Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
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Issue 10-23

THIS WEEK:

- **Indictments; Prosecutorial Vindictiveness**
- **Blood Tests; OCGA § 40-6-392 (e)**
- **Void Sentences; Resentencing**
- **Uniform Traffic Citations; Improper/Erratic Lane Changes**

Indictments; Prosecutorial Vindictiveness

Rice v. State, A22A1185 (1/6/22)

Rice is charged with multiple counts of VGCSA. Briefly stated, the record showed that before the State received the crime lab results, the State filed a four-count indictment charging him with: (1) possession of heroin; (2) possession of methamphetamine; (3) possession of fentanyl; and (4) possession of less than one ounce of marijuana. After the crime lab results showed that the samples tested were positive for only methamphetamine and heroin, appellant filed a motion to dismiss the indictment. Following a hearing, the State, re-indicted appellant with: (1) possession of heroin with intent to distribute; (2) possession of methamphetamine; and (3) possession of less than an ounce of marijuana. The Court noted that the second indictment dropped the fentanyl charge but increased the heroin charge from possession to possession with intent to distribute. Appellant filed a special demurrer and motion to quash. The trial court denied the motions and the Court granted interlocutory review.

Appellant argued that the trial court erred in denying his special demurrer to the fentanyl charge of the first indictment because the crime lab report did not show evidence of fentanyl. The Court disagreed. The first indictment charged appellant with "the offense of Possession of a Controlled Substance in that the said accused … on or about the 15th day of December, 2017, did unlawfully possess [f]entanyl, a narcotic drug in Schedule II controlled substance, in violation of the Georgia Controlled Substances Act[.]" The Court found that the language of the indictment was not too vague to inform appellant of the charges against him and contained enough detail to sufficiently apprise him of what he must be prepared to meet. Specifically, the indictment stated the drug appellant is alleged to have possessed, fentanyl, and the approximate date of possession, December 15, 2017. And, the Court stated, although appellant argued that there was no evidence for the fentanyl charge, that is not the proper test for a special demurrer. Nevertheless, the Court stated, a prosecutor must refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. Still, the language of the indictment is sufficient for appellant to intelligently prepare a defense, and thus the trial court did not err in denying appellant's special demurrer,

Next, appellant argued that the State should be required to elect under which of the two indictments it wishes to proceed. The Court agreed. An indictment obtained without the dismissal of a prior indictment is a superseding indictment. A grand jury is not prevented from returning another indictment against an accused, even though an indictment is pending, where there has been no jeopardy upon the first indictment, and the existence of a prior indictment generally is not grounds for quashing the second indictment, although the State may be required to elect upon which indictment it will proceed. Thus, the Court directed that upon remand the trial court should require the State to elect upon which indictment it will proceed.

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Appellant also contended that the State increased the severity of the heroin charge in response to his exercise of certain procedural rights, and thus the State had to show that its decision was not the result of a vindictive motive. The Court stated that nothing precludes the State from reindicting a defendant on additional or modified charges if jeopardy has not attached to the first indictment. An exception to this general rule exists where the subsequent indictment increases the severity of the charges in response to the defendant's exercise of certain procedural rights, which raises the appearance of retaliation or prosecutorial vindictiveness. Citing *United States v. Goodwin*, 457 U. S. 368, 381 (III) (102 SCt 2485, 73 LE2d 74) (1982), the Court found that the State's second indictment after appellant's routine pretrial motions did not create a presumption of vindictiveness. Absent this presumption, the burden was on appellant to prove that the prosecutor's charging decision was motivated by a desire to punish him for doing something the law allows him to do. Thus, the Court concluded, because appellant did not present any evidence showing actual vindictiveness, the trial court did not err in denying his motion to dismiss the indictment.

Nevertheless, appellant argued, the trial court should have held a hearing regarding the prosecutorial vindictiveness issue. However, the Court noted, appellant did not request a hearing on this issue before the trial court. It is well settled that, even if a defendant has a due process right to a hearing, that right may be waived by failure to request a hearing. The trial court has no duty to initiate such hearing until requested by one of the parties. The party seeking a hearing must take affirmative steps to request one. Having failed to request a hearing, appellant could not complain of the trial court's failure to hold one.

Blood Tests; OCGA § 40-6-392 (e)

Ussery v. State, A22A1708 (1/9/22)

Appellant was convicted of DUI (per se). He contended that the trial court erred by admitting the results of a blood test because the State failed to show that the person who drew his blood was qualified to do so under OCGA § 40-6-392 (e) (1), and that insufficient evidence supported his conviction in the absence of the blood test results. The Court disagreed.

The Court noted that OCGA § 40-6-392 (e) (3) provides that the "[t]estimony, under oath, of the blood drawer's supervisor … that the blood drawer was properly trained and authorized to draw blood as an employee of the medical facility or employer shall be admissible into evidence for the purpose of establishing that such person was qualified to draw blood as required by this Code section." And here, the State did not present testimony from the person who drew the blood or a certification from the Secretary of State or the Department of Public Health. Instead, it presented testimony from the owner of Ten-Eight Forensic Service, the company hired to draw appellant's blood on July 6, 2018, at the county jail. The owner testified that beginning in 2007, she began providing blood-draw services to police agencies, and at the time of trial, she provided services to 18 counties and 32 law enforcement agencies. She hires a contract team staff for every county and "normally" contracts with "EMTs, paramedics, RNs, LPNs, nurses, doctors, whoever's in the medical field." The people she hired had "full-time jobs in hospitals and doctors' offices" and worked for her part-time to supplement their income. In order to be hired by her company to draw blood, a person would need to have "[s]chool qualifications and a good background check." By school qualifications, she meant "graduating from whatever school or university they went through to get their nursing degree or their phlebotomy certificate or whatever they're obtaining." When she hires someone, she checks their credentials, does a thorough background check, and then the person goes out with a seasoned technician to watch how it is done. After completing training with a seasoned technician, each person hired goes out with the owner, a licensed practical nurse, who provides supervision and critique before they are released to do blood draws on their own.

The owner testified that the person who drew appellant's blood was "[o]ne of [her] best" and that she never received any complaints about her. At the time the blood drawer first started working for the owner, she was also working for Quest

Diagnostic until she later resigned and "started her Social Security." She continued working for the owner for a total of three to four years; she left less than a year before appellant's trial in April 2022, due to a death in her family and a relocation. The owner testified that "[s]he was the best person [she] had" and had "been praying and begging her to come back." At the time she drew appellant's blood in July 2018, she would have been fairly new, but the owner was not certain.

Finally, the owner testified that she would receive a renewal of the blood drawer's phlebotomy technician certificate each year, and the State introduced a document obtained from the owner showing that the person who drew appellant's blood renewed her membership with the "American Society of Phlebotomy Technicians, Inc." on February 22, 2019. The document lists the title of the blood drawer as a "Certified Phlebotomy Technician," her member number, and an expiration date of February 22, 2020, for her membership. It also states, "Your next renewal year begins in December, 2019. Between December 1st, 2019 and January 30th, 2020, … renewal fees for 2020 should be completed and submitted."

Thus, the Court stated, having examined all of the evidence before the trial court, it could not conclude that the trial court abused its discretion by finding that the State met its burden of showing through the testimony "of the blood drawer's supervisor … that the blood drawer was properly trained and authorized to draw blood as an employee of the medical facility or employer" under OCGA § 40-6-392 (e) (3).

Void Sentences; Resentencing

Pittman v. State, A22A1247 (1/9/22)

Appellant was convicted of simple assault, as a lesser-included offense of aggravated assault, DUI (less safe), and moving violations. The trial court initially sentenced him to a total of 36 months, with the first 180 days to be served in confinement in a probation detention center ("PDC"), and the remainder on probation, and it required him to pay a fine and complete community service. Appellant met with a probation officer, paid his fine, and began performing his community service. Thereafter, probation notified the State that the PDC would not accept appellant because he had not been convicted of a felony, as required under OCGA § 42-8-35.4 to be eligible for placement in a PDC. The State then recommended that appellant's sentence be corrected to impose 180 days in the county jail. Following a hearing, the trial modified the sentence imposed to substitute 170 days in county jail in place of the time in the PDC.

Appellant argued that his sentence could not be modified because he had already started serving it, and therefore, by entering a more severe sentence, the trial court violated double jeopardy provisions under both the state and federal Constitutions. He contended instead that the proper remedy was for the court to strike the void portion of his original sentence and leave the remainder intact. The Court disagreed.

The Court stated that a void sentence in law amounts to no sentence at all and once a sentence has been found null and void, the trial court has the discretion to impose a new sentence consistent with statutory limits. As set out in OCGA § 17-10-3 (a) (1), the trial court was authorized to impose a sentence that involved incarceration in the county jail. Thus, once the trial court determined that the PDC sentence was void, it had the discretion to amend the sentence to include jail time.

Appellant contended that the trial court could not increase his sentence because he had started serving it by paying his fine and meeting with a probation officer. But, the Court stated, even if the amended sentence constituted an increase in the sentence imposed, a defendant may be resentenced after the original sentence has begun being served, so long as (a) such resentencing is allowed by law, and (b) the defendant has no reasonable expectation in the finality of the original sentence. It is well-settled that a defendant has no legitimate expectation of finality where the sentence was void, and thus, the trial court was authorized to impose a new, and more severe, sentence even though appellant had started serving it.

Furthermore, the Court held, to the extent that *Edge v. State*, 194 Ga. App. 466, 467 (1990) and *Inman v. State*, 124 Ga. App. 190, 192-193 (1) (1971) hold otherwise, they are disapproved.

Moreover, the Court found, because appellant did not have a legitimate expectation of finality in his original sentence, the modified sentence did not violate double jeopardy. And, the Court held, contrary to appellant's argument, the trial court was not required to vacate only the void portion of the sentence and leave the valid portion intact. Accordingly, the Court concluded, the trial court was within its discretion to impose a sentence of jail time after finding that the original sentence was void.

Nevertheless, appellant argued, the trial court erred when it failed to sentence him in open court. The State and Court agreed. A criminal defendant has the right to be present at all critical stages of the proceedings against him. Thus, where a defendant is resentenced, or a sentence is amended, the defendant should be allowed to be present because a resentencing proceeding is a critical stage in which a defendant's rights may be lost, privileges may be claimed or waived, or in which the outcome of the case can be substantially affected. And here, the Court found, although the trial court held a hearing at which both appellant and his counsel were present, the trial court did not issue its amended sentence in open court. Instead, the order was e-mailed to the parties. As such, the trial court erred, and therefore, the Court vacated the sentence imposed and remanded with instructions for the trial court to reimpose the modified sentence in open court.

Uniform Traffic Citations; Improper/Erratic Lane Changes

Smith v. State, A23A0371 (1/12/23)

Appellant was charged by uniform traffic citation ("UTC") with improper/erratic lane change in violation of OCGA § 40-6-123 (a). At the close of the evidence during her bench trial, appellant made an oral motion to quash the charge. The trial court denied the motion to quash but certified its order for immediate review. The Court granted appellant's application for interlocutory appeal.

Appellant contended that the trial court erred in failing to quash the citation because it failed to set out all the essential elements of the offense of improper lane change under OCGA § 40-6-123 (a), and that she could admit all the allegations in the citation and still be innocent of having committed any offense. The Court stated that withstanding a motion to quash requires more than simply alleging the accused violated a certain statute. A legally sufficient accusation or indictment must either (1) recite the language of the statute that sets out all the elements of the offense charged, or (2) allege the facts necessary to establish a violation of a criminal statute.

Here, the UTC contained a section titled "OFFENSE (Other than above)" and asked the officer to specify the name of the offense and the violated Code section, along with a section for any "REMARKS." Below these sections, a table set forth a number of options to check under the headings Weather, Road, Traffic, Lighting, and Commercial Vehicle Information and allowed the officer to fill in where the offense occurred. Within the "OFFENSE" section the officer typed in "IMPROPER/ERRATIC LANE CHANGE" and specified that appellant was in violation of "Code Section 40-6-123 (a)" in "CLAYTON" County on "RIVERDALE RD" "at/on (secondary location) E I285 RAMP."

The State argued that the term "erratic" is defined "as not following any plan or regular plan; that you cannot rely on; unpredictable." (Emphasis omitted.) Accordingly, the State contended that the language "erratic lane change" in the citation was sufficient to put appellant on notice that she violated OCGA § 40-6-123 in that (1) it informed her that she moved from her current lane of travel into another lane of travel and (2) "erratic" indicated her action deviated from a normal or regular plan with regards to this lane change. The State further pointed out that when appellant changed lanes in front of the citing officer, her actions were unpredictable, unexpected, and without concern for whether the lane change

could be completed safely for herself and "without regard to the safety of the surrounding traffic." Finally, the State argued that the offense requires only two elements to be communicated to the alleged offender: (1) presence of other traffic and (2) a lane change performed by the offender when such movement was not sufficiently safe to perform.

The Court disagreed. First, merely stating that appellant made an "improper" lane change states a legal conclusion, not an allegation of fact. Second, while the phrase "erratic lane change" in the citation alleges some facts, it does not allege the facts necessary to establish a violation of OCGA § 40-6-123 because it does not contain an essential element of the offense - that appellant changed lanes without first ascertaining that such movement could be made "with reasonable safety." See OCGA § 40-6-123 (a). The State argued that when a person performs an "erratic" action, that action "cannot be considered to have been performed with any determination or consideration of safety as the language of the code requires" and that appellant did not testify at trial and therefore did not rebut any testimony of the officer's description of appellant's action. But, the Court stated, nothing in the definition of erratic indicates that the performance of an action is taken without the consideration of safety. And whether appellant testified at trial and rebutted the officer has no bearing on the sufficiency of the citation. Finally, immediately following the blanks for the designation of the offense there is a specific blank titled "REMARKS" where the officer could set forth facts describing the offense, but nothing was written.

Thus, the Court concluded, appellant making an erratic lane change does not necessarily mean that such maneuver was not reasonably safe within the meaning of the statute. Consequently, the citation at issue was substantively defective because it simply alleged that appellant violated a certain statute, which is insufficient to survive a motion to quash. Accordingly, the trial court erred in denying appellant's motion to quash the citation.