Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 5, 2018

THIS WEEK:

Sufficiency of the Evidence; Felony Murder

Lebis v. State, S17A0948 (12/11/17) (Substitute Opinion)

Appellant was convicted of felony murder, numerous counts regarding possession of firearms and dangerous weapons, and four counts of misdemeanor obstruction. The evidence, briefly stated, showed that appellant and her husband, Tremaine, were staying in a rented motel room near their home. Tremaine had an outstanding arrest warrant out for him. Appellant rented the room under her son's name and Tremaine was hiding out with her at the motel to avoid arrest. The motel room was very small and there were very many weapons inside. The Court found that the evidence introduced at trial plainly supported the inference that appellant and Tremaine were prepared to resist arrest with firearms and other dangerous weapons in the event that they were detected at the motel. Two officers, Brown and Callahan, arrived at the hotel in response to a 911 call concerning appellant's unruly behavior. At some point, the officers determined to arrest appellant and Tremaine. A struggle with Tremaine ensued and appellant yelled at the officers to leave Tremaine alone. Tremaine broke free and began to run around the back of the motel. Neither officer noticed that Tremaine was wearing a fanny pack. During the pursuit, Tremaine pulled a Glock from the fanny pack and shot Callahan, killing him. Brown then shot and killed Tremaine. Appellant contended that the evidence was insufficient to support her conviction for possessing the weapons found in the motel room. But, the Court found, significant evidence connected appellant to the weapons in the motel room. The State was not required to show that appellant solely or actually possessed the weapons at any point. Nor was it required to offer direct evidence that she possessed them. Instead, the State had to put forward enough evidence so that a properly-instructed jury could reasonably conclude that appellant at least jointly and constructively possessed the weapons in her motel room. The State did just that; the circumstantial evidence in this case showed a connection between appellant and the weapons in her motel room beyond mere presence and spatial proximity, or at least a rational trier of fact could find that it did. Accordingly, there was sufficient evidence to support the jury's verdict on the constructive possession charges in this case, and the Court affirmed her convictions of these crimes. Appellant was also charged as party to the crime of felony murder. Specifically, the indictment charged that appellant, as a party to the crime, caused the death of Officer Callahan "while" she "did jointly possess a Glock .357 handgun" with her husband Tremaine, a convicted felon,

when he shot Officer Callahan. The .357 Glock was the weapon that Tremaine had placed in his fanny pack at some point, and that he later used to shoot and kill Officer Callahan. The Court originally found that the evidence was insufficient to support this conviction because her husband had sole control of the weapon at the time he shot the officer. In this substitute opinion, the Court reversed itself and found that the evidence was sufficient. The Court found that a defendant can be held responsible for the actions of another as a party to the crime or as a co-conspirator, without also concluding that the defendant constructively possessed the weapon actually and solely possessed by another. So even though appellant did not jointly possess the firearm with Tremaine at the moment of the murder, it remains true that she can be held to account for the actions of another—here, her husband—as a party to the crime or as a co-conspirator. Accordingly, the Court found, her arguments that she did not constructively possess the firearm did not help her escape responsibility for the crime Thus, the Court found, the shooting would not have happened but for Tremaine's possession of the firearm. And, the jury had sufficient evidence before it to conclude that appellant and Tremaine had together hidden out in the motel room with a stockpile of weapons in order to escape or defend against Tremaine's arrest. Indeed, when the crimes involve relatives, slight circumstances can support the inference that the parties colluded. Nevertheless, appellant argued, even if there had been previous joint ownership, her husband's act of fleeing from officers constituted a superseding intervening variable, severing her responsibility for his actions. The Court disagreed. Rather, the Court found, the flight from the officers appeared to be entirely consistent with the shared purpose of appellant and Tremaine. Accordingly, the Court concluded, because the jury could have reasonably concluded that appellant was a party to the crime of her husband's possession of the firearm, she also bore responsibility for the consequences of that crime. Appellant also challenged her convictions for misdemeanor obstruction based on her repeatedly yelling at Officers Callahan and Brown to leave Tremaine alone. When asked about the effect of appellant's screaming, Officer Brown testified that it was "not assisting" with the arrest of Tremaine. He did not testify, however, and the evidence did not show, that appellant intentionally hindered the arrest by her protestations. And there was no evidence that appellant refused or failed to comply with any directives from either officer at that time. The Court noted that under certain circumstances, words alone might constitute obstruction. This case, however, is different from those in which our courts have found obstruction based solely on words or remonstrations. Misdemeanor obstruction convictions based on a defendant's words have survived appellate review where defendants' words affirmatively interfered with the officers' actions. The fact that appellant was "not assisting" with the arrest in this case when she yelled at officers to leave Tremaine alone, without anything more, did not rise to the level of obstruction, and so, the Court held, her convictions for obstruction based on her yelling at the two officers to leave her husband alone was reversed.

Cruel and Unusual Punishment; Merger

Womac v. State, S17A1385 (12/11/17)

Appellant was convicted of aggravated sexual battery, child molestation, cruelty to children in the first degree, and false imprisonment. The evidence showed that appellant invited the victim, K.W., to his motel room. Some of the criminal acts occurred on the bed and the remaining acts occurred when appellant followed the fleeing victim into the motel bathroom Appellant contended that his life sentence for aggravated sexual battery violates the prohibition against cruel and unusual punishment under the Georgia Constitution. Specifically, he argued, because K.W.'s lack of consent was presumed by law without the State having to prove that the criminal act of aggravated sexual battery occurred without the victim's consent, the aggravated sexual battery statute is a strict lability crime for which he received an overly harsh life sentence. The Court disagreed. Here, the jury was not instructed that a minor is legally incapable of consenting to sexual contact as it applied to aggravated sexual battery. The jury charge on aggravated sexual battery did not suggest that the element of "without consent" was established based solely upon the victim's age. Thus, the aggravated sexual battery charge was not a strict liability crime as the jury was required to find that K.W. did not, in fact, consent to the penetration alleged in the indictment. Consequently, the Court concluded, appellant's constitutional challenge was without merit. Appellant also argued that the trial court erred in failing to merge his convictions for aggravated sexual battery (count 5), child molestation (count 9), and cruelty to children in the first degree (count 11) for sentencing purposes. The Court again disagreed. The Court found that appellant completed the crime of aggravated sexual battery on the bed prior to molesting and causing K.W. cruel or excessive physical or mental pain in the bathroom. Where facts show one crime was completed before the commission of a subsequent crime, the crimes are separate as a matter of law, and there is no merger. Therefore, appellant's contention that the trial court erred in failing to merge the aggravated sexual battery count into the child molestation and cruelty to children counts was without merit. Moreover, the Court found, the child molestation and cruelty counts required proof of an element that the other did not. The offense of child molestation required proof that appellant placed his hands into contact with [K.W.'s] vaginal area and buttocks and kissed her with the intent to arouse his own sexual desires. The cruelty to children in the first degree charge required proof that appellant maliciously caused K.W. cruel or excessive physical or mental pain. Accordingly, under the "required evidence" test of *Drinkard*, because these crimes required proof of an element that the other did not, the trial court properly sentenced appellant.

Rule 404 (b); Motive

Whaley v. State, A17A0848 (11/2/17)

Appellant was convicted of RICO. The evidence, briefly stated, showed that he was in a romantic relationship with Rice, who was employed as accounts

payable manager and eventually assistant comptroller for the victim corporation. Rice funneled money through fraudulent checks into a bank account created by appellant and known as "Robert Whaley, d/b/a Hughes Services." At trial, the State admitted extrinsic act evidence pursuant to OCGA § 24-4-404 (b) of Whaley's 2005 guilty plea under the First Offender Act to theft by taking. Specifically, the State presented evidence that appellant, while working as a computer technician, stole approximately $16,000 worth of computer equipment from a hospital with whom his employer had contracted and attempted to sell the equipment on eBay. He entered a guilty plea on April 25, 2005, and pursuant to the plea agreement, was ordered to pay $16,000 in restitution. He opened the Hughes Services Account the day before he entered his plea.Appellant contended that the trial court erred in admitting this extrinsic evidence. The Court noted that the trial court admitted the extrinsic act evidence for the purpose of proving, among other things, appellant's motive. Appellant contended that its admission was erroneous because the evidence was not substantially relevant to an issue other than Whaley's bad character and was otherwise overly prejudicial. The Court disagreed. The Court found that because evidence of appellant's prior theft was offered to show motive, the State was not required to show an overall similarity between the prior crime and the RICO violations with which he was charged. The evidence showed that appellant opened his Hughes Services Account the day before he entered into a First Offender plea agreement pursuant to which he was ordered to pay $16,000 in restitution. That same account was then used to "wash" a significant amount of stolen funds and to provide appellant with cash and pay his personal expenses. Therefore, the Court found, the trial court was authorized to conclude that the prior plea and resulting restitution obligation was relevant to the issue of whether appellant may have been motived to engage with Rice in the racketeering activity for which he was later tried and convicted. Furthermore, the Court found, Rule 403 did not require the exclusion of evidence of appellant's prior crime. In light of the fact that Rice was the direct actor with respect to the theft of victim's funds, the State was required to prove that appellant knowingly joined in her plan to commit the crime. Certainly evidence that he had incurred a substantial financial obligation near the time that the conspiracy was alleged to have begun had a tendency to make his participation in the conspiracy more probable, and its logical connection to establishing appellant's motive was strong. Moreover, the extrinsic act evidence was not cumulative of other evidence tending to establish motive. Consequently, the probative value of the evidence was high and was not substantially outweighed by its prejudicial effect. Accordingly, the Court concluded, appellant failed to show that the admission of the evidence was erroneous under OCGA § 24-4-404 (b).

Search & Seizure; Mistakes of Law

Abercrombie v. State, A17A1847 (11/3/17)

Appellant was charged with VGCSA. The evidence showed that an officer noticed that appellant's singlecab pickup truck lacked an interior rearview mirror. Believing it to be an equipment violation under OCGA § 40-8-7 and OCGA § 40-8-72, the officer stopped the vehicle and a subsequent search revealed methamphetamine. At the hearing on the motion to suppress, the officer stated that he believed the lack of a mirror violated the law because appellant's vehicle had originally been equipped with an interior rearview mirror and so, the failure to have original equipment in good working order constituted a violation of the law. The trial court denied appellant's motion to suppress, finding that the two statutes were "vague enough that the officer's interpretation is correct." The Court granted interlocutory review. Appellant argued that the officer who stopped him lacked reasonable, articulable suspicion to initiate a stop of his vehicle. Specifically, he contended that his truck's lack of an interior rearview mirror did not constitute a violation of OCGA § 40-8-7 and OCGA § 40-8-72 and, as a result, could not have given the officer the requisite reasonable, articulable suspicion to justify a stop. The Court agreed. First, although the officer repeatedly testified that his understanding was that OCGA § 40-8-7 required vehicles to be equipped with anything original to manufacture, it instead requires that vehicle equipment be "in good working order and adjustment *as required in this chapter*" and that a vehicle "contain those parts or … at all times [be] equipped with such lights and other equipment in proper condition and adjustment *as required in this chapter*." (Emphasis supplied). Thus, OCGA § 40-8-7 does not require vehicles to contain all original equipment from the time of manufacture but, instead, only such equipment in such proper condition and adjustment as explicitly required by the remaining provisions of Chapter 40. Next, the Court found that the plain language of OCGA § 40-8-72 (a), shows there is no specific requirement that a non-commercial vehicle contain an interior rearview mirror. Instead, OCGA § 40-8-72 (a), (which is subject only to an exception in subsection (b) that applies to commercial motor vehicles) requires that vehicles be "equipped with a mirror so located as to reflect to the driver a view of the highway for a distance of at least 200 feet to the rear of such vehicle" when the vehicle is "so constructed or loaded as to obstruct the driver's view to the rear thereof from the driver's position." That subsection (a) does not specifically require the use of an interior mirror is bolstered by the fact that subsection (b), applicable to commercial motor vehicles, does specify the use of an interior mirror under certain circumstances. Accordingly, the Court found, because, by its plain language, OCGA § 40-8-72 (a) does not require that a motor vehicle be equipped with an interior rearview mirror under these circumstances, appellant's lack of an interior rearview mirror did not violate that statute or OCGA § 40-8-7's requirement that vehicles be equipped as provided for in Chapter 40 of the Code. Next, appellant argued that the trial court erred in denying his motion to suppress on the alternative ground that the officer made the traffic stop in a good faith belief of the law. The Court noted that in *Heien v. North Carolina*, ___U.S.___(135 SCT530,190LE2d 475) (2014), the US Supreme Court held

that *objectively reasonable* mistakes of law *can* give rise to the reasonable suspicion necessary to uphold a search and seizure under the Fourth Amendment. But, the Court found, here there was but one reasonable interpretation of the statutes in this case: OCGA § 40-8-7 specifies that vehicles be equipped as required by other provisions in Chapter 40, and OCGA § 40-8-72 does not require the use of an interior rearview mirror under the circumstances the officer observed (i.e., a single-cab, noncommercial vehicle with two side mirrors, and no testimony regarding an obstructed view). Accordingly, the Court held, the officer's mistake of law was not objectively reasonable and thus, could not provide the reasonable, articulable suspicion necessary to justify a traffic stop.Nevertheless, the Court stated, *Heien* does not explicitly indicate whether the good-faith exception to the exclusionary rule can ever apply when an officer initiates a stop based upon a good faith mistake of law that is not objectively reasonable and thus violates the Fourth Amendment. However, the Court found, it was precluded from addressing this good faith issue the Georgia's Supreme Court holding in *Gary v. State*, 262 Ga.573 (1992) that the "good faith" exception to the exclusionary rule was inapplicable in Georgia. In so holding, the Court stated that given the "criticisms and considerations" regarding the *Gary* decision, "our Supreme Court may wish to revisit *Gary*'s construction of OCGA § 17-5-30." Accordingly, the Court reversed the denial of appellant's motion to suppress.

Sentencing; Recidivists

Conwell v. State, A17A2068 (11/21/17)

Appellant was convicted of aggravated assault with intent to rape, two counts of false imprisonment, and rape. After his conviction was affirmed on appeal, he filed a motion vacate an illegal sentence, which the trial court denied. Relying upon OCGA § 17-10-7 (d), appellant contended the trial court erred in sentencing him as a recidivist because two of his three predicate convictions for recidivist treatment, although based on different indictments, were obtained by guilty pleas entered on the same day and thus should have been considered as only one conviction. However, the Court found, all three convictions were based on crimes committed at different times, indicted separately, and sentenced on separate orders. Where a defendant is charged for separate crimes, arising out of separate incidents, and is sentenced for each crime in a separate order, those offenses are not considered "consolidated" under OCGA § 17-10-7 (d). Accordingly, the Court concluded, the trial court properly determined appellant's recidivist status. Appellant also argued that his sentence of 20 years to serve for the aggravated assault conviction was illegal because OCGA § 17-10-6.2 (b) requires a split sentence including at least one year of probation for such a sexual offense. The Court agreed. As appellant was properly determined to be a recidivist and as aggravated assault with intent to rape is one of the sexual offenses specified in OCGA § 17-10-6.2 (b), the total sentence permissible for the aggravated assault conviction was still 20 years, but under the terms of the statute at least one year of that sentence should have been probated. The Court therefore remanded for resentencing.