Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 24, 2008

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THIS WEEK:

Rule of Lenity

Chandler v. State, A08A1430

Appellant was convicted of selling a counterfeit substance pursuant to OCGA § 16-13-30 (i). Appellant argued that under the rule of lenity, he should have been sentenced for a misdemeanor rather than a felony. The rule of lenity entitles a defendant to the lesser of two penalties where the same conduct would support either a felony or misdemeanor conviction. Appellant contended that his conduct was also a violation of OCGA § 16-13-30.2 which provides that "[a]ny person who knowingly … possesses with intent to distribute an imitation controlled substance as defined in paragraph (12.1) of Code Section 16-13-21 is guilty of a misdemeanor of a high and aggravated nature." The Court disagreed. An "imitation controlled substance" is defined as "[a] product specifically designed or manufactured to resemble the physical appearance of a controlled substance, such that a reasonable person of ordinary knowledge would not be able to distinguish the imitation from the controlled substance by outward appearances," or "[a] product, not a controlled substance, which, by representations made and by dosage unit appearance, including color, shape, size, or markings, would lead a reasonable person to believe that, if ingested, the product would have a stimulant or depressant effect similar to or the same as that of one or more of the controlled substances." OCGA § 16-13-21 (12.1) (A) and (B). Here, the parties stipulated that the substance recovered was not a controlled substance, and there was no evidence presented that it was "specifically designed or manufactured to resemble the physical appearance of a controlled substance." Also, the agent testified that he observed a "white, powdery substance" inside the bag that he believed was cocaine but, there was no evidence that the substance had any special "dosage unit appearance" based on color, shape, size, or markings. The Court noted that while it has found that the term "dosage unit" has been used to describe a certain quantity of crack cocaine, no basis exists to extend the term to a substance described merely as a white powder. The rule of lenity did not therefore apply because the evidence here revealed that the substance would not fall under either definition of "imitation controlled substance,"

Search & Seizure

Williams v. State, A08A1420

Appellant was convicted of possession of marijuana. He appealed, contending that the trial court should have suppressed the marijuana seized from his person because the police sergeant allegedly lacked probable cause to conduct the search and failed to obtain a search warrant. Appellant was pulled over for a window tint violation. During his initial

encounter with the officer, appellant was shaking and would not make eye contact with him. The officer asked appellant to step out of the vehicle, and when he did, the officer noticed a large bulge in appellant's pants in the crotch area. The officer attempted a pat-down search for his protection and safety, but appellant kept moving his body whenever he attempted to pat-down his crotch area. The officer also could smell the "really heavy" odor of raw marijuana coming from appellant's person. When asked about the strong smell, appellant admitted that he had smoked some marijuana. The officer handcuffed appellant and searched his person. The search revealed a package in appellant's crotch area containing marijuana.

The Court found that appellant was placed under custodial arrest when he was handcuffed because a reasonable suspect, having admitted to recently smoking marijuana and knowing that a police officer had smelled marijuana on his person, "would not believe that he was free to leave or that his detention was only going to be temporary." Moreover, the Court held, the custodial arrest was lawful. An officer is entitled to make a warrantless arrest if, at the time of the arrest, he has probable cause to believe the accused has committed or is committing an offense. Here, probable cause existed to arrest appellant based on his admission that he had recently smoked marijuana; the smell of marijuana coming from his person; the unusual bulge in his crotch area; his extremely nervous demeanor; and his attempt to prevent a lawful pat-down of his person in the exact area of the suspicious bulge. Appellant's custodial arrest being lawful, the officer was entitled to conduct a warrantless search of his person incident to that arrest.

Britt v. State, A08A1460

Appellant was convicted of possession of methamphetamine. He appealed, contending that the roadblock at which he was stopped was unconstitutional and that even if constitutional, his consent to search was invalid. First, the Court found that the roadblock was constitutional because the State proved that (1) the decision to implement the roadblock was made by supervisory personnel at "the programmatic level," rather than by officers in the field and for a legitimate primary purpose; (2) all vehicles, rather than random vehicles, were stopped; (3) the delay to motorists was minimal; (4) the roadblock was well identified as a police checkpoint; and (5) the screening officer had adequate training to make an initial determination as to which motorists should be given field sobriety tests. The Court also found that the consent was valid. Appellant had contended that the consent was invalid because it was obtained after he had been detained for an unreasonable period of time. However, the officer asked appellant for permission to search his car immediately after completing the sobriety test. Therefore, the request was not made following an unreasonably long detention. Although the officer could not recall if he had returned appellant's documents at the time he asked for consent to search, "as a matter of Georgia law, it does not matter whether the request to search comes during the traffic stop or immediately thereafter."

Sentencing

Hwang v. State, A08A1196

Appellant pled guilty to driving with a suspended license, in violation of OCGA § 40-5-121, the trial court sentenced her to twelve months confinement, with ten days to be served in jail and the remainder on probation. The conviction was her second in six months for driving with a suspended license. In such cases, OCGA § 40-5-121 provides that the defendant "shall be guilty of a high and aggravated misdemeanor and shall be punished by imprisonment for not less than ten days nor more than 12 months, and there may be imposed in addition thereto a fine of not less than $1,000.00 nor more than $2,500.00." Relying on the statute's use of the word "shall," the trial court stated that it was without discretion to probate or suspend appellant's ten day jail term. Appellant challenged this finding on appeal and the Court agreed with appellant. The Court found that under OCGA § 17-10-1, the trial court could have probated the entire sentence because OCGA § 40-5-121, the statute under which she was convicted, did not explicitly prohibit the trial judge from probating or suspending any part of the statutorily required sentence. A remand would not be necessary if the trial court had indicated that he would have sentenced appellant to serve the ten days regardless of what he believed the statute required. But, because this was not the circumstance presented here, the Court vacated the sentence and remanded the case for the exercise of the trial judge's discretion upon resentencing.

Indictments

Stevens v. State, A08A1581

Appellant was convicted of aggravated assault. Appellant argued that the trial court committed reversible error by permitting the jury to convict him of aggravated assault in a manner not charged in the indictment. The trial court charged the jury that an aggravated assault occurs "when [a] person assaults another person with a deadly weapon, or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in a serious bodily injury." The indictment, however, more narrowly averred that the assault committed by appellant actually resulted in serious bodily injury to the victim. Appellant therefore argued that the jury could have convicted him of committing aggravated assault other than in the specific way set forth in the indictment. The Court found that a charge citing a code section in its entirety is not error where only a portion of the section is applicable if it does not appear that the inapplicable part misled the jury. Here, the trial court also charged the jury that 1) "[t]he indictment and the plea form the issue that [it was] to decide"; 2) the state was required to prove beyond a reasonable doubt "every material allegation of the indictment"; and 3) that in order to find appellant guilty of aggravated assault, it would have to "find and believe beyond a reasonable doubt that [appellant] . . . commit[ed] the offense of aggravated assault as alleged in … the indictment." In light of these additional instructions to the jury that confined the aggravated assault charge to the specific portion of the code set out in the indictment, the Court concluded that the trial court's charge was not misleading.

Defenses; Relevance

Dodd v. State, A08A1347

Appellant was convicted of child molestation. He appealed, arguing that (1) the trial court abused its discretion by refusing to allow him to admit evidence of alleged similar crimes in support of his third party perpetrator defense; and (2) the trial court

improperly denied him access to records from the Department of Family and Children's Services. In order for a criminal defendant to introduce evidence implicating a third party in the commission of the crime for which the defendant is being tried, the proffered evidence must raise a reasonable inference of the defendant's innocence and it must directly connect the other person with the corpus delicti or show that the other person has recently committed a crime of the same or similar nature. A reasonable inference of a defendant's innocence is raised by evidence that renders the desired inference more probable than the inference would be without the evidence. Evidence which only casts a bare suspicion on another or raises a conjectural inference as to the commission of the crime by another is not admissible. Appellant wished to offer evidence at trial that another family member living in the house committed the crimes. Specifically, he sought to introduce evidence that the third party was charged with the 2005 statutory rape and molestation of a 13 year old girl and that the person had been accused of sexually abusing other juveniles. Here, the 10 year old victim, who had known and spent time around appellant for years, consistently identified him and only him as the perpetrator. Moreover, appellant's telephone conversation with the victim's father following the crimes, his polygraph results, and his changing statements to law enforcement tended to corroborate the victim's testimony. Additionally, the evidence failed to establish that the third party was present when both crimes occurred. Thus, the trial court reasonably concluded that evidence of alleged similar crimes, whether considered alone or in connection with other evidence the defense relied upon to attempt to implicate the third party, failed to raise more than a conjectural inference that the third party committed the crimes.

Although DFACS records concerning reports of child abuse are confidential, a court can subpoena such records for in camera inspection and under certain circumstances, allow access to them by the parties. Here, after completing an in camera inspection during trial, the trial judge did not produce any documents to appellant. Instead, the court provided a verbal summary of certain materials in the Department's files which he identified as potentially valuable or exculpatory. These materials included reports on medical examinations of the victim and her sister conducted shortly after the crimes. Defense counsel requested but was denied the opportunity to examine several documents the court described, including the medical examination reports. The Court of Appeals found that the refusal to turn over the exculpatory documents themselves was erroneous. However, the trial court's description of the materials contained in the files did not indicate that the files contained exculpatory information of the type appellant claimed was withheld. Therefore, since appellant never requested that the records reviewed by the trial court be made part of the record on appeal, the Court had no basis for concluding that the trial court withheld any material, exculpatory information.

DUI; Expert Testimony

Oliver v. State, A08A0935

Appellant was convicted of less-safe DUI. He appealed, contending that the trial court erred in not allowing his expert witness in DUI investigations to testify and that the trial court should have declared a mistrial when the officer who administered an alco-sensor testified about unlawful blood concentrations. At trial, the officer testified that he asked appellant to blow into an alco-sensor machine after appellant admitted to drinking. The officer then testified that the purpose of the machine was to produce a preliminary breath sample to tell whether a person is under the influence of alcohol. The trial court sustained the appellant's objection, and instructed the jury to "disregard anything other than a positive or a negative indication." The officer then testified that he then arrested appellant and did not request appellant to do any field sobriety tests because appellant stated that he had problems with his knees, ankles, legs, and back.

Appellant proffered the testimony of his expert for two purposes: 1) to challenge the reliability of the alco-sensor test in that the test was administered too soon after the stop; and 2) to show that under NHTSA guidelines, the officer could have gotten an arguably more reliable indication of whether appellant was under the influence of alcohol to the extent that it was less safe for him to drive by performing field sobriety evaluations such as the horizontal gaze nystagmus and alphabet tests. The Court found that neither of these purposes warranted admission of the proffered testimony. Since the purpose of the alco-sensor test is simply to verify the presence or absence of alcohol in a suspect's breath and appellant admitted that he had been drinking, the expert's testimony that the officer administered the alco-sensor test too soon after he first stopped appellant would not have affected the test result to which the officer testified. Second, appellant conceded that the officer was not required to conduct any given field sobriety evaluations. Therefore, testimony that the officer could have conducted other evaluations more probative than the one actually performed was not relevant.

Appellant also contended that the trial court should have declared a mistrial when the officer testified on cross-examination that it is legal for persons 21 years of age and over to have alcohol on their breath or in their body only if the alcohol concentration is under the legal limit of 0.08 grams. However, the officer only gave this testimony in response to a question by defense counsel suggesting that such persons can have alcohol on their breath or in their body and still drive legally. Because the officer's testimony was responsive to defense counsel's question, and constituted an accurate clarification of the statement under the law, it provided no grounds for a mistrial.

Jury Deliberations

Olds v. State, A08A1495

Appellant was convicted of party to the crimes of burglary, armed robbery, a firearms offense and possessing marijuana. He contended that the trial court erred in allowing only a limited portion of the direct testimony of two eyewitnesses to be reread to the jury during its deliberations. A trial court, in its discretion, may permit the jury at their instigation to rehear requested portions of trial testimony after the jury has begun its deliberations, where the testimony is read in the defendant's presence. A jury is also permitted to limit what they rehear to what they desire to rehear, absent special circumstances which might work an injustice. Here, the jury requested to rehear specific testimony by two eyewitnesses regarding the color of the t-shirt worn by one of the intruders. Over objection, the trial court reread to the jury the requested

testimony concerning the color of the intruder's t-shirt. The trial court then issued a cautionary instruction to the jury, directing it to consider all of the trial testimony and "not to overly emphasize this testimony over the balance of the testimony." The Court found that no such special circumstances were shown and in light of the trial court's cautionary instruction to the jury after rereading the testimony no basis for reversal.

DUI; Scientific Evidence

Laseter v. State, A08A1245

Appellant was convicted of DUI. He appealed, contending that the trial court erred in admitting evidence of the results of the horizontal gaze nystagmus (HGN) test because the arresting officer did not perform the field sobriety test in accordance with the guidelines for performing it. Evidence based on a scientific principle or technique, such as evidence of an HGN test, is admissible where the state shows that, first, the general scientific principles and techniques involved are valid and capable of producing reliable results, and second, the person performing the test substantially performed the scientific procedures in an acceptable manner. Appellant conceded that the HGN test is an accepted, common procedure that has reached a state of verifiable certainty in the scientific community but contended that the state failed to make the second required showing. In determining whether an officer performed an HGN test in an acceptable manner, a trial court may consider "whether the arresting officer was sufficiently trained to give the test, whether the officer was experienced in administering the test, whether the officer administered the test according to the standardized techniques, and whether the officer scored or interpreted the test properly." Here, the Court found sufficient testimony to support the trial court's conclusion that the administering officer had sufficient experience and training to perform the HGN test, and that he substantially performed the test in an acceptable manner. The defense expert's testimony challenging the results of the HGN test went to the weight and credibility to be given to this evidence, not to its admissibility.

Appellant also argued that the test results from the Intoxilyzer 5000 were inadmissible because the DFS has not promulgated rules for the proper operation of the machine. The Court noted that under its prior decisions, breath test results are admissible if the "methods approved" by the DFS have been met, i.e, if the test is conducted on an Intoxilyzer 5000; the testing operator has a valid permit and has attended a breath analysis certification course; and the testing instrument has been tested periodically. Appellant asserted, however, that the "methods approved" by the DFS are separate and distinct from the "requirements for properly operating . . . any testing instruments." The Court stated that "[i]f we were writing on a clean slate, we might well agree with [appellant], …[b]ut this issue has already been decided adversely to the appellant [i]n Rowell v. State, [229 Ga. App. 397-398 (1) (a)]."

Judicial Comment

Wright v. State, A08A1221

Appellant was convicted of aggravated assault and possession of a firearm during the commission of a crime. He appealed, contending that the trial court expressed an opinion as to the evidence presented in violation of OCGA § 17-8-57. At trial, the court told defense counsel, "How about keeping your clients under control. They think this is a comedy apparently. They're out there laughing and everything." The Court of Appeals, however, found no error because the comment was not directed toward a material issue in the case nor was it an intimation on appellant's guilt or innocence.