

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 16, 2009

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THIS WEEK:

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Defense of Habitation; Convicted felons

State v. Burks, S09A1145

The State appealed from an order quashing its indictment against Burks for murder and other related offenses. The trial court found that Burks, a convicted felon, was entitled to immunity under OCGA § 16-3-24.2. The Court reversed, agreeing with the State that the trial court erred in granting Burks' motion to dismiss because the defense of immunity under OCGA § 16-3-24.2 does not apply if the person invoking the immunity statute is carrying a weapon unlawfully. OCGA § 16-3-24.2 provides that immunity from criminal prosecution is available to a person using threats or force in defense of habitation "unless

in the use of deadly force, such person utilizes a weapon the carrying . . . of which is unlawful by such person under [OCGA § 16-11-120 et seq., Georgia Firearms and Weapons Act]. " (Emphasis supplied). The uncontroverted evidence established that Burks, a convicted felon, used a firearm to shoot the victim. OCGA § 16-11-131 of the Georgia Firearms and Weapons Act criminalizes the possession of a firearm by a convicted felon. Therefore, Burks, a convicted felon in possession of a weapon, could not as a matter of law benefit from the pretrial immunity statute.

Voir Dire

Hubbard v. State, S09A1235

Appellant was convicted for murder and possession of a firearm during the commission of a felony. He contended that the trial court erred in not dismissing a particular potential juror for cause. The Court held that there is no such manifest abuse of discretion regarding a decision not to strike a juror unless it is shown that the juror's opinion is so fixed and definite that he or she will be unable to set the opinion aside and decide the case based upon the evidence and the trial court's instructions. Neither a prospective juror's doubts as to his ability to be impartial or his statement that he will try to set aside any preconceived notions mandate as a matter of law that the juror be excused for cause. Here, the juror stated: (1) He was a pastor who knew the victim's family from seeing them at area churches, but he did not know them well; (2) he did not know the victim's name until he saw it in a newspaper; and (3) he went to the funeral home to view the victim's body but none of the victim's family members were there. Nevertheless, the juror stated that he would not be affected by

any of these things and that he could make a fair and impartial decision in the case. Thus, the Court could not conclude that the trial court abused its discretion in not dismissing the juror for cause.

Equal Protection; Riot in a Penal Institution

Drew v. State, S09A1477

Appellant was convicted of riot in a penal institution (OCGA § 16-10-56) and both felony and misdemeanor obstruction. The evidence showed that appellant, acting alone, attacked two guards while incarcerated in an Adult Detention Center. He argued that OCGA § 16-10-56 is unconstitutional on equal protection grounds because the law imposes felony punishment and allows the crime to be committed by a single individual, whereas the offense of riot under OCGA § 16-11-30 is punished as a misdemeanor and is committed by two or more persons acting in concert. The Court held that in evaluating legislation under an equal protection claim, a claimant must first establish that he is similarly situated to members of a class who are treated differently than he. Criminal defendants are “similarly situated” for purposes of equal protection only if they are charged with the same crime or crimes. Thus, for equal protection purposes, only those charged with riot in a penal institution are similarly situated to appellant. Since appellant has not shown that he was punished differently from others accused and convicted of the same crime, there was no unconstitutional disparate treatment of similarly situated persons. Moreover, the Court held, contrary to appellant’s assertions, a prisoner, by virtue of incarceration alone, is not a member of a suspect class for equal protection analysis.

Miranda; Mental Incapacity

Griffin v. State, S09A0855

Appellant was found guilty, but mentally ill of malice murder in the stabbing death of his live-in girlfriend. He contended that the trial court erred in admitting his custodial statements because he lacked the mental capacity at that time to knowingly and voluntarily waive his rights. The Court held that a determination of mental illness is not tantamount to a finding of mental incompetency. A person

who is mentally ill can be competent to make a voluntary confession and a mere showing that a person who confessed to a crime may have suffered from some mental disability is not a sufficient basis on which to exclude the statement. Therefore, after a review of the record, including the audiotaped statement appellant gave to police officers, the Court found no error in the trial court’s conclusion that appellant’s statement was freely and voluntarily given after a knowing and intelligent waiver of his *Miranda* rights.

Miranda; Request for Counsel

Robinson v. State, S09A0786

The Court granted a discretionary appeal to determine if the trial court erred in not excluding statements made by appellant after being advised of his *Miranda* rights. The evidence showed the following exchange: Detective: If you decide to answer questions now without a lawyer present, you would still have the right to stop answering questions at any time. You will also have the right to stop answering at any time until you talk to a lawyer. Do you understand that right? Robinson: Yes. Detective: Knowing these rights that I just advised you, do you wish to speak to me without an attorney present? Robinson: *Uhm, yeah, I would like a lawyer.* Detective: So you would like to have a lawyer without —to —before you speak to us? Robinson: I mean, I can talk to y’all and stuff. It don’t matter. Detective: Here’s the thing. It’s up to you, Mr. Robinson. I can’t advise you whether you need or want a lawyer or not. You have to make the decision. You said you would like a lawyer. I can’t —it, it —like I said, it’s up to you. You have to tell me yes or no if you want a lawyer before you speak to us. Robinson: No, I can talk to y’all without a lawyer. Detective: Are you sure? Robinson: Yeah.

A suspect who asks for a lawyer at any time during a custodial interrogation may not be subjected to further questioning by law enforcement until an attorney has been made available or until the suspect reinitiates the conversation. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, the cessation of questioning is not

required. Here, the Court found, there was no ambiguity or equivocation in appellant’s statement: “Uhm, yeah, I would like a lawyer.” Any ambiguity was created solely by the detective’s subsequent questioning. Since appellant did not use equivocal words such as “might” or “maybe” when referring to his desire for a lawyer or refer to a need for counsel sometime in the future, the trial court erred in denying the motion to exclude such evidence.

Justices Carley and Nahmias dissented.

Void Judgments; Venue

Glean v. State, S09A0650

Appellant appealed from an order denying his motion pursuant to OCGA § 17-9-4 to declare a judgment of conviction void. Appellant was charged with malice murder in Ware County. Appellant moved for a change of venue. The trial court granted the motion and transferred venue to Chatham County. A jury was selected in Chatham County, and taken back to Ware County for trial, where appellant was subsequently convicted. Appellant argued that when the trial court granted a change of venue to Chatham County, the Superior Court of Ware County was completely deprived of jurisdiction, but that he was nonetheless convicted and sentenced by the Superior Court of Ware County. The trial court rejected appellant’s motion, stating that appellant’s only remedy was through a petition for a writ of habeas corpus.

The Court disagreed and reversed. OCGA § 17-9-4 provides that “[t]he judgment of a court having no jurisdiction of the person or subject matter, or void for any other cause, is a mere nullity and may be so held in any court when it becomes material to the interest of the parties to consider it.” An assertion that a judgment is void because venue is improper is cognizable under OCGA § 17-9-4, and the denial of such a motion is directly appealable.

Bail

Constantino v. Warren, S09A1541

Appellant appealed from a denial of his habeas petition seeking release on bail. The evidence showed that appellant defrauded a victim of almost 2 million dollars. He was denied bail by the trial court because it determined that he was a flight risk. Appellant then filed a habeas petition alleging that he

was entitled to bail. The habeas court denied relief and he appealed.

Appellant first argued that because he was not indicted for one of the offenses specified in OCGA § 17-6-1 (a), the bail provisions of OCGA § 17-6-1 (e) do not apply to his case, and he was entitled to bail as a matter of right. The Court disagreed. It held that only those persons charged with misdemeanors are entitled to bail as a matter of right. Appellant also argued that because he was charged with a non-capital offense that he was entitled to bail as a matter of right. The Court again disagreed, noting that the cases upon which appellant relied were outdated and interpreted a prior version of the state's bail laws.

Appellant also contended that the habeas court abused its discretion in not granting relief. Under OCGA § 17-6-1 (e), a person may be released on bail only if the court finds that the person posed no significant risk of fleeing, threatening the community, committing another crime, or intimidating a witness. Here, appellant produced some evidence of roots in the community but, the State showed that appellant did not own the home in which he lived, had no assets in the United States, had assets in Belize and Nicaragua, had allegedly funneled significant amounts of money to investments in Belize, and had traveled extensively to Belize. Additionally, his wife had no assets other than her home; she was uncertain how much equity she had in the house; and, due to the downturn in the real estate market, the house was worth less than it was several years ago. Based on this evidence, the habeas court did not err in ruling that the trial court acted within its broad discretion in finding that appellant posed a significant risk of flight and in denying bail.

Search & Seizure; Comment on Right to Remain Silent

Stringer v. State, S09A1065

Appellant was convicted of felony murder, attempted armed robbery and other related offenses. He contended that the trial court erred in denying his motion to suppress his custodial statement, because he was illegally arrested without probable cause. The evidence showed that following an attempted robbery in which the victim was shot and killed, the police were alerted to appellant as a possible suspect and to a house in which they were told

that the shooting was being discussed. One officer went to the back of the house while the others approached and encountered the occupants at the front door. The officer, who was covering the rear of the residence, saw appellant quietly slipping out the back door. The officer shined his flashlight at appellant, drew his gun, pointed it at him, frisked him for weapons, "probably handcuffed him," and escorted him to the front of the house. After the officers learned his name, appellant was asked if he would mind speaking with someone at the police station. Appellant agreed to go. At the police station, with his mother present, appellant waived his rights, confessed to shooting the victim and accurately sketched out the scene of the shooting.

The Court held that the officers who approached the house clearly possessed a reasonable suspicion that someone with knowledge of the shooting may be present and could attempt to flee. Thus, when appellant made an apparent attempt to evade contact with police, the initial detention was lawful because it was supported by a reasonable, articulable suspicion of his possible role in the murder. Moreover, flight in connection with other circumstances may be sufficient probable cause to uphold a warrantless arrest or search. In sufficiently dangerous circumstances, law enforcement officers may effect and maintain investigatory detentions by drawing weapons. Officers may also handcuff a suspect during an investigatory stop when such action is either reasonable under the circumstances to protect themselves or the public, or to maintain the status quo. Therefore, the Court determined, the means of the detention were reasonable and did not transform the investigatory stop into an arrest in light of the danger inherent in approaching and detaining an evasive person suspected of committing attempted armed robbery and murder. After appellant was brought to the front of the house, there was no need to detain him involuntarily, because he consented to go with an officer for further questioning.

Appellant also argued that the trial court erred in denying his motion for mistrial based on the State's cross-examination of him regarding his failure to have informed anyone about the alibi which was presented through his own and other defense testimony.

The record reveals that appellant did not avail himself of the right to remain silent immediately upon his arrest. Therefore, the Court

held, it was not improper for the prosecutor to cross-examine appellant regarding his failure to mention the alibi to officers or others when he made his statement or at any other time before trial. Under these circumstances, the State's questioning was not an impermissible comment on appellant's right to remain silent, because the evidence showed that he did not remain silent. If appellant had recently manufactured self-serving and exculpatory evidence, the jury was entitled to know of that possibility and weigh it in their deliberations.

Speedy Trial

Arbegast v. State, A09A1530

Appellant appealed from the denial of his plea in bar alleging that his constitutional right to a speedy trial was violated. The Court used the *Barker-Doggett* analysis in determining his claim. As a preliminary matter, the Court determined that the 64 month delay was presumptively prejudicial. The Court then analyzed appellant's claim under the four-factor test. First, the Court noted that the trial court failed to make a determination concerning the length of the delay. It found, however, that the 64 month delay weighed against the State. The Court found that both parties shared some responsibility for the delay. A majority of the delay, however, was attributable to the State, which failed to submit the case to the calendar clerk for placement on the trial calendar. Appellant was dilatory in asserting his constitutional rights, waiting 64 months and therefore this factor weighed against him. As to the last factor, the Court held that there are three sub-factors to consider in determining whether a defendant suffered prejudice as a result of delay: 1) whether there has been oppressive pre-trial incarceration; 2) the anxiety and concern of the accused; and 3) the possibility of harm to the accused's defense. Although appellant alleged prejudice, the Court found that appellant had not demonstrated an abuse of the trial court's discretion based on a lack of actual prejudice to his defense.

Verdicts

Lyons v. State, A09A1787

Appellant was indicted on charges of armed robbery, false imprisonment, aggravated assault, impersonating an officer, and possession of a firearm during the commission

of a crime. A jury found him guilty of all of the charges, except that it found him guilty of robbery by intimidation as a lesser-included offense of armed robbery. He argued that the armed robbery acquittal and the aggravated assault conviction are mutually exclusive because in finding him guilty of robbery by intimidation as a lesser-included offense of armed robbery, “the jury found that a firearm was not used in the robbery.” Such a finding, he urged, excluded a finding of guilt on the aggravated assault charge. The Court held that verdicts are mutually exclusive where a guilty verdict on one count logically excludes a finding of guilty on the other. Convictions for both robbery by intimidation and aggravated assault do not exclude each other where the offenses underlying the convictions can be reconciled by looking to either the legal requirements for each offense or to the unique facts adduced at trial. Here, the Court found, the convictions at issue can be reconciled by either method. First, as to the legal requirements, the verdicts are not mutually exclusive because robbery by intimidation can occur even where a weapon is involved. Thus, the fact that the jury found appellant guilty of robbery by intimidation as a lesser-included offense of armed robbery does not mean the jury found that no weapon was used. Second, the facts of this case do not make the verdicts mutually exclusive. The rule against mutually exclusive verdicts applies only where the convictions result from the same act involving the same victim at the same instant. Here, the acts were not committed at the same instant. The offense of robbery by intimidation occurred when appellant and his co-defendant came into a home wearing law enforcement attire, displayed a gun, ordered the victim onto the floor and took his money. The offense of aggravated assault was proven with evidence that the co-defendant pointed a gun at the victim to force him to write a letter incriminating the victim in an independent crime. Thus, there was both an aggravated assault involving a gun, and a robbery by intimidation that may or may not have involved a gun. Therefore, the two guilty verdicts were not mutually exclusive.

Venue, Identity Fraud

McKenzie v. State, A09A1991

Appellant was convicted of 20 counts of identity fraud and 4 counts of forgery. She

contended that the identity fraud venue statute was unconstitutionally applied to avoid prosecuting the crimes in the counties in which they occurred. The evidence showed that appellant, while she was working for a law firm in DeKalb County, stole blank checks, forged them, and then had others cash them in surrounding counties. The Court, citing *State v. Mayze*, 280 Ga. 5, 10 (2005), found that the statute has been upheld as constitutional, even as to a person who commits no act in the county in which the victim of the identity theft resides. Here, the victim was located in DeKalb County. Thus, even though many of the stolen checks were negotiated outside of DeKalb County, the trial court properly found that the evidence presented at trial was sufficient to prove venue in DeKalb County beyond a reasonable doubt for all 20 counts of identity fraud because the appellant accessed the financial information of the victim residing in DeKalb County.

Right to Be Present; Search & Seizure

Thomas v. State, A09A1501

Appellant was convicted of trafficking in methamphetamine, trafficking in cocaine, manufacturing methamphetamine, and other offenses. He argued that he was denied his right to be present at two critical stages of his trial. First, he contends his rights were violated when his counsel sought and was denied a continuance. The Court, however, found that a trial court’s refusal to continue a trial is not necessarily an event that is material to a case for the purposes of determining whether defendant was absent for a critical stage of the proceedings, i.e., one that materially affected his case. Furthermore, appellant failed to show that the court’s denial of the continuance was of such material effect to his case as to require his presence when the decision was made. Second, he contended he was denied his right to be present when the court twice met with a juror about the juror’s father’s medical emergency and subsequent open heart surgery. Both meetings were outside the presence of the State, appellant, and his counsel. The Court held that there should be no communication between the trial judge and the jury outside the presence of the defendant and his counsel which would tend in any manner to prejudice the accused, and unless the character of the

communication clearly shows that it could not have been prejudicial to the accused, the presumption of law would be that it was prejudicial, and the accused would be entitled to another trial. But here, the Court found no prejudice because the matter discussed solely related to the juror’s desire to be at the hospital for his father’s open heart surgery.

Appellant also contended that the trial court erroneously denied his motion to suppress evidence found in the detached garage. Although the search warrant specifically included the detached garage, appellant argued the garage was not in the curtilage of the apartment where contraband was seen and that therefore there was no probable cause to search the garage and it should not have been included in the warrant. The Court disagreed. The detached garage was associated with appellant’s apartment and thus fully accessible to him and subject to his control. It was therefore within the curtilage for Fourth Amendment purposes.

Merger

Gunn v. State, A09A1595

Appellant was convicted of two counts of child molestation, OCGA § 16-6-4; and three counts of sexual battery, OCGA § 16-6-22.1 (b). The State indicted appellant in five counts, charging as follows: in Count 1, that appellant committed child molestation “by touching the vagina of [the victim] with the hand of said accused”; in Count 2, that appellant committed child molestation “by touching the breast of [the victim] with the hand of said accused”; in Count 3, that appellant committed sexual battery “by intentionally mak[ing] physical contact with the inner thigh of [the victim] . . . without [her] consent”; in Count 4, that appellant committed sexual battery “by intentionally mak[ing] physical contact with the genital area of [the victim] . . . without [her] consent”; and, in Count 5, that appellant committed sexual battery “by intentionally mak[ing] physical contact with the breasts of [the victim] . . . without [her] consent[.]” The jury found appellant guilty beyond a reasonable doubt on all five counts, and the trial court imposed sentence on each count.

The Court held that the two counts of sexual battery merged into the child molestation convictions. Specifically, Count 4, sexual battery by touching the victim’s genital area,

merged with Count 1, child molestation by touching the victim's vagina, and Count 5, sexual battery by touching the victim's breast, merged with Count 2, child molestation by touching the victim's breast. Because a judgment of conviction and a sentence imposed on that conviction are void if the offense is included as a matter of law or fact in another crime for which the defendant was convicted and sentenced, the trial court erred in imposing a separate sentence on the jury's verdicts on Counts 4 and 5. Therefore, the Court stated, it was "compelled... to vacate the judgment in part, to the extent of the separate sentence imposed on Counts 4 and 5, even though [appellant] failed to raise this issue in the court below or to enumerate it as error on appeal."