Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 27, 2009

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THIS WEEK:

- Jury Charges; Entrapment
- Appeals; Right of Self-representation
- Rule of Lenity
- Bond Forfeiture
- Sentencing; First Offender
- Double Jeopardy
- Demurrer
- Welfare Fraud
- Motions for New Trial
- Ineffective Assistance of Counsel
- Similar Transactions; Character
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- Evidence; Character

Jury Charges; Entrapment

Robinson v. State, A08A2110

Appellant was convicted of conspiracy to traffic marijuana, attempt to traffic marijuana, and possession of a firearm during the commission of a felony. He argued that the trial court erred in not giving his request to charge on entrapment. The entrapment defense consists of three distinct elements: (1) the idea for the commission of the crime must originate with the state agent; (2) the crime must be induced by the agent's undue persuasion, incitement, or deceit; and (3) the defendant must not be predisposed to commit the crime. If all of the elements of an affirmative defense are raised by the evidence, the trial court is required to charge the jury on the defense. Here, the Court found, while there was evidence that the idea for the crime originated with a CI, there was no evidence that appellant was persuaded by or that the CI used any "undue persuasion, incitement, or deceit" to induce appellant to arrange the transaction, or that he was not so predisposed. Instead, the evidence shows that appellant acted to "pick up some extra money." The informant merely furnished the opportunity to do so. Accordingly, the trial court did not erred in failing to charge on entrapment.

Appeals; Right of Self-representation

Cook v. State, A08A2070

Appellant was convicted of burglary. Following his conviction, he moved to dismiss counsel and to represent himself at the motion for new trial and on appeal. The trial court held that a defendant does not have a constitutional right to represent himself on appeal. The Court reversed and remanded. Although a defendant does not have a federal constitutional right to self-representation of appeal, Georgia law does recognize a defendant's right to represent himself on appeal.

Rule of Lenity

Diaz v. State, A08A2199; A08A2200

Appellants were each convicted of two counts of possession with intent to distribute a noncontrolled substance. They argued that the trial court should have applied the rule of lenity and punished them for the corresponding misdemeanor offense of "[u]nlawful manufacture, distribution, or possession with intent to distribute of imitation controlled substances." OCGA § 16-13-31.2. It is a felony "for any

person knowingly to manufacture, deliver, distribute, dispense, possess with the intent to distribute, or sell a non-controlled substance" upon, among other things, "[t]he express or implied representation that the substance is a narcotic or nonnarcotic controlled substance." OCGA § 16-13-30.1 (a) (1) (A), (e). On the other hand, OCGA § 16-13-30.2 provides that "[a]ny person who knowingly manufactures, distributes, or possesses with intent to distribute an imitation controlled substance" is guilty of a misdemeanor. For purposes of this offense, an "imitation controlled substance" is "[a] product specifically designed or manufactured to resemble the physical appearance of a controlled substance, such that a reasonable person of ordinary knowledge would not be able to distinguish the imitation from the controlled substance by outward appearances." OCGA § 16-13-21 (12.1) (A). Alternatively, an "imitation controlled substance" is defined as "[a] product, not a controlled substance, which, by representations made and by dosage unit appearance, including color, shape, size, or markings, would lead a reasonable person to believe that, if ingested, the product would have a stimulant or depressant effect . . . ." OCGA § 16-13-21 (12.1) (B).

Here, following a sale to an undercover officer, the agents seized a black bag which contained multiple clear plastic baggies containing an off-white powdery substance. An officer testified that this was "[c]ommon packaging for narcotics." However, the GBI crime lab later tested the substances, which were "negative for common drugs of abuse." The Court held that the rule of lenity did not apply because even if the non-controlled substance was in common packaging for narcotics, the evidence did not establish that the substance appeared as a "dosage unit" based on color, shape, size, or markings. Therefore, since the evidence fails to establish that appellants possessed with intent to distribute an "imitation controlled substance," their conduct did not fall within OCGA § 16-13-30.2 (a).

Bond Forfeiture

Gomez-Ramos v. State of Ga., A08A1790; A08A1791

Appellant was arrested on child cruelty charges and posted an appearance bond. She was released from the jail, but because she was not legally in this country, she was immediately taken into the custody by I.C.E. and subsequently deported. When she did not appear for arraignment, the court forfeited her bond. Appellant first contended that she was "in custody" for purposes of OCGA § 17-6-72 (b) and (c). However, the Court held that the statute was inapplicable because she was not detained in a penal institution or jail because of an arrest or sentence; she was not confined in a mental institution because of any court order; and she was not in the custody of a sheriff or other responsible law enforcement agency. Instead, she was no longer in the United States because she had been deported. That she could not legally re-enter the United States did not bring her within the purview of the cited forfeiture exceptions.

The Court also rejected appellant's arguments that because it had become legally impossible for her to appear in court she should have been excused from performance under the bond agreement; that the Supremacy Clause pre-empted the state's bond forfeiture laws; and that the forfeiture denied her equal protection because illegal aliens were treated differently from U.S. citizens.

Sentencing; First Offender

State v. Stulb, A08A2284

Appellant was convicted in 2005 of statutory rape and sentence of 10 years with 1 year to be served in confinement and the remainder on probation. In 2008, the trial court granted appellant's motion to rescind his full sentence under OCGA § 42-8-34 (g) and then resentenced him as a first offender. The State appealed and the Court reversed. By the plain terms of the First Offender Statute, a trial court is only authorized to grant first offender treatment before a defendant has been adjudicated guilty and sentenced. Here, the trial court previously had entered final judgment on the statutory rape conviction and had sentenced appellant accordingly. Having done so, the Court held, the trial court could not modify the final judgment of conviction and sentence in order to grant first offender treatment. Furthermore, OCGA § 42-8-34 (g) authorizes a sentencing judge to modify or rescind only the probation portion of a defendant's sentence during the period of time prescribed for the probated sentence to run, not the underlying judgment of conviction or the confinement portion of the sentence. While the trial court could rescind the probation portion of appellant's sentence, the trial court lacked jurisdiction to rescind the underlying judgment of conviction or the confinement portion of his sentence. Therefore, the Court held, the trial court's attempt to do so in order to impose first offender treatment was a mere nullity.

Double Jeopardy

In the Interest of C. E. H., A09A0345

Appellant appealed from the denial of his plea in bar alleging double jeopardy. The record showed that appellant was charge in three separate UTCs with failure to obey a traffic control device-red light; driving under the influence of alcohol —under 21; and reckless driving. The Department of Juvenile Justice received all three UTCs from the sheriff's office as part of an intake evaluation. A probation and parole specialist with the Department of Juvenile Justice separated the juvenile traffic offense (red light violation) from the other two, which were delinquent traffic offenses, attached the UTCs to complaint forms, and signed each form as the complaining witness. The red light violation was sent to juvenile traffic court where it was disposed of and thereafter, the two more serious charges were sent to the D. A.'s office.

OCGA § 16-1-7 (b) states, "[i]f the several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution. . . ." . The Court held that because it was undisputed that the DA's office had no knowledge of the red light violation, the trial court did not err in denying appellant's motion. The Court further held that knowledge of the three UTCs by the DJJ probation and parole specialist could not be imputed to the DA's office.

Demurrer

Newsome v. State, A09A0211

Appellant was charge with one count of criminal trespass to property and one count of violation of a family violence order. He demurrered to each count and the trial court denied the motions, but granted an interlocutory appeal. The Court reversed as to each count. Count One charged appellant "with the

offense of CRIMINAL TRESPASS-DAMAGE/INTERFERE, for that said Accused, on or about August 10, 2007, in Gwinnett County, Georgia, did unlawfully damage and interfere with the property of [the victim], in violation of OCGA § 16-7-21 (a)." The Court held that the count was deficient because it failed to identify with particularity the property of the victim with which appellant was alleged to have interfered. Thus, the Court found, it would be difficult, if not impossible, to prepare a defense to this criminal trespass charge, or to protect against double jeopardy on the charge.

Count Two charged appellant "with the offense of VIOLATION OF FAMILY VIOLENCE ORDER, for that said Accused, on or about August 10, 2007, in Gwinnett County, Georgia, did unlawfully violate the provisions of a family violence order, in violation of OCGA § 16-5-95." The Court held that this count did not set forth the terms of the order appellant violated or the manner in which he violated the order. Thus, the count did not state the offense in the terms and language of the law or so plainly that the nature of the offense charged could be easily understood by the jury. In fact, the Court stated, the count was circular in that it essentially charged appellant with violating a statute by violating a family violence order in violation of the statute.

Welfare Fraud

Ousley v. State, A09A0186

Appellant was convicted of one felony count of fraud in obtaining public assistance, OCGA § 49-4-15 (a) and multiple other offenses. The Court, apparently of its own accord, found that the evidence was insufficient to convict for felony fraud. The evidence showed that appellant got married in January 2002 and that her husband was living with her and her three children during the relevant time period. The evidence also showed that appellant repeatedly failed to report her marriage or her husband's income to the State agencies from which she was receiving public assistance. According to the State, because the number of occupants in the home and the income of those occupants determines the amount of public assistance that a family receives, appellant received more public assistance money than she would have been entitled to had she been honest. However, the Court found, the State failed to present any evidence establishing the amount of public assistance appellant would have received if she had reported her husband and his income to the State. Instead, the State only showed that appellant had received a total of $24,616 in public funds during the relevant period. Thus, there was no evidence in the record to show that appellant received at least $500 more in public assistance than the amount to which she was legally entitled. Therefore, the Court held, she was properly convicted of welfare fraud in that the evidence was sufficient for a rational fact-finder to conclude that appellant committed fraud in obtaining some amount of public assistance to which she was not entitled, but, not to support a conviction for felony fraud.

Motions for New Trial

Rutland v. State, A08A2372

Appellant was convicted of armed robbery, hijacking a motor vehicle, and aggravated assault. He contended the trial court applied an incorrect standard of review in considering his motion for new trial challenging the weight of the evidence under OCGA § 5-5-21. The Court agreed and remanded for reconsideration. The trial court used the standard set forth in *Jackson v. Virginia* , 443 U. S. 307 (1979), whether viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. However, the Court held, this standard is applicable only to appellate courts, which unlike trial courts, are limited to reviewing the sufficiency of the evidence and are precluded from evaluating its weight. OCGA § 5-5-21 specifically empowers trial courts with the authority to weigh the evidence. It provides that a trial judge, in the exercise of a sound discretion, may grant a new trial "in cases where the verdict may be decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding." On a motion for new trial alleging this ground, the trial court sits as a "thirteenth juror." Thus, when presented with a motion for new trial based upon the provision of OCGA § 5-5-21, the trial court is not limited to the Jackson standard, but rather is charged with the duty of exercising its discretion and weighing the evidence under the standard set forth in the statute. Because the record failed to indicate that the trial court fulfilled its duty of exercising its discretion under the applicable standard set forth in OCGA § 5-5-21, the Court vacated the trial court's decision and remanded the case for the trial court's consideration of appellant's claim under the proper standard.

Ineffective Assistance of Counsel

Walker v. State, A08A1876

Appellant was convicted of numerous counts of child molestation relating to three victims. Appellant claimed that he received ineffective assistance when his trial counsel failed to object to the following testimony of the aunt of one victim, after the victim told the aunt that appellant wanted to have sex with the victim: "And I'm looking at her and I know her. I'm like now this child is telling me the truth." The credibility of a witness, including a victim witness, is a matter for the jury's determination under proper instruction from the court. OCGA § 24-9-80. Under no circumstances may a witness's credibility be bolstered by the opinion of another, even an expert, as to whether the witness is telling the truth. Thus, the Court held, defense counsel rendered ineffective assistance by failing to object. The Court also held that the appellant was prejudiced by the failure to object because there was no evidence, other than the victim's testimony, that the crime occurred. Accordingly, the Court concluded that but for defense counsel's deficient performance, the outcome of this trial on this one count of child molestation involving this particular victim would have been different. Therefore, appellant's conviction on this count was reversed.

Similar Transactions; Character

Smith v. State, A08A2426

Appellant was convicted of kidnapping, aggravated assault, and burglary. He argued that the trial court erred in denying his motion for a mistrial after the State, without complying with Uniform Superior Court Rule 31.3, introduced evidence of an independent act placing his character into issue. The evidence showed that the victim and Milledge were friends and discussed the possibility of

sharing an apartment. The appellant showed up at the victim's apartment one night, put a gun to the victim's head, asked about the whereabouts of Milledge, and said "where's the dope?" Although the victim did not know the identity of appellant, Milledge, a few days later, discovered that it was appellant, with whom he had prior dealing, and the police were notified. During redirect examination of appellant's girlfriend, the State established that two to three weeks before the incident at the victim's home, Milledge appeared at her residence carrying a gun and looking for appellant, who hid in the closet. Over defense counsel's objection, the trial court allowed the prosecutor to continue to question her, and she then disclosed that Milledge was unhappy because appellant had stolen cocaine from Milledge. The Court stated that arguably, evidence that Milledge went to the girlfriend's residence with a gun looking for appellant shed light on the relationship between appellant and Milledge —the person who alerted police that appellant was likely involved in the invasion of the victim's home. But the evidence objected to by the defense showed appellant stole Milledge's cocaine, as the girlfriend's testimony reflected an admission by appellant as to that fact. This was evidence of a similar, but independent, offense: a theft by the appellant from a third party weeks before the crime at issue. Furthermore, defense neither opened nor facilitated the line of inquiry which ultimately led to the evidence of the previous crime. Therefore, because the State failed to comply with Rule 31.3, the trial court erred in failing to grant a mistrial.

Appellant also contended the trial court improperly allowed the State to inject his character into issue through testimony that he was a drug user. However, the Court held, unlike the evidence of the theft of cocaine, this evidence was directly relevant and material to appellant's motives in committing the crime. Therefore, the admission of this evidence was not error.

Evidence; Authentication

Carter v. State, A08A2322

Appellant was convicted of criminal attempt to manufacture methamphetamine, conspiracy to manufacture methamphetamine, possession of methamphetamine and obstructing an officer. The evidence showed that appellant and his girlfriend had a meth lab at her home. The girlfriend, who pled prior to trial, testified at his trial. He unsuccessfully sought to impeach his girlfriend's testimony with a motion to suppress, filed and signed by her counsel. The motion contained a statement that appellant did not "reside" at the girlfriend's home. The Court held that statements contained in a petition, plea or answer filed in a civil case, and signed by counsel, though not verified or signed by the person apparently represented by such counsel, are admissible against that person in the trial of another civil case to which such person was a party. This rule, however, is not applicable to criminal cases. Admissions by agents or attorneys are not admissible in criminal cases in the sense in which they are admissible in civil cases. Instead, they are not to be treated as evidence against the accused unless shown to have been authorized by the accused. Here, the Court found that defense counsel did not show that the girlfriend "authorized" the statement contained in the motion to suppress. Therefore, the trial court properly refused to allow the statement in the motion to suppress to be admitted at trial.

Evidence; Character

Harris v. State, A08A2348; A08A2349

Appellant was convicted of armed robbery and possession of a firearm during the commission of a crime. He argued that the trial court erred by allowing the State to cross examine his character witnesses about his prior juvenile offenses. When a defendant presents witnesses as to his good character, the State is entitled to cross-examine as to his juvenile record to impeach such testimony. But, in order to utilize such evidence, the State is required to demonstrate that the questions were asked in good faith, and based on reliable information that can be supported by admissible evidence. Here, however, the trial court did not require the State to show that it had a good faith basis for this line of questioning nor did it consider such evidence in ruling upon the objection. Rather, the judge found the evidence admissible based only upon his own review of case law. Therefore, the Court held, the trial court erred and remanded the case to the trial court for a determination of whether the State can support the questions to the appellant's character witnesses as required.