Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING FEBRUARY 4, 2022
Issue 5-22

THIS WEEK:

- Probation Revocations; Law of the Case
- Out-of-Time Appeals; Motions to Withdraw Guilty Pleas
- Merger; Multiple Counts of Same Crime
- Search & Seizure; Prolonged Stops
- Sufficiency of the Evidence; Possession by a Convicted Felon

Probation Revocations; Law of the Case

Ward v. Carlton, S21A1088 (1/19/22)

The procedural facts in this case are complicated. Very briefly stated, in 2012, Carlton entered a negotiated *Alford* plea to three counts of impersonation of a public employee (Counts 4, 6, and 7), and the remaining counts (interstate interference with custody, burglary, criminal attempt to commit aggravated stalking, and criminal attempt to commit kidnapping) were nolle prossed. The trial court sentenced Carlton to serve five years in prison on Count 4, a consecutive split sentence of five years — one year to serve in prison and four years to serve on probation — on Count 6, and a consecutive five years to serve on probation on Count 7, for a total sentence of six years to serve in prison and nine years to serve on probation. On the sentencing disposition form for Count 4, the general and other terms of probation section was struck through, as were the words "see Addendum 'A' for special conditions of probation." The sentencing disposition forms for Counts 6 and 7 included general terms and conditions of Carlton's probation, as well as special conditions of his probation reflected in an Addendum A. The special condition at issue in this case said, "Defendant shall have no contact with his children unless an order from the Cobb County juvenile court allows it." Carlton did not appeal.

In 2014, while Carlton was incarcerated based on his sentence on Count 4, the State filed a petition to revoke his probation, alleging that he had violated the special condition by attempting to contact his children by telephone and mail on three occasions at their adoptive parents' residence and alleging he committed the offense of aggravated stalking by attempting to contact his children by mail. In 2015, after a hearing, the trial court revoked six years of Carlton's probation based on the violations of his probation conditions, ordered that he serve that time consecutive to the six years he was already sentenced to serve in prison, and modified his probation terms in an addendum. Carlton filed an application for discretionary appeal of the revocation order, but the Court of Appeals dismissed the application as untimely.

In 2018 Carlton was tried and convicted for criminal attempt to commit aggravated stalking, the conduct that was in part the basis for his probation revocation. In 2020, the Court of Appeals reversed based on the erroneous admission of bad-character evidence. See *Carlton v. State*, 356 Ga. App. 1, 7-10 (2020). In so doing, the Court of Appeals stated that the no-contact probation condition in Carlton's 2012 criminal sentence "pertained only to Counts 6 and 7, which he was not yet serving at the time he sent the postcard and letter [to his children's residence]." However, the Court found that this variance between the indictment and evidence was not fatal.

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Also in 2018, Carlton filed his habeas petition in which he alleged ten grounds including that the trial court violated his right to due process by revoking his probation before it began and before he was released from prison. The hearing on this petition was held before the Court of Appeals issued its opinion. In 2021, the habeas court granted Carlton's petition. The habeas court found that the Court of Appeals had determined that the trial court could not revoke Carlton's probation before he had begun serving it and based on *Buckner v. Barrow*, 297 Ga. 68 (2015), "[h]abeas courts are bound by determinations made by the Court of Appeals of Georgia, even if erroneous," The Commissioner of the Department of Corrections appealed.

The Court noted that in *Postell v. Humphrey*, 278 Ga. 651, 652 (2004), it explained that the General Assembly had amended OCGA § 17-10-1 (a) (1) (A) in 2001 to "provide expressly that sentencing judges [are] authorized 'to revoke . . . probation . . . even before the probationary period has begun.'" And, the Court stated, it had made similar rulings in *Layson v. Montgomery*, 251 Ga. 359 (1983), and *Parrish v. Ault*, 237 Ga. 401 (1976). But, although the habeas court accepted these holdings, it still found that it was bound by the ruling of the Court of Appeals that the trial court could not revoke Carlton's probation before it started.

However, the Court found, the Court of Appeals did not address, much less resolve, the issue of whether the trial court had authority to revoke his probation before he began serving the probationary period of his sentences, which is an issue governed by the plain text of OCGA § 17-10-1 (a) (1) (A) and *Postell*, *Layson*, and *Parrish*. Instead, the Court of Appeals decided the legally distinct question of whether Carlton had violated a court order then "'in effect'" as that term is used in the aggravated stalking statute. Therefore, the Court stated, it did not need to decide whether the Court of Appeals' discussion of Carlton's sentences with respect to the aggravated assault statutory question was correct, as that question was not presented here and it was clear that the Court of Appeals did not issue a ruling on the revocation-authority issue that Carlton raised in this habeas case, which means that the law of the case doctrine applied in cases like *Buckner* did not apply here.

Accordingly, the Court concluded, the habeas court was not bound by the Court of Appeals' inapposite ruling and instead should have decided Carlton's revocation-authority claim on its merits. And because OCGA § 17-10-1 (a) (1) (A), *Postell*, *Layson*, and *Parrish* make it clear that such a claim has no merit, the Court reversed the habeas court's grant of relief on that ground.

Out-of-Time Appeals; Motions to Withdraw Guilty Pleas

Boone v. State, S21A1065 (1/19/22)

In 2012, appellant entered a non-negotiated plea to malice murder and other offenses. In 2015, he filed a pro se motion for leave to file an out-of-time appeal, and filed a brief in support in January 2020, arguing that plea counsel was ineffective by failing to inform him of his rights to withdraw his guilty plea prior to sentencing and to appeal his convictions. Following a hearing, the trial court denied his motion for an out-of-time appeal, finding that he failed to establish that plea counsel was deficient in failing to advise him of his right to appeal when the record showed that counsel advised him of the consequences of pleading guilty, appellant was advised that he had the right to an appeal, appellant confirmed that he understood that right, and he never asked plea counsel to file an appeal.

The Court found that in his appeal, appellant referred to plea counsel's failure to advise him of his right to appeal or to withdraw his guilty plea. But he made no real argument that he wanted to appeal and that plea counsel's failure frustrated

this right. Instead, appellant argued that plea counsel's deficiencies resulted in his inability to file a timely withdrawal of his guilty plea and that, as a result, the trial court "erred in dismissing [his] Motion [to] Withdraw A Guilty Plea."

The Court noted that a motion for out-of-time appeal is a judicially created remedy for a frustrated right of appeal, allowing a defendant to file an appeal that he otherwise would have pursued but for trial counsel's ineffectiveness. However, the Court stated, in *Schoicket v. State*, Ga. , (1) (2021), it held that a motion for out-of-time appeal, even if granted, is not a mechanism for pursuing an untimely motion to withdraw a guilty plea. Therefore, even in the unlikely event that appellant's right to appeal was frustrated by plea counsel's alleged deficiencies, a grant of an out-of-time appeal would not entitle him to pursue an otherwise-untimely motion to withdraw a guilty plea. Accordingly, the Court concluded, because appellant's appeal sought only a remedy that was unavailable to him, the Court affirmed the trial court's denial of his motion for an out-of-time appeal.

Merger; Multiple Counts of Same Crime

Johnson v. State, S21G0673 (1/19/22)

In 2013, appellant was convicted of one count of burglary (Count 1), three counts of theft by taking based on the theft of three different Ford trucks (Counts 2, 3, and 4), and one count of theft by taking based on the taking of multiple pieces of property, including, among other things, a riding lawnmower, a plasma cutter, and a welder (Count 5).

In an unpublished opinion, the Court of Appeals affirmed, rejecting, among other things, appellant's contention that two of his three theft-by-taking convictions for the theft of the trucks should have merged. The Court granted certiorari based on the standard of review used by the Court of Appeals.

The Court stated that merger analysis often involves counts charging two different crimes. When convictions for two *different* crimes are the subject of a merger analysis, courts evaluate the merger claim using the "required evidence test." But the "required evidence" test does not govern a merger analysis where, as here, a defendant claims that he has been improperly convicted and sentenced for multiple counts of the *same* crime. Thus, the Court held, the Court of Appeals' merger analysis was erroneous in two respects. First, it erred by using the long-overruled "actual evidence" test to evaluate appellant's merger claims. And second, it used the wrong type of merger analysis when it applied a test that governs merger for multiple counts of different crimes instead of multiple counts of the same crime—the latter being the type of merger claim appellant presented before the trial court with respect to his convictions for theft by taking.

When a defendant enumerates a merger error after being convicted of multiple counts of the *same* crime, the correct merger analysis requires courts to ask whether those crimes arose from "a single course of conduct" and, if so, whether the defendant can face multiple convictions and sentences under a unit-of-prosecution analysis. Thus, by invoking an overruled and inapplicable merger test, the Court of Appeals failed to engage with the relevant case law that governs merger claims pertaining to multiple convictions for the same crime. As a result, it did not evaluate whether appellant engaged in a single course of conduct on the night of the thefts, and, if applicable, what the unit of prosecution would be for theft by taking under OCGA § 16-8-2. Consequently, the Court vacated the Court of Appeals' holding regarding the merger of appellant's theft-by-taking convictions and remanded the case to the Court of Appeals for it to apply the appropriate legal analysis.

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Search & Seizure; Prolonged Stops

McNeil v. State, A21A1600 (11/19/21)

Appellant was indicted for VGCSA after drugs were found on his person during a traffic stop. The evidence, very briefly stated, showed that an officer stopped a vehicle for following too closely. The car had Florida plates, was a rental, and appellant the passenger. The officer spoke with the driver and asked for her driver's license and rental agreement. He also asked for appellant's driver's license. The officer noted appellant was very nervous. Four minutes into the stop, the officer told the driver he planned to issue her a warning. The driver stated that she had an organic soy candle-making company. The officer found her story suspicious because, in his experience with drug interdiction, he had become aware of people concealing drugs inside candles and then melting off the wax.

While speaking to the driver, the officer noticed appellant rummaging around inside the car. Approximately seven minutes into the stop, the officer questioned appellant. Following his questioning of appellant, the officer walked back over to the driver. At that point, it was approximately eight minutes into the traffic stop. The officer did not start writing out a warning to the driver or return the licenses and rental agreement. Instead, the sergeant asked the driver if he could see the candle wax. The driver agreed, opened the car trunk, and showed the sergeant a black plastic bag full of wax. The officer asked more questions and then asked for consent to search. The driver consented. When the officer asked appellant to get out of the vehicle, he complied. When appellant started reaching down, the officer told him to stop doing so and then patted him down for weapons. During the pat-down, the officer found a bulge at appellant's lower back. Appellant stated the bulge was a bag of marijuana, but it was a bag of heroin. Cocaine was then discovered in appellant's shoe.

Appellant did not challenge the validity of the stop. Instead, he argued that the trial court erred by finding that the officer did not impermissibly prolong it. Specifically, he contended that the officer unreasonably prolonged the traffic stop beyond the time that was necessary to complete the purpose of the stop without having a reasonable articulable suspicion of other illegal activity. The Court agreed.

The Court stated that it is well-established that officers may, without unreasonably prolonging a stop, ask the driver to step out of the vehicle; verify the driver's license, insurance, and registration; complete any paperwork connected with the citation or written warning; and determine if there are any outstanding warrants for the driver or the passengers. With regard to rental cars, examination of the rental agreements and any ensuing investigation are considered part of the traffic stop. While carrying out these tasks, an officer may ask the driver questions wholly unrelated to the traffic stop or otherwise engage in "small talk" with the driver, so long as the questioning does not prolong the stop beyond the time reasonably required to complete the purpose of the traffic stop.

And here, the Court found, the officer did not unreasonably prolong the traffic stop by asking the driver to step out of the sedan, verifying the licenses of the driver and appellant, checking to see that there were no outstanding warrants for the driver and appellant, and reviewing the rental agreement. Nor did the officer unreasonably prolong the traffic stop by asking the driver and appellant questions unrelated to the traffic violation when carrying out those tasks. But after completing those tasks and identifying no outstanding warrants or issues with the licenses or rental agreement, the only remaining task for the officer to carry out was to issue the written warning for following too closely. Yet, approximately eight minutes into the traffic stop, instead of issuing a written warning and allowing the driver and appellant to leave, the officer walked over to the driver after speaking with appellant and continued to extensively question her about her candle business. Thus, the Court found, the officer unreasonably prolonged the stop in violation of the Fourth Amendment.

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Sufficiency of the Evidence; Possession by a Convicted Felon

Lee v. State, A21A1230 (12/17/21)

Appellant was convicted of possessing a firearm as a convicted felon. He contended that the evidence was insufficient to support his conviction. The Court agreed.

Briefly stated, the evidence showed that an anonymous citizen contacted the chief of police in reference to an online comment about "bad" law enforcement officers needing to be "shot," which was made by appellant's Facebook account. The chief then viewed several images from appellant's account (which was public) and noticed a photograph of appellant holding a firearm, though he could not tell when the image was posted or taken. The chief confirmed appellant was a convicted felon "through a GCIC check," and then located appellant at his girlfriend's residence where he lived part time. When officers arrived at the girlfriend's residence, appellant exited the home onto the front porch and was immediately arrested for terroristic threats based on his Facebook comments. Appellant was then handcuffed and placed in the back of a patrol car while the chief and other officers searched the girlfriend's home for a gun. Before doing so, the chief asked appellant's girlfriend—based on the images uploaded to appellant's Facebook account—if there were any guns in the home. She said yes and asked her son to retrieve it from the bedroom. However, it was not located there and eventually, a .22 caliber was located in the main living area of the house.

Appellant was then read his *Miranda* rights, and he proceeded to voluntarily speak with the chief, saying that he acquired the rifle for his girlfriend's son and did so by trading a small dirt bike. His girlfriend confirmed that the gun was acquired from appellant's family, and that her oldest son used it as a hunting rifle. She also testified that appellant did not personally go to pick up the gun from his family, but rather she and her son did.

The Court found that there was no evidence appellant actually or constructively possessed the .22 caliber rifle at issue. The Facebook photos of appellant allegedly holding a firearm were not admitted into evidence, and the chief testified that he could not say when the photographs were taken or posted—i.e., he did not know if they depicted appellant possessing a firearm prior to or after his felony conviction. As a result, the jury could not infer from the chief's testimony regarding these photographs that appellant actually or constructively possessed a firearm as a convicted felon. Additionally, the rifle was spotted in the main living area of the home after the chief and appellant's girlfriend traveled through the same area to reach the bedroom, where she could not locate the firearm; and before going back inside the home, appellant's girlfriend asked her son to retrieve the firearm. It is reasonable to conclude, then, that the son retrieved the gun while the girlfriend and the chief were looking for it in the bedroom (though she testified the gun was typically kept in the laundry room), during which time appellant was already handcuffed and sitting outside in a patrol car. And the Court disagreed that appellant "confessed." Instead, the Court found that the chief merely testified that appellant said he acquired the firearm for his girlfriend's son by trading a dirt bike for it. The chief did not say appellant confessed to transporting the gun. Similarly, appellant's girlfriend testified that appellant facilitated the acquisition of the firearm (which belonged to and was used by her son), but she was the one to pick it up.

As a result, the Court concluded, even viewing the foregoing in the light most favorable to the jury's verdict, there was no evidence that appellant actually or constructively possessed the firearm so as to sustain a conviction for possession of a firearm as a convicted felon. Indeed, a finding of constructive possession must be based upon some connection between the defendant and the contraband other than spatial proximity, and evidence of mere presence at the scene of the crime, and nothing more to show participation of a defendant in the illegal act, is insufficient to support a conviction. And here,

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the Court found, the most that the evidence showed was that appellant stayed at his girlfriend's home part-time; had previously arranged for her son to acquire a rifle; appellant's girlfriend transported the rifle to her home; the rifle was generally kept in the laundry room; the rifle was used by and belonged to the girlfriend's son; and the rifle was located and appeared in the common living area on the day in question while appellant was already handcuffed and sitting in a patrol car, after the girlfriend told her son to retrieve it. There was no testimony as to where in the bedroom the girlfriend and the chief looked for the gun (e.g., under the bed, in the closet), nor was there testimony as to whether appellant shared his girlfriend's bedroom while living there part-time. And there was no testimony as to whether appellant knew where the gun was kept—be it the girlfriend's bedroom or the laundry room. Thus, appellant's spatial proximity to a firearm within his girlfriend's home was insufficient to establish that he actually or constructively possessed the rifle. There was, then, no evidence that appellant knowingly had both the power and the intention at a given time to exercise dominion or control over the firearm, and thus, the evidence presented by the State was not sufficient for the jury to find beyond a reasonable doubt that appellant possessed a firearm as a convicted felon.