

THIS WEEK:

- **Sentencing; Merger**
- **Sufficiency of the Evidence; Controlled Substances**
- **Hybrid Sentencing; Sentence Stacking**
- **Criminal Contempt; Jefferson Factors**
- **Search & Seizure; Prolonged Traffic Stops**

Sentencing; Merger

Cameron v. State, A20A1829 (1/21/21)

Appellant was convicted of simple battery (as a lesser included offense of kidnapping with bodily injury), terroristic threats, criminal damage to property, and two counts of misdemeanor battery based on two separate incidents occurring a few days apart (January 26 and Feb 1) against the same victim. Appellant first argued that the trial court erred in failing to merge his conviction for simple battery (as a lesser included offense of kidnapping with bodily injury) (Count 1) into his misdemeanor battery conviction relating to the January 26, 2002 incident (Count 4). The Court disagreed.

The Court noted that Count 1 alleged that on January 26, 2002, appellant committed the offense of kidnapping with bodily injury by "unlawfully and forcibly abduct[ing] and steal[ing] away [the victim], a person, without lawful authority and warrant and hold[ing] said person against her will; said act resulting in bodily injury to said [victim]." Both sides recognized at trial that this charge centered on appellant's conduct in forcibly dragging the victim by her hair through the apartment to her bedroom, causing pain to her head and loss of hair. Appellant convinced the court that it should instruct on simple battery as a lesser included offense of kidnapping and ultimately, the jury agreed that the hair-dragging conduct involved in Count 1 constituted simple battery, not kidnapping.

However, Count 4 alleged that appellant committed a different crime - misdemeanor battery - by "intentionally caus[ing] visible bodily harm to [the victim] by punching her in the face with his fist, choking her, and kicking her in the stomach." Count 4 focused on appellant's acts of hitting, kicking, and choking the victim, rather than the hair-dragging conduct. And, as defense counsel argued to the trial court when requesting a charge on the lesser included offense of simple battery, the conduct underlying the jury's verdict on Counts 1 and 4 was not the same. Accordingly, the Court concluded, appellant's convictions on these two counts did not merge.

Next, appellant argued that the trial court should have merged Count 4 (alleging a battery committed on January 26, 2002) and Count 7 (alleging a battery committed on February 4, 2002) because, in his view, the two charges are almost "indistinguishable." The Court noted that it is true that if the counts in the indictment are identical except for the dates alleged, and the dates were not made essential averments, only one conviction can stand. Here, however, the two counts at issue not only alleged different dates, but different conduct as well. Count 4 alleged that on January 26, 2002, appellant intentionally caused "*visible bodily harm* to [the victim] by punching her in the face with his fist, choking her, and kicking

her in the stomach[.]" (Emphasis supplied). Count 7, on the other hand, charged that on February 4, 2002, appellant "did intentionally cause *substantial bodily harm* to [the victim] by punching and choking her[.]" (Emphasis supplied).

Pursuant to OCGA § 16-5-23.1 (a), a battery results when a person intentionally causes substantial physical harm or visible bodily harm to another person. Count 4 alleged one way of committing the offense (by intentionally causing visible bodily harm), while Count 7 alleged a different method (by intentionally causing substantial bodily harm). Thus, the Court found, given the differences in the allegations, as well as the clear testimony at trial that appellant physically assaulted the victim on two separate occasions in two different locations, the trial court did not err in failing to merge Counts 4 and 7.

Sufficiency of the Evidence; Controlled Substances

Roundtree v. State, A20A2067 (1/22/21)

Appellant was convicted of possession of cocaine and possession of a controlled substance, namely "Alpha-PVP (alpha-pyrrolidinopentiophenone)." The evidence showed that appellant was arrested on a probation warrant. In his pocket, the police found baggies containing residue of a white, powdery substance that later tested positive for cocaine, and further testing revealed that the residue was a mixture of cocaine and a substance called Alpha-PVP.

He contended that the evidence was insufficient to prove his possession of the controlled substance. The Court agreed.

As to the possession of a controlled substance, namely "Alpha-PVP (alpha-pyrrolidinopentiophenone)," the State failed to present sufficient evidence as to this count because "Alpha-PVP (alpha-pyrrolidinopentiophenone)" is not listed in any of the controlled substance schedules. Nor was there testimony or other evidence that "Alpha-PVP (alpha-pyrrolidinopentiophenone)" is chemically related to any listed controlled substance. Indeed, the forensic chemist only referred to the drug as Alpha-PVP and was never questioned about its specific chemical properties or other information that might link it to a listed controlled substance. Nor did the State elicit any such testimony from its law-enforcement witness who was admitted as an expert in use and possession of cocaine and Alpha-PVP. As a result, the State failed to present sufficient evidence to sustain appellant's conviction on the count for possession of "Alpha-PVP (alpha-pyrrolidinopentiophenone)" as a controlled substance because it failed to present evidence that the substance in his possession was controlled.

Hybrid Sentencing; Sentence Stacking

Torres v. State, A20A1596 (1/27/21)

In 2017, appellant was convicted of four counts of incest, two counts of aggravated child molestation, and a single count each of rape and aggravated sexual battery. Pursuant to former OCGA § 17-10-6.2 (b) in effect at the time appellant committed these crimes, the four incest counts (Counts 2, 3, 4, and 5) required a split sentence of incarceration and probation. The trial court sentenced appellant on these counts as follows: on count 2, 50 years, with the first 49 years to be served in confinement and the balance on probation; on count 3, 30 years, with the first 29 years to be served in confinement and the balance on probation; on count 4, 50 years, with the first 49 to be served in confinement and the balance on probation; and on count 5, 30 years, with the first 29 years to be served in confinement and the balance on probation. The sentencing order further provided that the sentences for counts 3, 4, and 5 were each consecutive to the

period of confinement for the previous count and concurrent with the one year on probation imposed in the previous count.

Appellant argued that the split sentence imposed on each of the incest counts was "illogical," because he received four years on probation in which he will never report to a probation officer, receive treatment, or pay fines or restitution. However, the Court held, the sentences entered by the trial court on the incest counts comply with the applicable law. As the Supreme Court explained in *State v. Riggs*, 301 Ga. 63, 67 (2) (2017), a trial court may impose a "hybrid" sentence — i.e., a sentence that runs "partially concurrent and partially consecutive to another" sentence. *Riggs*, 301 Ga. at 68 (2) (a). To comply with the provisions of the applicable version of OCGA § 17-10-6.2 (b), the trial court may run a split sentence partially consecutive and partially concurrent to another sentence, such that the probationary component of a split sentence may be served concurrently with the period of confinement imposed by the sentence on another count." And here, the Court stated, this is exactly what the trial court did.

Criminal Contempt; Jefferson Factors

In re Lightfoot, A20A1828 (1/27/21)

Appellant, a criminal defense attorney, was held in contempt during trial and fined \$1000.00. The facts, very briefly stated, showed that during cross-examination of the arresting officer, appellant attempted to place the body-cam video of the officer into evidence, but was unsuccessful. She then cross-examined the officer referencing what appeared to be times found on the body-cam video (e.g. "Isn't it correct that within 14 minutes and 17 seconds of your investigation of [the defendant],..." and "Isn't it correct that at 16 minutes and 16 seconds that you had a conversation with [the defendant]..."). The prosecutor objected and the trial court asked for appellant to identify the sources from which these specific times were adduced. Appellant stated that she arrived at these specific time markers from "several sources." Following a long colloquy between the court and appellant, during which appellant refused to identify these sources, the court stated it would take a 30 minute recess (appellant, when pressed, asked for four hours) for appellant to produce these sources. After the recess was over, appellant claimed that some of the sources were privileged. The court held appellant in contempt thereafter.

Appellant contended that the trial court erred in holding her in criminal contempt. Specifically, she contended that her conduct was not contemptible when evaluated in light of the factors enumerated in *In re Jefferson*, 283 Ga. 216 (2008). The Court agreed.

The Court stated that contempt of court, in its broad sense, means disregard for or disobedience of the order or command of the court; this also includes the interruption of court proceedings. Criminal contempt involves some form of willful disrespect toward the court; it may involve intentional disregard for or disobedience of an order or command of the court, or it may involve conduct which interferes with the court's ability to administer justice. Criminal contempt is a crime in the ordinary sense. Like all crimes, contempt has an act requirement (actus reus) and a mental component (mens rea). To satisfy the act requirement, proof must show the act constituted an imminent threat to the administration of justice.

To satisfy the intent element, the *Jefferson* Court adopted a nonexhaustive list of factors to be considered: (1) the extent to which the attorney was put on notice prior to the contempt citation that a continuation of the offending statements would

constitute contempt; (2) the likely impact of the offending statements on the deliberations of the factfinder, which calculus incorporates both the nature and timing of the offending conduct and whether the factfinder is a judge or jury; (3) whether the offending statements occurred as an isolated incident or constituted a pattern of behavior; (4) the significance of the particular issue in question to the case as a whole and the relative gravity of the case; and (5) the extent, if any, to which the trial court provoked the offending statements with its own improper statements.

In applying the factors, the Court noted that (1) appellant was not put on notice before the contempt citation that her failure to disclose her good faith basis for her questions would constitute contempt; (2) the allegedly offending conduct occurred outside of the presence of the jury; (3) appellant's assertion that she had other sources was made several times, but her assertion of privilege was made only on one occasion before she was held in contempt; (4) the particular issue in question, whether appellant had a good faith basis for her questions, was not of great significance to the case as a whole - in fact, the trial court stated that "this is no longer about the defense" but was instead about appellant and her statements as an officer of the court and a member of the Bar; and (5) the trial court did not provoke the offending conduct, although any delay in the trial was caused by the trial court's decision to take a 30-minute recess, which appellant did not request.

The Court also stated that in considering whether to hold an attorney in contempt, the court should always assess whether there are other correctives sufficient to address the problematic conduct in question. And here, the Court noted, other actions might have achieved the same result without holding appellant in contempt. For example, the trial court could have warned appellant that her failure to identify her sources would constitute contempt rather than simply announcing that appellant was in contempt. Thus, the Court concluded, considering the standards enunciated in *Jefferson*, including the five factors listed above, the judgment of contempt against appellant must be reversed.

Search & Seizure; Prolonged Traffic Stops

Terry v. State, A20A1627 (1/28/21)

Appellant was convicted for VGCSA, driving with a revoked license; and improper display of a license plate. He contended that the trial court erred in denying his motion to suppress evidence obtained after the conclusion of the traffic stop without reasonable, articulable suspicion. The Court agreed.

The evidence, very briefly stated, showed that an officer stopped a vehicle for an alleged window tint violation and an obstructed license plate. Appellant was driving and Smith was the front seat passenger. The officer determined that appellant's driver's license was revoked and arrested him. The officer then determined that the vehicle was registered to someone named Teresa Rodriguez, but that Smith was a "secondary owner" (her name appeared at the bottom of the car registration. The officer also determined that Smith had a valid driver's license and there was insurance on the vehicle. At this point, the officer asked Smith for permission to search the vehicle, but she said no. The officer then detained Smith while a "free air sniff of the vehicle" was conducted by a K-9 officer and police dog (already on the scene). The dog alerted and drugs were eventually found in the vehicle.

Although appellant conceded that the initial traffic stop was lawful, he argued that the open air dog sniff of Smith's car was unlawful because it was conducted after the "mission" of the traffic stop was complete. Specifically, he contended that

after the traffic stop was complete, the officer lacked any reasonable, articulable suspicion to prolong the stop to conduct the open-air K-9 search.

The Court found that the undisputed evidence showed that all tasks related to the mission of the traffic stop were completed before the free-air dog sniff was conducted. Indeed, the officer testified that when he gave Smith "her stuff back," which was prior to the dog sniff, she was "free to go[.]" and the only reason he asked her to stay by his patrol car was because he did not want her to get hit by a car while walking down the interstate. Thus, while the officer stated that he knew from his experience and training there was "something" in Smith's car, he also testified that if Smith wanted to, she could have "[gotten] in her vehicle and [driven] away." The officer then reiterated that, by this point, he had given "all her information back," and "technically, she was free to leave."

So, the Court found, although the officer believed there were "indications of criminal activity going on," he nevertheless determined that he had "no legal grounds" to keep Smith after determining that she had a valid license and returning her belongings. Additionally, prior to the K-9 search, appellant had already been arrested, and there were no remaining tasks related to his offense of driving with a suspended license being conducted. Thus, the undisputed evidence showed that all tasks related to the mission of the traffic stop were completed before the officer asked for Smith's consent to search the car and before the free air sniff was conducted. Consequently, the officers prolonged the traffic stop after the mission of the stop was completed in order to conduct an open-air dog sniff, which rendered the seizure at issue unlawful. And this was true even if that process added very little time to stop.

To be sure, the Court stated, an officer may detain a suspect after the conclusion of a traffic stop and continue to interrogate him or seek consent for a search so long as the officer has reasonable suspicion of criminal activity. But that was not what happened here. Again, according to the officer, Smith was not detained at the time of the dog sniff. To the contrary, the officer testified that Smith was free to leave in the car that was ultimately searched as soon as he returned her license and other documents. The officer also testified at length during the suppression hearing about the circumstances that caused him to believe that evidence of criminal activity would be found in Smith's car, such as discrepancies between Smith and appellant's stories regarding where they were going and for how long, Smith acting nervous, and the apparent absence of luggage. But regardless of those concerns, at the time of the dog sniff, Smith was not detained due to the officers' reasonable suspicion of criminal activity. Instead, the traffic stop was completed, her belongings had been returned, and she was free to leave. Again, even the officer testified that, after returning Smith's belongings, he had no legal basis to detain her, which meant he certainly did not have a particularized and objective basis for suspecting that appellant or Smith were involved in criminal activity unrelated to the traffic stop. Accordingly, the Court concluded, the trial court abused its discretion in denying appellant's motion to suppress the evidence seized from Smith's car.