

THIS WEEK:

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Game Wardens; Enforcement of the Uniform Rules of the Road

Thornton v. State, S20G0613 (11/16/20)

Appellant was convicted of two counts of obstruction—a misdemeanor count for defying the instructions of the game warden, and a felony count for offering violence to the game warden. The evidence, very briefly stated, showed that in the parking lot of a gas station, a Department of Natural Resources (DNR) game warden told appellant to turn down the volume of his car stereo. Appellant refused to comply, and he eventually drove away, dragging the game warden for a short distance.

On appeal, appellant argued that the evidence presented at trial was insufficient to sustain his convictions for obstruction because it failed to establish that the game warden was in the lawful discharge of his official duties at the time of the incident. In particular, he argued that a game warden has no authority to enforce the Uniform Rules of the Road—including OCGA § 40-6-14, which limits the volume of sound that can be emitted from a stereo in a motor vehicle—in the parking lot of a gas station. The Court of Appeals rejected these arguments and affirmed the judgment of conviction. *Thornton v. State*, 353 Ga. App. 252 (2019). Thereafter, the Court granted certiorari.

The Court stated that the first question is whether OCGA § 40-13-30 grants statewide arrest powers to DNR game wardens for violations of the Uniform Rules of the Road? In examining § 40-13-30, the Court stated that there are three distinct parts. The first part identifies the officers to whom the statute applies, namely, officers of the State Patrol, as well as other state officers, county officers, and municipal officers "having authority to arrest for a criminal offense of the grade of misdemeanor." The second part confers upon these officers the "authority to prefer charges and bring offenders to trial under [Article 2 of Chapter 13 of Title 40]," a grant of authority that necessarily implies the power to enforce the Rules of the Road by the issuance of a citation for a misdemeanor violation of the rules, as well as the concomitant power to effectuate an arrest by citation. And the third part of OCGA § 40-13-30 appears to be a limitation of the second part with respect to municipal officers, providing that they "shall have no power to make arrests beyond the corporate limits of [their respective] municipalities unless such jurisdiction is given by local or other law."

The Court concluded that a DNR game warden is among the officers identified in the first part of OCGA § 40-13-30 and noted that appellant rightfully did not dispute this. As such, the game warden here was authorized under the second part of OCGA § 40-13-30 to enforce the Rules of the Road, including the provision of OCGA § 40-6-14 (a) limiting the

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sound emitted by a car stereo, with respect to a misdemeanor violation of the rules subject to the procedures of Article 2 of Chapter 13 of Title 40. This power to enforce the Rules of the Road not only includes the power to issue a citation for a misdemeanor violation, but it necessarily must also include the power to effectuate an arrest for the purpose of issuing and serving the citation, as well as the authority to direct the offender to cease the conduct that constitutes the violation (by telling a driver, for instance, to turn down the volume of his car stereo) and to reasonably control the person of the offender during the arrest (by telling a driver, for instance, to remain outside his car or to stop his vehicle). Moreover, to the extent that a game warden is authorized to enforce the Rules of the Road—as was the game warden here—the Court readily concluded that he also is authorized to arrest any person who attempts to obstruct his enforcement of those rules.

Next, the Court considered the extent to which the Rules of the Road apply to the operation of vehicles in parking lots. Even though the game warden was authorized to enforce the Rules of the Road pursuant to Article 2 of Chapter 13 of Title 40, if the Rules of the Road did not apply in the parking lot in which the game warden encountered appellant, his attempts to enforce OCGA § 40-6-14 against appellant would not have been in the lawful discharge of his official duties for purposes of an obstruction conviction. In this regard, the Court noted that OCGA § 40-6-3 (a) (2) provides that the Rules of the Road apply to "a vehicle operated at shopping centers or parking lots or similar areas which although privately owned are customarily used by the public as through streets or connector streets."

In construing § 40-6-3 (a) (2), the Court agreed with appellant that OCGA § 40-6-3 (a) (2) applies the Rules of the Road to the locations identified in the statute—"shopping centers or parking lots or similar areas"—*only* to the extent that those locations are customarily used by the public as through or connector streets. Thus, the Court held, to the extent the Court of Appeals has previously held the Rules of the Road applicable in a parking lot without regard to its customary use as a through or connector street, those cases are disapproved. See, e.g., *Canino v. State*, 314 Ga. App. 633, 636 n.10 (1) (2012); *Jackson v. State*, 297 Ga. App. 615, 617 (2009); *Patton v. State*, 287 Ga. App. 18, 20-21 (2007); and *Miller v. State*, 221 Ga. App. 494, 495 (1996).

But, the Court stated, although appellant was correct that the Rules of the Road apply to the operation of vehicles in a privately owned parking lot only to the extent that the parking lot is customarily used by the public as a through street or connector street, the Court concluded that the evidence in this case nevertheless was sufficient to prove beyond a reasonable doubt that the game warden was in the lawful discharge of his official duties when he attempted to enforce the statutory limitation of sound emitted from a motor vehicle against appellant in the gas station parking lot. At trial, the evidence established that the gas station was situated at the intersection of two public roads, and the game warden was asked whether the parking lot was "[c]ommonly used as a cut through or a way to get from one road to the other?" The game warden answered: "Yes, sir, I have seen people do that before." This testimony was sufficient to authorize the jury to find that the parking lot outside the gas station was a parking lot that, although privately owned, was customarily used by the public as a through street or connector street. As such, the jury properly could have found that the game warden was in the lawful discharge of his official duties when he attempted to enforce OCGA § 40-6-14 against appellant in the parking lot. Accordingly, the judgment of the Court of Appeals was affirmed.

Void for Vagueness; Rule of Lenity

Smallwood v. State, S20A1274 (11/16/20)

Based on stipulated facts, appellant was convicted of entering an automobile under OCGA § 16-8-18. He contended that the trial court erred in denying his general demurrer. Specifically, he argued that OCGA § 16-8-18 is unconstitutionally vague on its face and as applied to his case. The Court disagreed.

Citing *Sessions v. Dimaya*, ___ U.S. ___ (138 SCt 1204, 200 LE2d 549) (2018) and *Johnson v. United States*, 576 U.S. 591, 602 (II) (B) (135 SCt 2551, 192 LE2d 569) (2015), appellant contended that his facial challenge prevails as long as he can show that in some hypothetical circumstance, OCGA § 16-8-18 could be applied in such a way that the offender would not have fair warning that his conduct violated the statute. But, the Court stated, vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand. In other words, outside of the First Amendment context, if a challenger's as-applied vagueness challenge fails, then his facial challenge also fails. Furthermore, the Court found, *Johnson* and *Dimaya* do not expressly disavow the principle that outside the First Amendment context, a defendant whose conduct falls squarely within the confines of the statute cannot prevail on a facial challenge. And here, a person of ordinary intelligence would have fair warning that appellant's conduct, namely, entering a vehicle that is not one's own and taking another's possessions from within the vehicle, would be covered by OCGA § 16-8-18.

Moreover, the Court found, OCGA § 16-8-18 does not authorize or encourage arbitrary and discriminatory enforcement. In so finding, the Court rejected appellant's argument that the statute can be arbitrarily enforced because law enforcement officers may arbitrarily choose to charge similar conduct under OCGA § 16-8-18 or for criminal trespass or both. Vague statutes invite arbitrary and selective enforcement by allowing law enforcement officers to charge a crime where there was no crime, not to charge a crime that has a higher penalty rather than a crime with a lesser penalty.

Finally, the Court found that OCGA § 16-8-18 does not fail to provide sufficient standards for law enforcement officers such that they are enabled to throw as large a net as possible to rid the public of undesirables, and it does not support charging as criminal any conduct absent probable cause of actual criminality. And in this case, it was stipulated that appellant both entered an automobile and committed a theft therein.

Nevertheless, appellant argued, even if OCGA § 16-8-18 is not void for vagueness, the trial court erred because his conduct in entering the automobile and committing a theft therein violated both OCGA § 16-8-18 and OCGA § 16-7-21 (b) (1), and therefore he must be sentenced to misdemeanor criminal trespass under the rule of lenity. The Court again disagreed.

The Court stated that where there is a specific and a general criminal statute, the rule of lenity is not implicated, and a specific statute will prevail over a general statute, absent any indication of a contrary legislative intent. And the Court found, the criminal trespass statute prohibits the knowing and unauthorized entry into any one of six places, including a "vehicle," for any "unlawful purpose," which the Court construed as a purpose to violate a criminal law. OCGA § 16-8-18, on the other hand, criminalizes entry into a vehicle "with the intent to commit a theft or felony." Thus, the Court concluded, because OCGA § 16-8-18 criminalizes the entry into an automobile or other motor vehicle and only for the

purpose of committing certain designated crimes, rather than the more general "unlawful purpose," appellant was properly sentenced under the more specific OCGA § 16-8-18, and the rule of lenity was not implicated.

Cumulative Effect of Trial Court Errors; Transcription of Voir Dire

Allen v. State, S20A1081, S20A1082 (11/16/20)

Allen and McCray were convicted for malice murder, and other offenses in connection with the armed robbery of a convenience store and the shooting death of a store clerk. Allen argued that the trial court erred in allowing the State to present other acts evidence under OCGA § 24-4-404 (b) ("Rule 404 (b)") that purportedly showed Allen's participation in a robbery two years earlier than the charged offenses. The court concluded that any error was harmless.

Allen also argued that the trial court committed plain error by allowing McCray's then-girlfriend to testify about McCray's out-of-court statement that he robbed the store with Allen and by allowing an investigator to repeat the statement in recounting an interview with McCall. The State conceded that the trial court erred in admitting the statement under OCGA § 24-8-801 (d) (2) (E) based on *State v. Wilkins*, 302 Ga. 156 (2017), which was decided after Allen and McCray's trial. The Court found that because the challenged statement was cumulative of other unchallenged evidence, and the evidence against Allen was strong, his plain-error claim failed.

Nevertheless, Allen contended, the cumulative effect of these two trial court errors prejudiced him. The Court stated that as to evidentiary issues, the Court must "consider collectively the prejudicial effect, if any, of trial court errors, along with the prejudice caused by any deficient performance of counsel." *State v. Lane*, 308 Ga. 10, 17-18 (1) (2020). The Court assumed that the trial court erred in admitting the other-acts evidence and that the trial court's error in admitting McCray's hearsay statement was clear error. But, it noted, it has yet to decide how multiple standards for assessing prejudice may interact under cumulative review of different types of errors. But, the Court stated, it again need not do so here, because Allen's claims failed under any of the standards. Specifically, the Court found that it was not at all probable that the collective effect of the assumed errors harmed Allen. The evidence against Allen was very strong, and given this strong evidence, it was highly unlikely that the jury was swayed by the other-acts evidence that Allen may have committed another robbery even when considered in combination with McCray's statements implicating Allen in this robbery.

McCray argued that the trial court erred in failing to instruct the court reporter to transcribe the entirety of voir dire. McCray contended that the plain terms of OCGA § 17-8-5 (a) require a court reporter to take down or record the entirety of voir dire.

OCGA § 17-8-5 (a) provides that "[o]n the trial of all felonies the presiding judge shall have the testimony taken down and, when directed by the judge, the court reporter shall exactly and truly record or take stenographic notes of the testimony and proceedings in the case, except the argument of counsel." The Court noted that in *State v. Graham*, 246 Ga. 341(1980), the Court evaluated former Code Ann. § 27-2401, the predecessor statute to OCGA § 17-8-5 (a), which is materially identical to the current statute. There, the defendant in a non-death penalty case argued that voir dire was a "proceeding" under the statute and that, therefore, the voir dire should be reported and transcribed. *Graham*, 246 Ga. at 342 (noting that voir dire must be made part of record in death penalty cases). The *Graham* Court held that the term "proceedings" referred to "objections, rulings and other matters which occur during the course of the evidence as well as

any post-trial procedures," and that the statute's requirement was met in that case because the record contained the objection and court ruling made during voir dire. *Id.* at 342-343. The *Graham* Court also stated that if a defendant wants a more complete record of voir dire, he must make a specific request to that effect. *Id.*

Nevertheless, McCray argued, *Graham's* interpretation of "proceedings" is no longer good law, citing several instances in which the United States Supreme Court and our Court of Appeals have referred to voir dire as a proceeding. He contended that this common usage shows that the plain meaning of "proceedings" as used in OCGA § 17-8-5 includes voir dire. But, the Court found, none of the decisions he cited actually held anything about when voir dire must be recorded. Furthermore, the Court found no compelling reason to reconsider *Graham's* statutory construction.

Motions to Withdraw Guilty Plea; Jurisdiction

Bonner v. State, S20A1146 (11/16/20)

Appellant pled to malice murder and other offenses and the trial court entered judgment on September 5, 2013. Appellant then filed a motion to withdraw his guilty plea in July 2014. After a hearing, the trial court denied the motion on the merits.

The Court noted that although appellant's appeal was timely, the motion itself was not timely filed in the trial court. It is well settled that, when the term of court has expired in which a defendant was sentenced pursuant to a guilty plea, the trial court lacks jurisdiction to allow the withdrawal of the plea. And here, the Court found, after appellant was sentenced on September 5, a new term of court began on Monday, September 16, 2013. Therefore, because the trial court lacked jurisdiction to consider appellant's untimely motion on the merits, the court should have dismissed the motion rather than denying it.

Furthermore, when an order states that a procedurally barred motion is "denied," rather than "dismissed," without more, the Court stated it assumes that the order was not an unauthorized decision on the merits, which would require vacatur of the order. But, that presumption does not apply here because the trial court's order plainly showed that it denied appellant's untimely motion to withdraw his guilty plea on the merits, in that the order sets out findings of fact and conclusions of law regarding the claims in appellant's motion. This unauthorized decision on the merits required vacatur of the order. After the expiration of the term of court in which the court accepted appellant's plea and sentenced him, he can only obtain the relief he seeks through a petition for a writ of habeas corpus. Accordingly, the Court vacated the trial court's order denying appellant's motion to withdraw his guilty plea and remanded the case to the trial court with direction that it enter the appropriate order dismissing the motion.

Motions for New Trial; General Grounds

Casey v. State, S20A1105 (11/16/20)

Appellant was convicted of felony murder predicated on an aggravated assault and possession of a firearm during the commission of a felony. He argued that the trial court failed to properly exercise its discretion as the "thirteenth juror" in ruling upon his motion for new trial. The Court agreed.

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The Court found that appellant properly raised the general grounds in a timely motion for new trial and argued that there was insufficient evidence to support his conviction under *Jackson v. Virginia*. These are two distinct legal arguments that required the trial court to apply distinct legal standards. The trial court's order, however, indicated that the court failed to exercise its discretion in its consideration of the general grounds and only applied the *Jackson* standard, by which a court assesses the legal sufficiency of the evidence as a matter of due process. When the record reflects that the trial court reviewed the motion for new trial *only* for legal sufficiency of the evidence, the trial court has failed to exercise its discretion under the general grounds. Accordingly, the Court vacated the denial of appellant's motion for new trial, and remanded the case for the trial court to apply the proper standard in exercising its discretion pursuant to OCGA §§ 5-5-20 and 5-5-21.

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