Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JANUARY 1, 2021
Issue 1-21

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Modifications of Sentences; OCGA § 17-10-1 (a)

Pitts v. State, A20A1565 (10/21/20)

In June 2017, appellant entered a negotiated plea to one count of manufacturing marijuana and, pursuant to OCGA § 42-8-60, was sentenced as a first offender to 10 years' probation with a $10,000 fine. In October 2019, he filed a motion to terminate his probation, arguing that he had successfully completed 28 months of his probation without any violations or instances of bad behavior, that he had paid the fine in full, and that he was actively enrolled in college courses because he had plans to soon enter medical school. Following a hearing, the trial court denied his request to terminate his probation, but it instead ordered that appellant's sentence be shortened from ten years to six years and that his probation would thenceforth be unsupervised.

Appellant argued that the trial court exceeded its authority under OCGA § 17-10-1 (a) (5) (A) when it shortened his sentence instead of fully terminating his sentence. Specifically, he contended that there was no evidence in the record to indicate that continuing his probation would have served the standards and purposes of probation set out by statute. The Court disagreed.

The Court noted that a trial court "is empowered to revoke any or all of the probated sentence, rescind any or all of the sentence, or, in any manner deemed advisable by the judge, modify or change the probated sentence … at any time during the period of time prescribed for the probated sentence to run." OCGA § 42-8-34 (g). Under OCGA § 17-10-1 (a) (5) (A), "the court may shorten the period of active probation supervision or unsupervised probation on motion of the defendant or on its own motion, or upon the request of a community supervision officer, if the court determines that probation is no longer necessary or appropriate for the ends of justice, the protection of society, and the rehabilitation of the defendant."

After reviewing the evidence presented at the hearing, the Court found that the trial court did not abuse its authority when it balanced these factors and only reduced appellant's probation sentence by four years instead of terminating it outright. OCGA § 17-10-1 (a) (5) (A) provides that the court "may" shorten or terminate a defendant's probation upon motion, which indicates that the decision whether to shorten or terminate probation rests within the trial court's discretion. And here, the trial court considered all the relevant factors and determined that the ends of justice only supported a four-year reduction instead of a full termination, which the Court found was not an abuse of discretion.

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Appellant next took issue with a statement made by the trial court that if appellant successfully completed six years of his probation (to end in June 2023), the court would terminate the balance of the probation. Appellant contended that by this statement, the trial court set a minimum of six years' probation and that this minimum prevents him from seeking further relief from his sentence under the "behavioral incentive date" provision provided for in OCGA § 17-10-1 (a) (1) (B).

The Court noted that appellant was sentenced in June 2017. But, the "behavioral incentive date" provision provided in OCGA § 17-10-1 (a) (1) (B) did not become effective until July 1, 2017, see Ga. L. 2017, Act 226, § 2-1, and that provision also did not apply to persons such as appellant that were sentenced as first offenders pursuant to OCGA § 42-8-60 until July 1, 2018. See Ga. L. 2018, Act 416, § 2-6. Thus, because OCGA § 17-10-1 (a) (1) (B)'s "behavioral incentive date" provision cannot apply retroactively to appellant, any impact the trial court's order might hypothetically have had on his ability to seek relief under that provision cannot constitute increased punishment and consequently, there was no error.

Finally, appellant contended that the trial court improperly increased the punishment by imposing limitations on the date on which his case can be terminated. He contended that the trial court's hard minimum of six years' probation improperly limited "the authority of the Department of Community Supervision, any other trial court judge, and [appellant] from seeking reconsideration of the issue for an extended period of time." However, the Court found, despite the trial court's oral statement at the hearing that it would not revisit appellant's probation sentence until June 2023, the trial court's written order simply reduced appellant's sentence to six years and rendered the balance of his probation unsupervised. In fact, the order specifically noted that "[a]ll other terms and conditions of the original sentence shall remain in place." Therefore, the Court found no indication that the trial court ever restricted appellant's ability to seek further reductions in his probation in the future or that it prevented the Department of Community Supervision from making its required reports on appellant's progress under OCGA § 42-8-37 or otherwise affected the Department's ability to make recommendations under that same statute. Accordingly, because the trial court did not actually impose any limitations on appellant's ability to seek relief, it could not be said that it increased the punishment in this manner.

Venue; Coercive Jury Deliberations

Lawrence v. State, A20A1075 (10/21/20)

Appellant was convicted in Liberty County of six counts of sexual exploitation of children. He argued that there was insufficient evidence to support venue in Liberty County because all of the actionable conduct in this case, i.e., the distribution of child pornography, occurred on a military base in Chatham County, and thus venue was only appropriate in federal court. The Court disagreed.

The Court stated that the Georgia Constitution requires that venue in all criminal cases must be laid in the county in which the crime was allegedly committed. Venue is a jurisdictional fact, and is an essential element in proving that one is guilty of the crime charged. Like every other material allegation in the indictment, venue must be proved by the prosecution beyond a reasonable doubt. The State may establish venue by whatever means of proof are available to it, and it may use both direct and circumstantial evidence.

Under OCGA § 16-12-100 (b) (5), "[i]t is unlawful for any person knowingly to create, reproduce, publish, promote, sell, *distribute*, give, exhibit, or possess with intent to sell or distribute any visual medium which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct." (Emphasis supplied). In the absence of a specific venue provision, as is the case here, venue is determined by Art. VI, Sec. II, Para. VI of the Georgia Constitution which provides: all criminal cases shall be tried in the county where the crime was committed.

The Court noted that in *Maddox v. State*, 346 Ga. App. 674, 681 (3) (a) (2018), in analyzing OCGA § 16-12-100 (b) (5), it held that where an individual knowingly makes materials available for others to take and those materials are in fact taken, distribution has occurred. Thus, the Court held, under OCGA § 16-12-100 (b) (5), the crime of unlawful distribution of visual media was committed when appellant knowingly made the files available from Chatham County and when the detective in Liberty County downloaded the files. Therefore, because the files were downloaded in Liberty County, venue could have legally been laid in Liberty County.

Appellant also contended that the trial court abused its discretion when it made no provisions to feed the jurors an evening meal during deliberations and that it did not allow them to obtain dinner, rendering them without a meal break for almost nine hours and thus coercing them to arrive at a "fast verdict." The Court again disagreed.

A trial court is empowered "[t]o control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto[.]" OCGA § 15-1-3 (4). Also, the trial court has broad discretion in regulating and controlling the business of the court, and the appellate court should never interfere with its exercise unless it is made to appear that wrong or oppression results from its abuse, or the court in some manner takes away rights the parties have under the law. Here, the Court found, the trial proceeded until the night, the jury began their deliberations at around 9:23 p.m., and the jury reached a verdict shortly afterward. Simultaneously, however, the record showed that the jurors were afforded a lunch break and multiple breaks thereafter, and no juror complained of being hungry or too tired to proceed with deliberations or felt rushed to render a verdict. Accordingly, the Court concluded, the record failed to demonstrate that the trial court abused its discretion in regulating and controlling the business of the court so as to coerce the jury into rendering a hasty verdict.

Rule 404 (b); Identity

Scott v. State, A20A1327 (10/21/20)

Appellant was convicted of two counts of armed robbery; three counts of aggravated assault; possession of a firearm during the commission of a felony; obstruction; and possession of a firearm by a convicted felon. The evidence, briefly stated, showed that appellant and co-defendant Parker, wearing hooded sweatshirts, masks covering their lower faces and carrying handguns, entered a McDonald's and robbed the restaurant and occupants. They then fled to a waiting vehicle and were chased to an apartment complex close to appellant's residence. They then jumped from the moving vehicle and ran into the woods. Nevertheless, a subsequent investigation led to appellant's arrest.

Prior to trial, the State sought to admit extrinsic evidence to prove intent but the trial court admitted the evidence to prove identity. This evidence showed that four years earlier appellant and three of his friends (none of which was Parker),

returning home in the early morning hours, stumbled upon an intoxicated male who had apparently passed out in the grass while exiting his vehicle. The men began rummaging through the man's pockets and his vehicle, and at some point, the man woke up and began objecting. Appellant and his friends physically beat and kicked him, and at least one witness testified that appellant held a gun to the man's head. When the police arrived, they fled into the same woods in which appellant fled after the McDonald's armed robbery. Eventually, appellant was apprehended, charged with armed robbery, but he was convicted of the lesser-included crime of robbery.

Appellant contended that the trial court erred in admitting this Rule 404 (b) evidence to prove identity. The Court agreed. The Court found that the admission of the evidence was "an obvious example of propensity evidence." Specifically, the Court stated, there was nothing peculiar or unique about these two crimes that would mark them as the handiwork of the same individual or that would demonstrate a modus operandi. One was a planned armed robbery of a fast-food establishment, the other was a random crime of opportunity. And although there were some similarities — both occurred during the early morning hours and in the month of July, both involved more than one perpetrator, both involved the use of a handgun, both involved the taking of cash from a victim — none of those features were remotely unique to these particular crimes or to appellant. The most significant similarity was the apartment complex and the suspects' flight into the same wooded area, but similar locations alone is not sufficient evidence of identity in the absence of more unusual similarities to indicate a signature crime.

Moreover, the Court found, any similarities in the crimes were vastly undermined by their significant differences. There was no reason to believe that a person who entered into a McDonald's restaurant in the middle of the night and robbed its employees at gunpoint was the same person who, four years earlier, stumbled upon an unconscious drunk man while returning home and then stole from and physically assaulted him. Consequently, the Court concluded, because nothing in the features of the charged crimes and the prior crime viewed individually or as a whole, marked those crimes as the unique "signature" of the same perpetrator, the trial court abused its discretion by admitting evidence of that crime to prove appellant's identity.

However, the Court stated, although the admission of the other acts evidence was error, the error was evidentiary and not of constitutional dimensions. The test for determining nonconstitutional harmless error is whether it is highly probable that the error did not contribute to the verdict. And here, the Court found, given the overwhelming evidence of guilt, the Court concluded that it was highly probable that the erroneously admitted evidence of the prior crime did not contribute to the jury's guilty verdict.

Transfer Orders; Appellate Jurisdiction

In Re J. A., A20A1193 (10/23/20)

The State indicted appellant, who was 14 years old, with two counts of armed robbery and one count of battery. Appellant moved to transfer his case to juvenile court pursuant to OCGA §§ 15-11-561 and 15-11-567. Following a hearing, the superior court denied the motion, noting in the order that there was "a significant factual dispute as to whether the robbery in this case was perpetrated using a firearm as defined in OCGA § 15-11-560 (h)." Appellant filed a direct appeal of the superior court's decision.

The State argued that the appeal should be dismissed for lack of jurisdiction because a juvenile has no right to a direct appeal from a superior court order denying a request to transfer to juvenile court. In a 2-1 decision, the Court agreed.

OCGA § 15-11-564 (a), provides: "The decision of the court regarding transfer of the case shall only be an interlocutory judgment which either a child or the prosecuting attorney, or both, have the right to have reviewed by the Court of Appeals." The Court noted that the Supreme Court held that under this statute, decisions regarding the transfer of juveniles to superior court, though interlocutory in nature, are directly appealable to the Court of Appeals. *In the Interest of K. S.*, 303 Ga. 542 (2018). But here, the issue is whether "the court" referred to in Paragraph (a) of this Code section includes a superior court ruling on a motion to transfer a criminal case to juvenile court. OCGA § 15-11-2 (15) defines "court" as used in the Juvenile Code as "the juvenile court or the court exercising jurisdiction over juvenile matters" and here, the superior court was not exercising jurisdiction over a juvenile matter because appellant had been charged as an adult in an indictment filed in superior court. Instead, it was acting in its capacity as a superior court when considering the motion to transfer based on appellant's argument that the superior court lacked jurisdiction over what should have been a juvenile matter. The mere fact that appellant was under 17 does not transform the superior court into a "court exercising jurisdiction over a juvenile matter" under OCGA § 15-11-2 (15).

Accordingly, the Court held, OCGA § 15-11-564 (a) does not apply to the superior court's order denying appellant's motion to transfer his case to juvenile court. To appeal it, appellant was required to comply with the interlocutory appeal procedures, which include obtaining a certificate of immediate review from the superior court and filing an application in the Court for interlocutory appeal. By failing to do so, the Court dismissed his appeal for lack of jurisdiction.

Statements; *Miranda*

Edwards v. State, A20A0919 (10/23/20)

Appellant was convicted of child molestation, rape and incest. The evidence showed that after his conduct with his then-six-year-old granddaughter became known, appellant fled the state. Months later, appellant was discovered in Missouri, where he had been arrested for allegedly molesting a nine-year-old girl, S. H., whom appellant viewed as a granddaughter. Appellant submitted to two custodial interviews in Missouri — the first regarding S. H.'s allegations, and the second regarding the victim's — during which he admitted to the conduct alleged by both girls and wrote apology letters to them.

Appellant contended that the statements he made during his first interrogation should have been suppressed because they were induced by the detective's promise that he would receive counseling. However, the Court found, its review of the videotaped interview confirmed the detective's testimony that he initially interviewed appellant regarding the case in Missouri involving S. H.; that he advised appellant of his *Miranda* rights at the beginning of the interview; and that he obtained appellant's signature on a waiver form; that he did not promise appellant anything in exchange for his statements, nor did he coerce or threaten appellant. Approximately fifteen minutes before appellant confessed to touching S. H., the detective stated that his primary concern was providing services to S. H., and then he noted that appellant might need counseling as well. The Court found that even if this remark could be interpreted as a promise to provide appellant with counseling, such a promise would not result in the interview's exclusion under OCGA § 24-8-825. Nowhere in the interview did the detective promise a reduction in the charges or the potential sentence in exchange for the confession. As

such, appellant's confession was not wrongly induced, and the trial court correctly found that his *Miranda* waiver was voluntary and knowing.

Appellant also argued that the statements he made during his second interrogation should have been suppressed because he requested legal counsel at the outset. The recorded interview showed that appellant was still incarcerated under the previous allegations at the time he was questioned. When the detective entered the room, appellant mentioned that a lawyer was supposed to be coming to see him, and asked if it would be the public defender. The detective responded that it probably would be, and proceeded to read appellant his *Miranda* rights. Appellant continued to participate in the interview, never asking for an attorney.

The Court found that appellant's comments did not amount to a clear invocation of his right to counsel. At best, appellant was indicating an expectation of legal counsel in the future, which is not the type of unequivocal request for counsel that would result in the suppression of the interview. Moreover, even if the admission of the second interview was error, it was harmless in light of the overwhelming evidence against appellant, especially the testimony of the victim, which remained consistent throughout.