The interview was played for the jury, but because the cellphone conversation was entirely in Spanish, the State provided a written transcript, which included a Spanish-to-English translation. The trial court told the jurors that they would be given copies of the transcript, but instructed them that the taped cellphone conversation itself was the evidence, not the transcript, which was just there to assist them. During the cellphone conversation, appellant told his wife three times that he was "fucked!" He also cursed a co-conspirator who implicated him.

The Court noted that in *Rogers v. State*, 290 Ga. 18 (2011), our Supreme Court rejected a claim of attorney-client privilege because the defendant's phone call from jail to his lawyer could not be considered confidential because it also included the defendant's girlfriend. The Court found that the *Rogers* Court rule that communications between an attorney and client in the presence of third persons or of the adverse party are not within the prohibition against testimony regarding the communications applies equally to the marital/spousal privilege. Accordingly, similar to *Rogers*, in this case, appellant's cellphone call to his wife while in the custodial interview room was not a confidential communication protected by OCGA § 24-5-501 (a) (1) because it was made after appellant specifically acknowledged to detectives during the interview that he was being recorded, was also told that the interview was being recorded, and was using the detective's cellphone. Furthermore, the Court found it was of no consequence that the detective closed the door to the interview room, leaving appellant alone. In any event, even if the trial court erred in admitting the recording, the error was harmless given that appellant admitted during the interview with detectives to his participation in the robberies.