

THIS WEEK:

- **Jury Charges; Deliberate Ignorance**
- **Search & Seizure; Prolonged Stops**
- **Sentencing; Right to Be Present**
- **Theft by Receiving; Sufficiency of the Evidence**
- **Search & Seizure; Patterns of Criminal Activity**

Jury Charges; Deliberate Ignorance

Grullon v. State, A20A1051 (10/29/20)

Appellant was convicted of trafficking in heroin. The Court charged the jury as follows: “The element of knowledge, intent, may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant’s knowledge of a fact may be inferred from willful blindness to the existence of the fact. Again, whether or not you draw such an inference is a matter solely within your discretion.”

Appellant contended that the trial court erred in giving this charge on the issue of deliberate ignorance because the charge equated intent with knowledge. The State conceded that the charge was error. However, the Court found, appellant did not preserve this claim of error for regular appellate review. Although he objected to the charge at the charge conference (albeit on different grounds), he did not object to the charge at the time it was given. Therefore, his claim that the trial court erred by giving the charge was subject to review only for plain error.

As to plain error, appellant was required to show the error had not been intentionally relinquished or abandoned, i.e., affirmatively waived, by him. And here, the Court found, after giving the charge to the jury, the trial court asked if appellant had any objection to it, and his trial counsel responded “no.” Thus, the Court concluded, by affirmatively stating that he had no objection to the charge to the jury, appellant waived any claim that the charge was improper, meaning that he could not show plain error.

Search & Seizure; Prolonged Stops

Weaver v. State, A20A1046 (10/30/20)

Appellant was charged with VGCSA. The trial court denied his motion to suppress, but granted him a certificate of immediate review. The Court granted the application.

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The facts, briefly stated, showed that an officer made a stop of an SUV pulling a trailer loaded with salvaged partial truck bodies. The officer approached the SUV on the passenger side and told the driver, later identified as appellant, that he had a non-functioning trailer light. While appellant and the passenger were retrieving their identifications, the officer told appellant that he would not write a ticket for the violation but wanted him to be aware of the malfunction so he could get it repaired. Approximately two and a half minutes into the stop, the officer radioed dispatch to check appellant's and the passenger's information. Appellant exited the vehicle to test the trailer lights, and the officer reiterated that "it's not a big deal." While waiting for a response from dispatch, the officer asked appellant about the trailer load. Approximately 6 minutes into the stop, dispatch radioed the officer with information on the identifications, noting nothing irregular with appellant's license or registration and only mentioning that the passenger was on probation. Although appellant's license was good and he had no outstanding warrants, the officer, rather than ending the stop, returning to his cruiser, or telling appellant he was free to leave, inquired with the passenger about the items on the trailer. The officer then questioned appellant about where he acquired the truck bodies. This took another minute and twenty seconds and still the officer did not tell appellant he was free to leave. Instead, the officer inquired about a knife appellant had on his belt, asking whether he had any other weapons, and then requested to pat-down appellant, who denied having other weapons and consented to the pat-down. The officer then asked appellant if he was involved in any criminal activity. Appellant stated he was not. The officer followed that question with whether appellant had any drugs on his person or in his truck. Appellant stated that he did not. Nevertheless, the officer told appellant that because appellant was "moving around a lot," he suspected that appellant had drugs and requested consent to search. Appellant consented and methamphetamine was found in the truck.

Appellant contended that the trial court erred by finding that the officer did not prolong the stop, and thereby erred in denying his motion to suppress. The Court agreed.

The Court stated that an officer may continue to detain a driver after the investigation of the traffic violation is complete only if the officer has a reasonable, articulable suspicion that the driver was engaged in other illegal activity. Here, the Court found, the officer continued to question appellant and his passenger about multiple subjects unrelated to the purpose of the stop even after receiving an answer from dispatch regarding the legality of appellant's license and registration. Furthermore, the Court stated, even if the officer's continued questioning of appellant and the passenger about the scrap metal did not constitute an unreasonable prolongation of the stop, the officer should have ended the stop after he finished his questions as to that matter. Instead, the officer continued to question appellant about a knife that was plainly visible for the first half of the stop, about other possible weapons, and finally about general criminal activity or drug possession. The only possible reason for suspicion about drug possession given by the officer was that appellant was nervous during the stop. But, mere nervousness is not sufficient to support a reasonable articulable suspicion to extend a stop after completion of the original mission and here, the officer did not provide, nor did the trial court find, any other facts to support a reasonable articulable suspicion.

Accordingly, the Court concluded, the officer had no basis for prolonging the traffic stop beyond the time reasonably required to complete his investigation of appellant's traffic violation. Consequently, the search of appellant's SUV resulted from an illegal detention and therefore, the Court reversed the order of the trial court and remanded the case with direction to grant appellant's motion to suppress.

Sentencing; Right to Be Present

Bettis v. State, A20A1387 (11/2/20)

Appellant was convicted of two counts of aggravated assault, one count of criminal attempt to commit rape, one count of kidnapping, and one count of possession of a knife during the commission of a crime. Appellant represented himself at trial. He contended that the trial court erred in denying him the opportunity to be present at sentencing when he requested to be brought back to the courtroom for the pronouncement of his sentence. The Court agreed.

The Court stated that sentencing is a critical stage at which a defendant is generally entitled to be present under the Georgia Constitution. Thus, a trial court violates these constitutional rights unless the defendant validly waives his right to be present, and the violation of his right to be present which is presumed prejudicial is not subject to a harmless error analysis under Georgia law. While a trial court is not required to make moment-by-moment inquiries as to whether a defendant who voluntarily absented himself later wishes to be present, a nondisruptive defendant who voluntarily absents himself for a time may regain his right to be present.

Here, the record showed, appellant did not want to be present during the evidentiary part of the sentencing hearing when the victims testified, but stated "Bring me back here and give me the digits. I don't want to hear nothing they got to say." After appellant was removed from the courtroom, the trial court ruled that appellant had waived his right to be present for sentencing and sentenced him to 95 years' imprisonment.

The Court concluded that the trial court denied appellant his right to be present for the portion of the sentencing hearing where the trial court pronounced its sentence. Appellant chose to waive his right to be present only during the evidentiary portion of his sentencing hearing but desired to be present when his sentence was pronounced. Specifically, appellant told the trial court, "bring me back here and give me the digits." Consequently, because appellant was absent for a critical part of his sentencing for which he specifically requested to be present, the Court vacated appellant's sentence and remanded the case for resentencing.

Theft by Receiving; Sufficiency of the Evidence

Johnson v. State, A20A1141 (11/2/20)

Appellant was convicted of home invasion in the first degree, aggravated assault, possession of a firearm during the commission of a felony, possession of a handgun by a person under the age of 18, VGCSA, theft by receiving stolen property, and other offenses. The evidence, very briefly stated, showed that appellant and two others invaded a home in order to steal weapons. Although they intended to enter an unoccupied home, they brought a gun in case someone was home and they needed it to rob the occupants. A victim was home and called the police before one of appellant's accomplices pointed the weapon at her. Appellant and his accomplices then stole some property and fled. They were pursued and one of them dropped a book bag that he was carrying. A search of the book bag revealed a watch and iPhone taken from the victim's home, as well as a Glock .9mm, marijuana, plastic bags, a scale, and additional cell phones. The owner of the Glock .9mm found in the book bag testified that the gun was stolen from his truck two months before the home invasion. The truck was located in the same city as the location of the home invasion.

Appellant argued that the State presented insufficient evidence showing that he knew that the firearm found in the backpack was stolen. The Court agreed.

The Court noted that under OCGA § 16-8-7 (a), "[a] person commits the offense of theft by receiving stolen property when he receives, disposes of, or retains stolen property which he knows or should know was stolen . . ." And here, the State charged appellant with receiving stolen property that he knew or should have known was stolen. Thus, proof that appellant knew or should have known that the firearm at issue was stolen at the time he received it, was an essential element of the offense. However, proof of possession, alone, of recently stolen property is not sufficient to establish the essential element of the offense of theft by receiving stolen property that the possessor knew or should have known that the property was stolen. Nevertheless, knowledge that goods are stolen may be inferred where the circumstances would excite suspicion in the minds of ordinarily prudent persons.

The State contended that it produced sufficient evidence to support appellant's conviction because "[appellant] could not have purchased the gun legally due to his age," and the stated purpose of the subsequent home invasion was to steal guns to sell or keep. It also argued that appellant's conduct in abandoning the backpack and fleeing as the police responded supported the inference that he knew the gun was stolen. The Court disagreed.

While flight or abandonment of stolen property can provide circumstantial evidence of guilty knowledge, here, the other items found in the backpack (property stolen in the home invasion and marijuana) diluted the value of such evidence to the point that it could not be said that such evidence "exclude[s] every other reasonable hypothesis save that of the guilt of the accused." OCGA § 24-14-6. Furthermore, the Court found, the fact that appellant could not legally purchase the gun due to his age did not exclude the possibility that the weapon may have been given away or sold "on the black market." Finally, the Court could not agree that appellant's motive to steal guns in the home invasion showed that he knew or should have known at the time he received the gun that it had been stolen. Accordingly, the Court reversed appellant's conviction for theft by receiving stolen property.

Search & Seizure; Patterns of Criminal Activity

Runnells v. State, A20A1154 (11/2/20)

Appellant was convicted of VGCSA and weapons offenses. He contended that the trial court erred in denying his motion to suppress. The Court agreed.

The evidence, briefly stated, showed that a sergeant in the narcotics squad with extensive training in drug investigations was conducting a random patrol of an apartment complex in a "very high crime" area known for drug activity and recent robberies. It was dark at the time. She noticed a vehicle parked "oddly" behind several other parked vehicles. A Hispanic male was standing at the driver's side door, who looked as if he was engaged in "some sort of contact with the driver" of the oddly parked vehicle. When the Hispanic male saw the sergeant's police car, he ran from the scene. The sergeant suspected that the man had engaged in some kind of drug transaction or sale of stolen property with the driver of the vehicle. However, she did not see any actual hand-to-hand transaction or exchange between the two. She moved her police car closer to the parked vehicle and noticed a passenger in the vehicle. The driver, later identified as appellant, got out of the car and popped its hood, looking at the engine as if something was wrong with the car. The driver went back into the

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driver's seat, popped the trunk, and got out again and placed a backpack into the trunk. The sergeant then decided to engage the driver; she "repositioned [her] car so that [she] could approach him." Choosing to bypass a first-tier stop, she turned on her blue lights, and got out of her police car. As she approached the vehicle, she noticed a strong smell of marijuana coming from the vehicle. A subsequent search led to appellant's arrest.

The State conceded and the Court agreed that the sergeant's interaction with appellant constituted a second-tier investigatory detention. The Court also stated that the activity witnessed by the sergeant provided her with a basis to increase her level of suspicion of appellant. However, the Court stated, whether that level of suspicion was enough to justify a second-tier investigatory detention is another question, and a close one.

Citing *Hughes v. State*, 269 Ga. 258 (1998) and *Adkinson v. State*, 322 Ga. App. 1 (2013), the Court noted that a police officer witnessing a suspect fitting a pattern of criminal behavior in a high-crime area is not sufficient to provide a reasonable, articulable suspicion to detain the suspect. However, citing *Lambright v. State*, 226 Ga. App. 424 (1997) and *State v. Preston*, 348 Ga. App. 662 (2019), where a suspect was observed directly making a hand-to-hand exchange with another individual, sufficient justification has been found to warrant a second-tier detention. And here, the facts were somewhere between the *Hughes/Adkinson* line of cases and the *Lambright/Preston* line of cases. Although the sergeant testified plainly that she did not observe any hand-to-hand exchange between appellant and the Hispanic male who later fled the scene, she witnessed them engaged in some way, and she did suspect that some kind of transaction had occurred. However, the record reflected that the sergeant witnessed only "some sort of contact" between the two men, and she did not specify whether she observed any physical contact between them, versus observing mere communication. Additionally, when pressed, the sergeant could not specifically articulate her suspicion about what she observed, explaining that she "figured there was some sort" of crime taking place, either "an illegal drug transaction" or "possibly stolen property being sold."

Based on the totality of the circumstances, the Court concluded that the sergeant's level of suspicion was more akin to the "pattern of behavior" level of suspicion criticized in *Hughes* and *Adkinson* than the more specific and articulable suspicion found in *Lambright* or *Preston*. Accordingly, although appellant's behavior might have justified closer observation, the officer lacked sufficient information to believe that appellant, in particular, was engaged in illegal activity so as to provide a reasonable, articulable suspicion to justify the stop. Significantly, the sergeant made no allegation that she saw appellant commit a traffic violation or any other crime while observing him, she was not patrolling the apartment complex as a part of any specific ongoing drug investigation, and she was not looking for anyone matching appellant's or his passenger's description. Further, although the Hispanic male seen interacting with appellant at the vehicle ran when he saw the sergeant's police car, appellant did not attempt to avoid police detection or act in any erratic manner. Thus, additional indicia of criminal behavior that could have contributed to the sergeant's level of suspicion were not present in this case.

Accordingly, the Court held, the trial court erred in denying appellant's motion to suppress the results of such detention and subsequent search, and reversed his convictions on this basis.