Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 10, 2008

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THIS WEEK:

Jury Charges

Carroll v. State, A08A1107

Appellant and the victim, his girlfriend, got into a fight. Appellant subsequently was charged with two counts of aggravated battery: one count for a laceration to the victim's nose which required several stitches and one count for blackening the victim's eyes. During deliberations, the jury sent out a question asking for "a definition of what is considered 'seriously disfiguring' and does this definition depend on length of injury[?]" The jury then found him guilty on both counts, but the trial court granted appellant's motion for directed verdict as to the charge based on the black eyes. Appellant then appealed his conviction on the other count, arguing that the trial court erred in failing to fully charge the jury on the lesser included offense of battery. Specifically, that the trial court erred by omitting a portion of the statutory definition of battery and thus, not adequately informing the jury of the distinction between the "substantial physical harm" required for battery and the "seriously disfiguring" injury required for aggravated battery.

The Court of Appeals agreed and reversed. It found that the trial court did not include in its charge to the jury the definition of "visible bodily harm" as defined in OCGA § 16-5-23.1 (b). The trial court therefore failed to give the jury the proper framework for evaluating whether the laceration to the victim's nose was severe enough to merit a finding of aggravated battery or the lesser included charge of battery.

Search & Seizure

Looney v. State, A08A0911

Appellant was convicted of manufacturing marijuana. On appeal, he contended that the trial court erred in denying his motion to suppress. Appellant lived in one of four travel trailers sitting on property owned by appellant's landlord. Police officers came to the property to execute an arrest warrant for a third party who had no connection to appellant. The landlord gave the police consent to search all the trailers. When no one answered the knock on appellant's door, an officer opened the door and saw growing marijuana in "plain view."

The Court reversed appellant's conviction. It found that law enforcement may not legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant, absent exigent circumstances or consent. Here, the officers had no search warrant; nor were there any justifying exigent circumstances. Moreover, a landlord cannot give valid consent to a search of his or her tenant's quarters, and the fact that the officers may have believed in good faith that the landlord had authority to consent to the search does not

make the search lawful. Finally, the plain view doctrine did not apply because the officer had no right to open and enter appellant's trailer.

Spaeth v. State, A08A0979

Appellant was convicted of VGCSA. On appeal, she contended that the trial court erred in denying her motion to suppress. The record shows that an officer received information about illegal drug sales from a confidential informant. The informant told the officer that if the CI gave money to Glover, Glover would obtain methamphetamine from someone named "Stephanie" who lived near Highway 29. The officer then gave the informant marked money and followed him to a house. Soon after the informant entered the house, he and another man left the house in a vehicle with Glover driving. The men went to a CVS store, where the passenger exited the vehicle, and then Glover continued on to appellant's house which was 2/10ths of a mile from Highway 29. When Glover left that house, he returned to CVS and picked up his passenger. He was then stopped by the police, who found methamphetamine in an amount consistent with the money given to the informant in the vehicle. In his affidavit for the issuance of a search warrant for the appellant's house, the officer set out these facts, but incorrectly stated that the vehicle driven by Glover had made no stops and failed to establish the reliability of the CI.

The Court upheld the search. Even when a magistrate has no basis upon which to determine an informant's veracity, "a tip may be proved reliable if portions of the tip are sufficiently corroborated." In order for corroboration to establish an informant's reliability, the corroboration should either predict future behavior or involve inside information not available to the general public. Here, the information provided by the CI was sufficiently corroborated by the events that transpired. Moreover, the trial court correctly concluded that the deletion of the false statement (no stops) and the inclusion of the omitted information (a stop at a CVS) did not change the determination that probable cause existed to issue a warrant.

Jury Charges; Equal Access

Bailey v. State, A08A0997

Appellant was convicted of possession of a sawed-off shotgun and other crimes. As to the weapons charge, appellant claimed at trial that he was not guilty because of the equal access of others. The trial court gave a charge on presumption of possession based on appellant's ownership of the premises, but not equal access. Defense counsel did not ask for a charge on equal access. On appeal, appellant argued that the court should have given an equal access charge even if he did not request it. The Court agreed. It found that the evidence adduced at trial supported an equal access charge as to the possession charge. It further held that because it was appellant's sole defense, the trial court should have sua sponte given a charge on equal access, especially since it gave the presumption of possession charge. Nevertheless, the Court also held that because the evidence was sufficient to convict appellant, he may be retried on this count.

Juveniles; Burden of Proof

In the interests of A.S., A08A1004

The trial court adjudicated appellant, a juvenile, delinquent for acts which, if committed by an adult, would constitute the offense of child molestation. At the conclusion of the hearing, the court found "clear and convincing evidence" to adjudicate appellant a delinquent. Appellant argued that the trial court applied an incorrect burden of proof and the Court of Appeals agreed. Under the Juvenile Code, "the standard of proof on charges of a criminal nature is the same as that used in criminal proceedings against adults —proof must be beyond a reasonable doubt." The state's argument that appellant waived the issue by not objecting was without merit. The Court found it was its duty to make sure that appellant was not deprived of a fair trial and the specific statement of the trial court using the wrong standard of proof raised a serious concern that such a deprivation had occurred. Thus, the case was reversed and remanded for further findings applying the correct standard of proof.

Sentencing

Eidman v. State, A08A1126

Appellant pled guilty to trafficking in cocaine. He contended on appeal that the trial court erred in failing to sentence him below the mandatory minimum pursuant to OCGA § 16-13-31 (g) (2) based on his substantial assistance to the police in identifying his drug supplier and in arranging a subsequent controlled drug buy. Specifically, he contends that a reduction was mandatory because he gave a written statement in which he admitted that he purchased the cocaine from a supplier with the intention of selling it to another; he led police to the supplier's apartment complex; and, he acted as a confidential informant for the police, resulting in the apparent arrest and conviction of another individual for the sale of 5.7 grams of cocaine.

OCGA § 16-13-31 (g) (2) provides that a trial court "may impose a reduced or suspended sentence" if it determines that the defendant has provided "substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principals." In other words, the statute does not require a reduction, but merely authorizes such a reduction if, in the trial court's discretion, the defendant has provided "substantial assistance." Here, at the conclusion of the sentencing hearing, the trial court exercised its discretion in determining that the actions of the appellant did not rise to the level of substantial assistance. There being no abuse of that discretion found, the Court of Appeals affirmed the sentence.

Evidence; Impeachment

Wilkes v. State, A08A1262

Appellant was convicted of forgery in the first degree. She contended that the trial court erred in admitting evidence of her prior felony convictions for impeachment purposes, and that the trial court erred in not redacting the misdemeanors from one certified copy of a conviction showing that appellant was indicted for, pled guilty to, and was sentenced for two felony and two misdemeanor offenses arising out of the same transaction. She cited *Adams v. State*, 284 Ga. App. 534 (2007) (physical precedent only) for authority on both contentions. The Court held that Adams was not binding precedent because the decision was not concurred in by all members of the panel on this point of law. Also, Adams interpreted the provisions of OCGA § 24-9-84.1 (a) (3) to prohibit the admission in evidence of certain misdemeanor convictions not involving dishonesty or making a false statement, but,

the portion of the Code section discussed in Adams does not apply to felony convictions, which are governed in this case by the provisions of OCGA § 24-9-84.1 (a) (2). Moreover, the Court held, even if Adams were binding precedent, neither it nor OCGA § 24-9-84.1 (a) (2) requires redaction of portions of a validly admitted felony conviction.

Merger; Prior Inconsistent Statements

Stubbs v. State, A08A1140

Appellant was convicted of attempted armed robbery, aggravated assault, and numerous other offenses. He appealed contending that his conviction for attempted armed robbery should have merged with the aggravated assault and that the trial court erred in admitting a prior inconsistent statement because the state failed to lay a proper foundation for its admission. The record showed that the victim was walking to her car when her attacker approached her and demanded that she give him "everything [she's] got." The victim refused, at which point the attacker pointed a gun at her. The attacker then struck the victim in the face with the gun and ran off. The Court found that aggravated assault is not included in an attempted armed robbery as a matter of law, although these two offenses may merge as a matter of fact if the same facts are used to prove each offense. However, where the underlying facts show that one crime was completed prior to the second crime, there is no merger. Here, the evidence showed that the crime of attempted armed robbery (pointing the gun and demanding "everything") was completed before appellant committed the aggravated assault by striking the victim. Thus, no merger occurred.

The trial court also did not err in admitting a victim's statement as a prior inconsistent statement. At trial, the victim failed to give a description of the clothing worn by his assailants. The state then offered the victim's prior statement to an officer on the date of the armed robbery to establish the description of the clothing, including a description of a distinctive jacket worn by appellant. This description was also used by officers when searching appellant's residence for the distinctive jacket. The Court of Appeals found that although the state did not lay a proper foundation for the statement's admission as a prior inconsistent statement, the statement nevertheless was properly admitted as part of the res gestae because the victim's statement was given to the officer at the time the officer interviewed the victim shortly after the commission of the crime. The Court also held that the statement was admissible because it explained the officer's conduct and in any event, was harmless error in light of another witness's testimony regarding the jacket.

Custodial Statements; Refreshing Recollection

Boone v. State, A08A1300

Appellant was convicted of manufacturing, trafficking and possession with intent to distribute methamphetamine. He appealed, contending, among other things, that the trial court 1) erred in admitting his custodial statement; and 2) erred in allowing into evidence the out-of-court statement of a State's witness as a prior inconsistent statement.

The record showed that after appellant was arrested and transported to the jail, he asked to speak to the police. Pursuant to this request, an investigator interviewed him and during the interview, appellant asked for assistance in having a warrant against him dismissed. The investigator replied that he would talk to the District Attorney's office about doing so at a later time. The Court held that a confession is inadmissible if made with the hope of "direct" benefit; however, hope of a "collateral" benefit does not render a confession inadmissible. The phrase 'hope of benefit' generally means the reward of a lighter sentence. Here, the investigator's response was no more than a promise of collateral benefit, and accordingly did not render appellant's custodial statement inadmissible.

A state's witness who was at the time of arrest a house guest of appellant testified at trial. On the day of the incident, the witness gave a statement to police in which he admitted, among other things, that he had been smoking methamphetamine which appellant had given him and that appellant had destroyed methamphetamine in the residence as the police arrived. At trial, however, he testified that he could not recall the contents of his statement to police. The prosecutor, then referred to the transcript made of his prior statement and asked the witness to "glance at the statement to refresh [his] memory" and admonished him not to read aloud from it. The Court found that the prosecutor properly refreshed the witness's recollection under OCGA § 24-9-69.

On direct examination, the witness also testified that he did not know whether appellant destroyed any methamphetamine prior to the police entering the residence. The Court held that the trial court did not err in allowing a GBI agent who was present when the witness's statement was given to testify that the witness had stated that appellant had flushed methamphetamine down a toilet in the rear of the house as the police were entering the front door. Such evidence comes in as substantive evidence and is not limited in value to impeachment purposes only.

Expert Testimony; Juror Misconduct

Boone v. State, A08A1300

Appellant was convicted of manufacturing, trafficking and possession with intent to distribute methamphetamine. He appealed contending, among other things, that the trial court 1) err in allowing the testimony of the state's expert, forensic chemist; and 2) erred in denying his motion for a mistrial, based upon the allegation that "one or more jurors" had begun deliberating before the close of the evidence. The record showed a GBI forensic chemist was allowed to testify concerning one substance removed from the scene that was tested by another GBI forensic chemist. At trial, the chemist, who had been present at the scene, testified that the substance tested positive for methamphetamine based on her colleague's analytical findings. The Court found no error. An expert who personally observes data collected by another may offer his opinion which is not objectionable merely because it is based in part on another's findings. Here, the expert was available for full and searching cross-examination. Therefore, the failure of the expert to test independently the control sample, after observing its analytical test results, went only to the weight of the evidence and not to its admissibility.

Appellant based his claim of juror misconduct on the fact that during an out of court hearing, the trial court received two questions from the jury before it received the case —one

asking the difference between trafficking and distribution and the other seeking the definition of possession of a firearm during the commission of a crime. If irregular juror conduct is established, a presumption of prejudice to the defendant results, requiring the prosecution to show, beyond a reasonable doubt, that no harm occurred. A jury verdict will not be upset solely because of juror misconduct, unless it is so prejudicial that the verdict must be deemed inherently lacking in due process.

The Court found no error here because the record showed that while at least one juror had begun thinking about the case, there was no evidence that any deliberations had begun. Moreover, when the jury reentered the courtroom, the trial court gave a curative instruction.

Similar Transactions

Sheppard v. State, A08A0703

Appellant was convicted of child molestation. On appeal, he alleged that the trial court erred when it admitted similar transaction evidence without holding a Uniform Superior Court Rule 31.3 (B) hearing. The record showed that the state timely filed a notice of intent to introduce evidence of similar transactions. But, although the state asserted that a Rule 31.3 (B) hearing was held, the Court could not determine that fact from the record. The state bears the burden of initiating Rule 31.3 (B) procedures and the failure of the defense to object if those procedures are not followed does not amount to a waiver. The trial court's apparent failure to conduct a Rule 31.3 (B) hearing would have been harmless error if the evidence did not measurably contribute to the verdict. Here, however, because of the extensive testimony concerning numerous similar transactions, the Court could not find that the error was harmless. It therefore remanded the case back to the trial court with directions that it determine whether a Rule 31.3 (B) hearing had been held and, if not, to hold such a hearing.