Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING FEBRUARY 3, 2023
Issue 5-23

THIS WEEK:

- **Sentencing; Split Sentences**
- **Rule 413; Notice Requirements**
- **Restitution; Repair Costs**
- **Search & Seizure; Consent**

Sentencing; Split Sentences

Bolish v. State, A22A1135 (10/28/22)

In 2008, appellant entered a guilty plea to multiple felonies. In 2021, appellant filed a motion to vacate as void the sentences imposed for three sexual offenses. In relevant part, the final disposition sheet shows that, for each of the three sexual offenses at issue here (Count 9: Aggravated Sexual Battery; Count 10: Rape; and Count 11: Aggravated Sodomy), the trial court imposed: "life, serve 25 yr each count concurrent (serve 25 yrs) in [confinement]. However, it is further ordered by the Court … THAT upon service of … Cts 9, 10, 11 = 25 yrs cc of the above sentence, the remainder of Life on prob. may be served on probation PROVIDED that the said defendant complies with the general and other conditions [of probation]." The court denied the motion.

Appellant contended that each of these three sentences was void as imposing punishment not statutorily permissible. The Court noted that a sentencing court has jurisdiction to vacate a void sentence at any time. A sentence is void if the court imposes punishment that the law does not allow. But when the sentence that is imposed falls within the statutory range of punishment, the sentence is not void.

And here, the Court agreed with the trial court that appellant did not establish that any one of the three contested sentences was void. The Court found that while perhaps inartful, the cited provisions of the final disposition sheet, when read as a whole, left no question that appellant's punishment for each sexual offense amounted to a split sentence comprised of a 25-year term of imprisonment, followed by probation for life. Relying on *Cruz v. State*, 346 Ga. App. 802, 803 (1, 2) (2018) the Court stated that because each one of the contested sentences falls within the statutory range of punishment for these charges, the trial court did not err by denying appellant's motion to vacate these sentences as void. See OCGA §§ 16-6-22.2 (c) (2008), 16-6-1 (b) (2008), 16-6-2 (b) (2) (2008) and OCGA § 17-10-6.1 (b) (2) (2008).

Furthermore, the Court held, to the extent that *Upton v. State*, 350 Ga. App. 535, 539-540 (3) (2019), expresses an opinion contrary to *Cruz*, it is disapproved.

Rule 413; Notice Requirements

Williams v. State, A22A1297 (11/10/22)

Appellant was convicted of kidnapping, sexual battery, and three counts of simple battery for events that occurred in 2018. The evidence, very briefly stated, showed that the victim met appellant when she served him and his friends at her job a Top Golf. Appellant offered her a job as his personal assistant and as a babysitter for his children. Appellant offered her an iPhone as a tip, but she refused it. The next day, appellant showed up at the victim's second job, working as a waitress

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at a restaurant. Appellant showed up more than once that day and at one pointed, returned with a car salesman and offered her a new car. The victim again refused. When the restaurant closed, appellant was there waiting for her. The victim agreed to meet appellant at a Waffle House, but then changed her mind and started to drive home. Appellant followed her and harassed her as she drove. Eventually the victim stopped her car and fearing appellant had a gun, agreed to go sit in appellant's car to talk. Appellant then yanked her in, slammed the door, locked the doors, and then whispered in her ear that she was his property forever; they would get married whether she wanted to or not; and he would own her even if he eventually got tired of her and found somebody else. He then drove away with her. During the drive, he touched her inner thigh, kissed her hand, pulled her hair, and slapped her hand. Eventually, he stopped for gas, and she was able to escape and contact the police.

Before trial, the State gave a pretrial notice that it intended to introduce evidence of a 2011 incident pursuant to OCGA § 24-4-404 (b) ("Rule 404 (b)"), "to illustrate intent, plan, motive, absence of mistake or accident, and for any other permissible purpose." The evidence showed that appellant drugged and raped a woman. At the hearing, the State, upon questioning from the trial court, stated that it was not seeking to admit the evidence under OCGA § 24-4-413 ("Rule 413"). The trial court admitted it under Rule 404 (b).

Appellant contended that the trial court erred in admitting the evidence under Rule 404 (b). The Court, however, found that the evidence was admissible under Rule 413.

First, relying on *U. S. v. Benais*, 460 F3d 1059 (8th Cir. 2006), the Court found that the notice requirement does not require that the State must specifically notify the defendant that it intends to admit the evidence under Rule 413. Instead, the notice requirement is satisfied when the State discloses the evidence that it intends to admit within the requisite time limits. Thus, the State met its burden in this case.

Second, the Court found that the evidence was admissible under Rule 413. Specifically, the Court found that evidence of appellant's prior offense of rape was relevant to prove his "lustful disposition" and to disprove his claim that the victim had fabricated her version of events.

Turning to the balancing test under Rule 403, the Court found that the 2011 evidence was similar to the evidence presented here. Both victims were females close in age. In both instances, appellant contacted the victims under the auspices of business and a professional relationship. In one instance, appellant purchased clothing for the victim, and in the other, appellant attempted to give the victim a cell phone, car, and clothing. Finally, each involved nonconsensual sexual contact with the victim. And, although the probative value of the prior act was diminished somewhat because it occurred seven years before the charged crimes, it was not so remote as to be lacking in evidentiary value.

As to prosecutorial need, the Court noted that appellant's theory of defense at trial was the victim's lack of credibility and the unbelievability of her story; during both opening and closing arguments, defense counsel asserted that the victim's version of events was fabricated, that the victim had voluntarily gotten into appellant' car, and that appellant was merely offering the victim a job without any sexual motive or intent. The Court noted that when a defendant seeks to attack a victim's credibility, the State has an increased need to introduce evidence of prior acts. Thus, the Court found, given that the case boiled down to appellant's word against the victim's, the prosecutorial need for the prior act evidence was high. And the Court found, the risk of unfair prejudice from the prior act was relatively low.

Nevertheless, appellant contended, the trial court did not adequately conduct the balancing test in admitting the evidence. Specifically, he argued that the "record is absent on the legal analysis required by a trial court" based on its oral ruling during the hearing and its drafting instructions to the State. But, the Court stated, absent some express showing that the trial court did not understand its obligation to conduct the balancing test, it will not read such error into the trial court's

ruling. Moreover, there is no requirement that the court explicitly analyze the balancing test on the record. And here, the Court found, the trial court, in admitting the evidence during the hearing, referenced the balancing test as well as Rule 403, and thus implicitly found that the evidence was admissible after applying Rule 403's balancing test. Accordingly, the Court concluded that the trial court did not abuse its discretion in admitting the evidence of the 2011 incident.

Restitution; Repair Costs

Tran v. State, A22A1487 (11/14/22)

Appellant pled guilty to four counts of second-degree criminal damage to property and two counts of criminal trespass. The evidence showed that appellant punctured the tires on, broke the windows of, and scratched the two victims' vehicles on multiple occasions in February and March 2021. Following a hearing, the trial court ordered him to pay $15,529.75 in restitution to the victims.

Appellant contended that the evidence was insufficient to support the amount of restitution imposed. The Court agreed.

The Court stated that a primary goal of restitution is, as nearly as possible, to make the victim whole. Thus, the amount of restitution ordered may be equal to or less than, but not more than, the victim's damages. The maximum amount of restitution recoverable in a criminal case is that which would be recoverable in a civil action. While fair market value typically is the measure of such damages, evidence of the cost to repair an item also might be sufficient to establish the amount of damages. In a case involving an automobile, however, even when the cost to repair the vehicle is used as a measure of damages, evidence of the fair market value of the car before it was damaged is required to determine whether the cost of repairs exceeded the car's value, so as to comply with OCGA § 17-14-9. And, when determining the nature and amount of restitution, a trial court also must consider several factors in addition to the amount of damages, including the offender's financial resources, assets, income, and financial obligations, and the dual goals of restitution to the victim and rehabilitation of the offender. OCGA § 17-14-10 (a). However, written findings of fact supporting a restitution order are not required under Georgia law. Rather, the only requirement is that the restitution order be supported by a preponderance of the evidence.

Here, the Court noted, the victims in this case, I. A. and J. A., are a married couple. J. A. testified at the restitution hearing that he and his wife had incurred $4,197.69 in out-of-pocket expenses for damage to their vehicles caused by appellant ($1,625.96 for J. A.'s truck and $2,571.73 for I. A.'s car). The victims sought an additional $11,332.06, based on estimates for repairs that had not yet been completed as of the date of the restitution hearing. J. A. further testified that the fair market value of his truck was $9,000 in February 2021 but that he did not know the fair market value of his wife's car at that time. I. A. did not testify during the restitution hearing.

Appellant contended that the trial court failed to consider his financial circumstances, given the substantial evidence he presented in that regard. He also argued that his limited financial means precluded an award in the amount ordered by the court. But, the Court found, while appellant testified that he has been out of work for some time since his initial incarceration in this case and currently relies on his family for support, he also testified that he has a commercial driver's license and previously earned $50,000 per year driving trucks. Given his earning potential, the Court discerned no error in the trial court's implicit conclusion that appellant's financial situation did not preclude the amount of restitution imposed.

Appellant next contended that the trial court was not authorized to award any restitution whatsoever for costs of vehicle repairs that have not yet been made. However, the Court found, the trial court's restitution award could not stand for several other reasons. First, J. A.'s testimony regarding the costs to repair his and his wife's vehicles did not account for the total amount of restitution imposed. Specifically, the total for both vehicles as testified was $15,003.80. Therefore, the

trial court's restitution award of $15,529.75 exceeded that amount by more than $500.00. Second, the amounts identified included sums paid for warranties on replacement tires, but no evidence was presented as to how the costs of the warranties constituted "damages" sustained by either victim. And third, while J. A. testified as to the fair market value of his truck before it was damaged, the State presented no evidence of the value of I. A.'s car before any of the damages occurred.

Consequently, the Court concluded, it had to vacate the trial court's restitution award and remand this case for a new restitution hearing to address (i) the discrepancies between the evidence regarding the total repair costs and restitution awarded and (ii) after those discrepancies are resolved, whether the cost to repair either vehicle exceeds that vehicle's fair market value.

Search & Seizure; Consent

Cruz v. State, A22A1701 (11/15/22)

Appellant was convicted of 19 counts of sexual exploitation of children. The evidence showed that several sex offenders, including appellant, who was on probation, lived at a Homestead Inn. Police learned that someone had been downloading child pornography at that location, and they decided to visit the hotel to verify that those sex offenders were living there as they claimed. Probation officer J. S., another probation officer, and two deputies went to appellant's door. J. S., who was aware that appellant's probation terms did not include a Fourth Amendment waiver, knocked on his door. When appellant opened the door, J. S. asked whether she and the other probation officer could "come in and search," and appellant replied, "sure." J. S. asked if the two deputies who had accompanied her could enter and search, and Cruz said, "sure, . . . I don't have that right anymore." J. S. replied, "[W]ell, I'm asking you now, can the deputies come and search with us, and he said, 'sure, come in,'" gesturing with his hands and stepping back to allow the group inside. The other probation officer on the scene testified at the suppression
hearing that appellant was "cordial. He cooperated. He didn't look like he was agitated, upset or anything." Once inside, the search revealed child pornography on a DVD that they viewed.

Appellant argued that the trial court erred in denying his motion to suppress. Specifically, he contended that the trial court erred in making a factual finding that he consented to the search of his room. The Court disagreed.

The Court stated that generally, a search based on voluntary consent eliminates the need for a search warrant or probable cause. The State has the burden of proving the validity of a consensual search and must show the consent is given voluntarily. The voluntariness of consent is determined by looking at the totality of the circumstances, and the standard for measuring the scope of a suspect's consent is that
of objective reasonableness. Mere acquiescence to the authority asserted by a police officer cannot substitute for free consent. And, the Court stated, it is required to scrutinize closely an alleged consent to search.

Here, the Court found, J. S. asked appellant for consent to enter and search his hotel room, and he agreed. When he expressed his belief that he could not refuse their request, she asked, "[W]ell, I'm asking you now, can the deputies come and search with us," and appellant agreed. There is no requirement that a defendant be informed of his right to refuse consent. Instead, this knowledge is one factor to be considered in assessing voluntariness.

The Court noted that it has consistently held that a trial court's decision on questions of fact and credibility at a suppression hearing must be accepted unless clearly erroneous. And in the absence of evidence demanding a finding contrary to a trial court's determination, an appellate court will not reverse the ruling sustaining a motion to suppress. And here, the Court concluded, the trial court's findings were supported by the evidence, and the evidence did not demand a finding contrary

to the trial court's decision. Consequently, the Court held that the trial court did not err in denying appellant's motion to suppress.