Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 23, 2007

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THIS WEEK:

Jury Charges- Aggravated Battery

Ferrell v. State, A06A2386,

Appellant was convicted of aggravated battery and other crimes, and appeals his convictions. Evidence presented at trial showed that appellant punched the victim repeatedly in the face while she was unconscious on the ground, breaking her nose and cheekbone, and causing a fracture to her eye socket from which her eye receded into the socket. The victim had to undergo multiple surgeries to repair the damage to her eye, cheekbone, and nose. Appellant claims, among other things, that he was denied due process of law when the trial judge charged the jury on the entirety of the aggravated battery statute although the indictment only alleged that he committed an aggravated battery by serious disfigurement. Specifically, he claimed that the jury could have found him guilty of aggravated battery in a manner not alleged in the indictment. The court, in affirming appellant's conviction, held that the trial judge gave necessary limiting instructions in regard to the necessity of the state proving the allegations in the indictment, as well as reiterating to the jury the specific portion of the statute that appellant was alleged to have violated. Thus, although the aggravated battery charge contained language which was not applicable to the offense charged, the trial court's instructions, when read as a whole, properly instructed the jury on the limited manner in which they could consider the statute.

Sentencing

Johnson v. State, A06A1685,

Appellant was convicted of possession of cocaine and was given a sentence of seven years, two to serve, balance on probation conditioned upon first serving 20 to 24 months at a probation detention center. Appellant challenges his sentence as unconstitutional. In affirming appellant's sentence, the Court of Appeals reasoned that this was not a situation in which appellant was being forced to serve his sentence "in installments" such as where a person is erroneously released from prison, through no fault of their own, but then rearrested and forced to serve the remainder of the sentence after the error is revealed. The Court stated that O.C.G.A. § 42-8-35.4 clearly dictates when a person such as appellant may be forced to serve a period of probation confined in a probation detention center. Under that statute a court may order a defendant to serve a period of probation in a probation detention center so long as the person is convicted of a

felony and is sentenced to one year or more on probation. The Court further held that the limited confinement of the probation detention center is not "incarceration" for the purposes of determining whether a sentence includes "installments" of incarceration. Because the trial court was acting within its discretion, the sentence was affirmed.

Sentencing Hearing

Fraser v. State, A07A0557,

Appellant, a criminal defense attorney, was convicted of trafficking cocaine and sentenced. Appellant challenges the sentence and claims that the State presented evidence in aggravation of sentence that was not disclosed pre-trial, and that the trial judge relied upon that evidence in sentencing. Specifically, appellant challenges statements made by the State at the sentencing hearing, which related testimony of appellant's wife and friend at their own plea hearings for the same incident, in which they stated that appellant regularly accepted illegal drugs as payment for legal services. Appellant argued that the trial court's statements that appellant's "conduct was a disgrace to the Bar and other members of the legal community" was proof that the trial court relied upon the improperly admitted evidence. The Court of Appeals found that the State's comments on the plea hearing testimony amounted to improperly admitted evidence in aggravation of punishment. However, the Court reasoned that absent a strong showing to the contrary, there is a presumption "that the trial judge sifts the wheat from the chaff, ignoring illegal evidence and considering only legal evidence." Tutton v. State, 179 Ga. App. 462, 463, 346 S.E. 2d 898 (1986). The Court found that the trial court's statements were insufficient to overcome that presumption, and affirmed the sentence.

Motion To Suppress/ Motion in Limine

Fraser v. State, A07A0557,

Appellant, a criminal defense attorney, was convicted of trafficking cocaine. Evidence presented at trial showed that appellant agreed to search his client's home for cocaine that police did not find after executing a search warrant. Appellant, his wife, and two friends went to the client's house, located the cocaine, and instead of disposing of it for his client, as agreed, began consuming it. Police were called to the house as a possible burglary in-progress, where appellant was discovered with a quantity of cocaine in his possession. Appellant waived formal arraignment, pled not guilty, and requested a jury trial. The appellant filed no motion to suppress. Nearly three months later, appellant filed a "Motion In Limine To Suppress Evidence". The trial court dismissed the motion as untimely. Appellant challenges the trial court's ruling. The Court of Appeals affirmed the judgment of the trial court. The Court held that a motion to suppress was not timely filed and that the requirements of Uniform Superior Court Rule 31.1 and O.C.G.A. § 17-5-30, that a motion to suppress be filed prior to arraignment, could not be circumvented by couching a motion to suppress as a motion in limine. Copeland v. State, 272 Ga. 816, 817, 537 S.E. 2d 78 (2000); Van Huynh v. State, 258 Ga. 663, 664, 373 S.E.2d 502 (1988). The Court also held that as appellant had waived his right to challenge the constitutionality of the search that discovered the evidence to be suppressed, he had likewise waived his right to challenge the admissibility of testimony regarding the discovery of that evidence, on grounds that it was the product of an unconstitutional search or seizure. Therefore, the trial court properly dismissed appellant's motion as untimely.

Inconsistent/Mutually Exclusive Verdicts

Einglett v. State, A06A1791,

After a jury trial, appellant was convicted of burglary but acquitted of armed robbery. Appellant challenges his conviction and claims that because the two crimes are mutually exclusive, he could not be found guilty of the burglary but acquitted on the armed robbery charge. The evidence at trial showed that appellant went to the victim's home. According to the victim, appellant took money from him at gunpoint. According to the appellant, he went to the victim's house because the victim was a drug dealer and he owed the victim a debt which he could not pay at the time. At some point, appellant testified that he "took drugs" from the victim but later stated that he meant that he "received drugs" from the victim but did not take them without his permission. The Court of Appeals affirmed appellant's conviction for burglary. The court explained that the verdict may have been inconsistent, which is permissible, but was not an impermissible mutually exclusive verdict. Inconsistent verdicts are "inconsistencies between verdicts of acquittal and verdicts of conviction…". Quoting Milam v. State, 255 Ga. 560, 562, 341 SE 2d 216 (1986). The Court explained that Milam abolished the inconsistent verdict rule, as an inconsistent verdict is as likely to be caused by a jury's leniency as any error. The mutually exclusive verdict rule "applies to multiple guilty verdicts which cannot be logically reconciled". A guilty verdict and a not guilty verdict cannot be mutually exclusive. Because appellant's case did not invoke the mutually exclusive verdict rule, his conviction was affirmed.

Restitution

McMahon v. State, A06A2213,

Appellant was convicted of seven counts of theft by taking, and acquitted on three counts of theft by taking and one count under Georgia's RICO statute. Appellant was given a sentence which included incarceration and probation. As part of probationary sentence, appellant was required to pay restitution to the victim. Appellant challenges the trial court's restitution order. Specifically, appellant argues that the trial court erred when it ordered him to pay restitution, because there was undisputed evidence that he would be unable to pay the amount of restitution, and that the restitution amount ordered was greater than the amount for which he was convicted for taking. As to appellant's first contention, that he would be unable to pay, the Court of Appeals held that appellant's claim was not ripe for challenge. A challenge to a sentence because of inability to pay does not become actionable until the probationer is facing a revocation of probation, or is actually unable to pay. Miller v. State, 264 Ga. App. 801, 592 S.E. 2d 450 (2003). Furthermore, a court

may order restitution up to the amount of damages that a victim could recover in a civil action based on the same set of facts which gave rise to the conviction. Caldwell v. State, 225 Ga. App. 337, 484 S.E. 2d 38 (1997) and O.C.G.A. § 17-14-2. Therefore, the restitution order was proper and the judgment of the trial court was affirmed.

Search & Seizure

State v. Bingham A06A2363; A06A2364 (02/06/07)

The State appealed from the trial court's grant of a motion to suppress evidence obtained from a traffic stop of the two defendants. The stop was based on a 911 call reporting that two men involved in a bar fight were leaving the bar in a truck. The report included descriptions of the truck, the two men, the truck's license plate number, and its direction of travel. The 911 caller relayed this information to a police dispatcher, who relayed it to the officer. The officer observed appellee's truck which fit the description and initiated a vehicle stop. Upon activating his lights, he observed the truck's passenger and driver switching positions. Both were arrested for DUI. Appellee moved to suppress evidence obtained from the stop. The trial court granted appellee's motion on the basis that the State failed to prove articulable suspicion at the suppression hearing. Although the trial court determined that the 911 caller provided a sufficient factual basis to justify the stop, it found that, under Duke v. State, 257 Ga.App. 741 (2002), the State was required to offer testimony of the 911 caller in order to prove these facts. The Court of Appeals reversed, finding that the trial court misinterpreted Duke. In Duke, the Court of Appeals found no articulable suspicion, where testimony at trial established only that a stop was initiated based on a report of "suspected drug activity." Unlike Duke, the officer's testimony in the present case included evidence of the factual basis for the stop (i.e., the fight). The Court of Appeals held that this testimony was sufficient to establish proof of the facts that gave rise to articulable suspicion. In addition, the Court of Appeals noted that independent proof of articulable suspicion was established through Sergeant Hampton's testimony that he observed the defendants switching places after he turned on his lights.

Implied Consent

Anderton v. State A07A0418 (02/07/07)

Appellant contends that the trial court erred in denying his motion to suppress his breath test results on the basis that: 1) he requested an independent chemical test and was not granted one; and 2) the arresting officer mislead him regarding his right to have an independent test. The Court of Appeals found that the appellants' statement that "I will take a blood test," in response to the officer's question of whether he would submit to the state administered breath test, was not a request for an independent test. When asked at the suppression hearing whether he was requesting an independent test, appellant stated: "I don't know about that. I thought they took you to a hospital and gave you a blood test somewhere. I didn't know there were any other kind of options or independent…test or whatever." The Court of Appeals thus held that appellant's statement was not a request for an independent test, but rather was a response to the officer's request and an attempt to designate which test would be administered by the State. The Court of Appeals also held that the officer's statement that a blood test was not the option presented by the officer did not mislead appellant about his right to have an independent test, where the officer correctly read the implied consent warning, and where the contested statement was true and came in the context of an exchange regarding the method of state-administered testing.

Evidence: Identification

Mitchell v. State A06A2229 (02/06/07)

Appellant contends that the trial court erred in allowing a witness to identify him in two photographs introduced as evidence in his trial for sale of cocaine. At trial, the State introduced two photographs purporting to show appellant engaged in the sale of cocaine. Appellant denied that he was the person shown in the photographs, and the trial court permitted a police officer to testify that he knew appellant, and could thus identify him in the photographs. The Court of Appeals held that the trial court abused its discretion in admitting the officer's testimony because the testimony was offered to establish a fact that the jurors could decide for themselves on the basis of the evidence presented. Further, the error was harmful, and thus warranted reversal of appellant's conviction.