

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 17, 2008

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THIS WEEK:

- **Closing Arguments**
- **Prior Inconsistent Statements**
- **Sentencing; Merger**
- **Ex Post Facto Laws; Sex Offender Registration**
- **Immunity**
- **Venue, Indictment**
- **Search & Seizure**
- **Jury Instructions; Impeachment**
- **Child Molestation, Evidence**

Closing Arguments

Wright v. State, S08A1098

Appellant was convicted of murder and other offenses. He argued that the prosecutor made an improper comment during closing argument when she argued that the appellant used “crocodile tears” during his testimony in order to garner sympathy from the jury and avoid responsibility for his actions. The Court held that the arguments were proper because the comments were permissible conclusions that the prosecutor wished the jury to draw from the evidence rather than a statement of the prosecutor’s personal belief as to the veracity of the appellant.

Prior Inconsistent Statements

Broner v. State, S08A1037

Appellant was convicted of murder and other offenses. A witness told the police after the incident that he saw the appellant shoot

the victim. At trial, however, the witness disavowed his original statement, claiming that he had been coerced by threats from the police to charge him with conspiracy to murder the victim unless he implicated appellant. The witness then testified that he heard gunshots, but did not see appellant holding a firearm and did not know who had fired the gun. The state then called the witness’s wife, who testified that on the day of the homicide, the witness told her that he heard the gunshot and looked up and thought that the victim shot appellant but that appellant remained standing and the victim, who was seated in a car, was leaning over.

Appellant contended that the wife’s testimony was an improper bolstering of the witness’s testimony. However, the Court held that while the statement to which the wife testified may have been consistent with the one that the witness originally gave to the police, the admissibility of her testimony for substantive and impeachment purposes is governed by what transpired at trial when the witness recanted his original statement and testified to an inconsistent version of the events in question. The testimony therefore was not a prior consistent statement bolstering the witness’s credibility but rather, a prior inconsistent statement which was admissible for both impeaching and substantive purposes.

Sentencing; Merger

Abdullah v. State, S08A0932

Appellant was convicted of the murder of one female victim and numerous offenses against two male victims. The trial court sentenced appellant to a consecutive five-year sentence for possession of a firearm during the commission of the aggravated assault on one of the male victims, as well as a consecutive

five-year sentence for possession of a firearm during the commission of an armed robbery of the same victim. Appellant argued that the two sentences should have merged. The Supreme Court agreed. Where multiple crimes are committed together during the course of one continuous crime spree, the Court has held that a defendant may only be convicted once for possession of a firearm during the commission of a crime as to each individual victim. Therefore, the Court held, the two possession charges related to the same male victim should have been merged and the conviction and sentence imposed on one such charge must be vacated.

Ex Post Facto Laws; Sex Offender Registration

Frazier v. State, S08A1159

Appellant was originally convicted of child molestation in 1988. He failed to renew his sex offender registration in 2006 and subsequently was convicted of failing to register as a sex offender. He challenged the constitutionality of the registration requirement and the penalty component, alleging both to be ex post facto laws. To determine whether a penal statute is an ex post facto law, courts should employ a three-step analysis: First, a court should determine if the law applies retrospectively. If it does not, the inquiry is ended. If it does, the court should determine if the law is punitive or regulatory. If it is punitive, the statute is an ex post facto law. If it is regulatory, the court must then examine the statute's effect. If the effect of the statute is punitive, the statute is deemed ex post facto — even if the statute was intended to be regulatory.

Utilizing this test, the Supreme Court analyzed the registration requirement by first looking to see if it applies retrospectively. A penal statute is retrospective if it alters the consequences for crimes committed prior to its enactment. The Court found that in making such a determination, the definitive time period is the date on which the criminal offense is committed. Here, the appellant's punishment for the underlying child molestation was not increased. Instead, he was convicted of a new offense, the failure to register as a sex offender, one element of which was his earlier child molestation conviction. The statute therefore does not apply retrospectively because it does not

increase the punishment originally meted out for the child molestation. Instead, it punishes for the current felony of failure to register.

Immunity

Bunn v. State, S08A1132

Appellant contends that the trial court erred in denying his motion for immunity pursuant to OCGA § 16-3-24.2. The Court held that “[a]s a potential bar to criminal proceedings which must be determined prior to a trial, immunity represents a far greater right than any encompassed by an affirmative defense, which may be asserted during trial but cannot stop a trial altogether.” Therefore, the Supreme Court held, to avoid trial, a defendant bears the burden of showing that he is entitled to immunity under OCGA § 16-3-24.2 by a preponderance of the evidence. This burden is similar to that required of defendants who wish to avoid trial and guilt by showing that they are insane or mentally incompetent. If a defendant cannot meet this burden of proving immunity prior to trial, a defendant may nonetheless pursue an affirmative defense at trial, even though these affirmative defenses may be based on the same statutory provisions underlying a prior immunity motion. In such instances, the well-established burden of proof for affirmative defenses would be applicable during trial. Since the trial court did not employ the proper standard in denying appellant's motion, the case was remanded with directions to employ a preponderance of evidence standard.

Venue, Indictment

Wallace v. State, S08A1819

Appellant appealed the denial of his motion to vacate his 1990 conviction for murdering his wife. He contended that his conviction was void because venue was not in the county in which he was convicted and because the trial court improperly amended the one-count indictment when it responded to an inquiry from the deliberating jury. The Court held that venue was proper in the county of conviction. Here, the victim's body was found in that county and it could not be readily determined in what county the cause of death had been inflicted. In such instances, the cause of death is said to have been inflicted in the county where the body is found.

The Court also held that the indictment was not voided by judicial amendment during jury deliberations. The indictment charged appellant and three others with “unlawfully and with malice aforethought, caus[ing] the death of [the victim], by strangulation, and did conspire with each other to commit said crime. . . .” The jury inquired whether they had “to find each individual [defendant] guilty or not guilty of malice murder and/or conspiracy for murder? Is conspiracy a separate consideration?” The trial court responded that the defendants were charged only with murder and not with conspiracy. Since the indictment did not charge appellant and his co-defendants with the crime of conspiracy to commit murder, the trial court's response to the jury inquiry did not constitute a judicial amendment that materially affected the indictment.

Search & Seizure

Hicks v. State, A08A0795

Appellant was convicted of possession of methamphetamine, marijuana and DUI. He argued that the trial court erred in denying his motion to suppress because the arresting officer illegally detained and searched him based only upon his nervous demeanor. The record showed that appellant was stopped for speeding. The officer asked appellant to exit the vehicle and noticed that he was extremely nervous, almost to the level of “paranoia.” Upon inquiry of whether he had any weapons, appellant replied that he had a pocketknife and began to reach into his front pocket. Concerned, the officer instructed appellant to remove his hand from the pocket. The officer then stated that he was going to pat appellant down and asked for consent to reach inside appellant's pockets. He consented. During the pat-down, the officer felt the outside of the front pocket and detected an object that he believed to be a glass pipe commonly used to smoke methamphetamine. The object felt like other glass drug pipes he had seized in the past, and he “could clearly feel it through the pocket.” At that point — and based on his prior experience with persons using methamphetamine — the officer handcuffed appellant for his safety and continued the search. He seized the pipe and also located a small bag of suspected methamphetamine in one of appellant's pockets.

The Court found no error. During a lawful detention, the officer asked about weapons. Nervousness was not the only basis for the frisk because appellant admitted that he possessed a weapon, an admission that clearly factored into the officer's decision to pat him down. Given the circumstances, the trial court was authorized to find the pat-down reasonable for officer safety. Under the "plain feel" doctrine, the officer was permitted to confiscate the pipe that he detected during the pat-down. Moreover, because appellant consented to the search of his pockets, the officer was also authorized to seize the methamphetamine found in one of appellant's other pockets.

Jury Instructions; Impeachment

Blanch v. State, A08A1287

Appellant was convicted of aggravated battery and simple battery. He argued that the trial court erred by allowing the state to impeach him with a prior conviction and that it should have defined the term "maliciously" for the jury in its instructions following the close of evidence. The Court of Appeals affirmed. The state produced evidence that appellant was convicted of possessing soap, a non-controlled substance, with the intent to distribute it as crack cocaine, a controlled substance. Since this was a crime of fraud involving the knowing misrepresentation that soap was cocaine, the trial court did not err when it admitted this conviction for impeachment purposes under OCGA § 24-9-84.1 (a) (3). The trial court was also not required to define the term "maliciously" in the course of instructing the jury on the elements of aggravated battery because the term "has such obvious significance and common understanding that there is no need to define it in the jury charge."

Child Molestation, Evidence

Green v. State, A08A1359

Appellant was convicted of child molestation. He contended that the trial court erred in (1) allowing the victim to read a letter she had written to herself to the jury; and (2) allowing an expert witness to read a report she had prepared to the jury. During the trial, the victim testified that she wrote the letter

to "help her work through the issues of being molested." The trial court allowed the victim to read the letter to the jury, but did not allow the letter to be submitted to the jury during deliberations. The Court of Appeals found that appellant objected to the victim reading the letter on the grounds that it would be improper and prejudicial, which is not a proper objection. "[A]n objection to evidence on the ground that it is irrelevant, immaterial and prejudicial is entirely too vague and general to present any questions for determination by the trial court, and the overruling of this objection does not constitute reversible error." Although the Court found the letter to be of doubtful relevance or competence, such evidence should be admitted, with its weight and credibility left to the jury to resolve. Thus, the trial court's ruling on the admissibility of this evidence did not amount to an abuse of discretion.

Appellant also argued that the trial court erred in allowing an expert witness to read a portion of her report to the jury rather than testifying from her own knowledge and memory. However, the record only showed that the expert witness delivered her testimony in narrative form. "It is not error to allow a witness to deliver testimony in narrative form, without the aid of questions from counsel, when counsel so request[s], provided the witness is not permitted to state anything which is inadmissible as evidence." Here, appellant did not argue that the expert witness stated anything which was inadmissible as evidence. Therefore, there was no error.