Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 21, 2008

Legal Services Staff Attorneys

David Fowler
Deputy Executive Director

Chuck Olson
General Counsel

Lalaine Briones
Legal Services Director

Joe Burford
Trial Services Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Coordinator

Gary Bergman
Staff Attorney

Tony Lee Hing
Staff Attorney

Rick Thomas
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Brad Rigby
Staff Attorney

THIS WEEK:

DUI; Search & Seizure

Baynes v. State, A08A2305

Appellant was convicted of DUI. He contended that the trial court erred by finding that the officer had probable cause to arrest him. The evidence showed that the officer had legal justification to stop appellant after witnessing him commit a traffic offense. The officer was justified in a brief investigative inquiry after observing appellant's flushed face and the smell of an alcoholic beverage on his breath. Appellant also stated that he recently drank two beers. During the authorized brief investigative inquiry, the officer further observed that appellant's eyes were "bloodshot red," and appellant failed to comply with the officer's instruction regarding two field sobriety tests: The alphabet test and the heal-to-toe test. Based on these observations, the Court held, the officer had probable cause to arrest appellant for DUI.

Motion for New Trial

Ricks v. State, A08A1320

Appellant contended that the trial court's denial of his motion for new trial was improper because the court denied it without holding a hearing on the merits. The Court agreed and reversed. The record showed that following his conviction in February, 2004, appellant's counsel filed a motion for new trial but no hearing on the merits was conducted. At a hearing in August, 2005, appellant dismissed his counsel, and the hearing was then continued until October, 2005, but no evidence in the record reflects the hearing took place. In August, 2006, the trial court denied appellant's motion for new trial. Absent a waiver, a movant for new trial is entitled to a hearing on the motion in the trial court before a ruling is made. If the movant's right to such a hearing has been denied, the case must be remanded to the trial court for a hearing and disposition of the motion before the merits of the remaining claims of error are addressed. Although the state argued that appellant waived his right to a hearing by terminating his counsel at the time of the hearing, the Court disagreed, noting the fact that appellant asserted ineffective assistance of counsel as one of the bases upon which he sought a new trial.

Search & Seizure

Pollack v. State, A08A1453

Appellant was convicted of trafficking in cocaine and marijuana and following too closely. He contended that the trial court erred in denying his motion to suppress. The evidence showed that two officers, who were looking for appellant's car, stopped him after observing him following too closely and noticing that his

car had potentially illegal window tinting. Appellant agreed to the officers' request to check the window tint, and volunteered his keys to the vehicle. Upon opening the door of the vehicle, one officer stated he was "overwhelmed by a strong odor of raw marijuana." When the officers questioned him about the odor, appellant advised that he did not do drugs because he was on parole. Appellant refused consent to search and the officers summoned a K-9 unit to the scene, which arrived approximately 43 minutes after the traffic stop. The dog alerted on the passenger's side door and, after going into the vehicle, made another positive alert on the dash. The officers also searched the trunk, where they found a plastic box containing a zipped nylon bag. Inside the bag, they found four sealed plastic bags of marijuana.

The Court first found that the stop was not pretextual. Next, the dealership exception to the window tint statute, set forth in OCGA § 40-8-73.1 (c) (6) (D), was inapplicable because appellant never stated that he bought the vehicle from a dealership. Third, the Court stated that while the officer's "insistence that he was able —as soon as he opened the driver's door of [appellant's] vehicle —to smell raw marijuana wrapped in sealed plastic bags inside a zipped nylon bag and a rubber container inside a closed trunk strains credulity, to say the least," because the trial court believed him, the evidence was sufficient to detain appellant further. The Court further found that the 43-minute detention while the police waited for the K-9 unit to arrive was not unreasonable because both officers smelled marijuana in the vehicle driven by appellant, an admitted parolee.

Appellant also argued that the officers lacked a sufficient basis to search the vehicle because the evidence established that the K-9 dog was not reliable. Here, the K-9 handler conceded that the dog had "made a mistake on occasion," but the police ultimately found drugs the "vast majority of the time" the dog gave a positive alert for the presence of narcotics. The handler also testified that the dog was certified through the National Narcotics Detection Dog Association and Law Enforcement Training Specialist, and he was trained in detecting marijuana, cocaine, methamphetamine, heroin, and narcotics derivatives. Finally, the officers had probable cause to search the trunk of the vehicle even though the dog only alerted to the passenger compartment. The trial court, therefore, did not err in denying appellant's motion to suppress.

Venue

McKinney v. State, A08A2044

Appellant was convicted of armed robbery. He challenged his conviction, alleging insufficient proof of venue. The Court agreed. Proving that a crime occurred in a city is not sufficient to prove venue, absent a showing that the entire city is located within one county. Similarly, proof of a street name is not enough unless it is also shown that the entire street is in one county. At trial, the state used a map to illustrate where the robberies occurred. But, the trial court limited the map to demonstrative evidence only and the officer whose testimony the map was used to illustrate did not testify regarding the location of the county line. Further, there was no evidence that the map went out with the jury. The Court held that demonstrative evidence, such as the map in this case, has no intrinsic testimonial value, but is only an aid in evaluating evidence. Therefore, venue was not proven. Nevertheless, because the evidence was otherwise sufficient to convict appellant, he may be re-tried.

Juveniles; Sentencing as an Adult

Pascarella v. State, A08A1284

Appellant was indicted on seven charges, including malice murder and felony murder predicated upon, among other things, conspiracy to commit armed robbery. Although she was 15 years old at the time of the offense she was prosecuted as an adult in superior court. The jury acquitted her of six charges, but found her guilty of conspiracy to commit armed robbery. On appeal, appellant argued that OCGA § 15-11-28 required her to be adjudicated as a juvenile delinquent, not convicted and sentenced as an adult. OCGA § 15-11-28 establishes the jurisdiction of juvenile and superior courts over matters involving juveniles. This Code section gave the superior court exclusive jurisdiction over appellant's trial for murder, and because the conspiracy charge arose from the same criminal transaction as the murder charges, the superior court also had jurisdiction over appellant's trial for that offense. Appellant argued that OCGA § 15-11-28 (b) (2) (D), which allows a superior court to transfer a case to juvenile court if the child was alleged to have committed an offense for which the superior court had exclusive jurisdiction but, as here, was convicted only of a lesser included offense, required the superior court to treat her adjudication of guilt on the conspiracy charge as an adjudication of delinquency rather than a criminal conviction. The Court disagreed. The language of OCGA § 15-11-28 (b) (2) (D) gives a superior court discretion over whether to transfer a case to juvenile court for disposition or to retain jurisdiction for sentencing. Appellant's interpretation of the statute would strip this discretion of meaning. If after choosing to retain a case rather than transferring it to juvenile court, the superior court nevertheless must adjudicate a defendant as a juvenile under OCGA § 15-11-28 (b) (2) (D), then there would be no purpose to giving the court the option of transferring the case. The Court also rejected her constitutional challenges finding 1) no constitutional right to be treated as a juvenile; 2) no constitutional infirmity in allowing the exercise of discretion to determine whether she is adjudicated as a juvenile or sentenced as an adult for an offense; and 3) no 8th amendment violation because the 10 year sentence fell within the statutory limits and was not overly severe or excessive in proportion to the offense.

DUI; Implied Consent

Fowler v. State, A08A2120

Appellant was convicted of DUI. He argued that (a) that the State failed to reasonably accommodate his request for an independent breath test; and (b) that the officer improperly read him the implied consent notice before placing him under arrest. The evidence showed that appellant was involved in a one car accident which resulted in appellant sustaining a fractured jaw. The investigating officer smelled an alcoholic beverage on appellant and noted other indicia the lead him to believe appellant was intoxicated. Appellant was taken to the hospital for treatment and while waiting for x-rays, the officer arrived and read appellant his implied consent rights. The officer asked for a blood test and appellant either asked for a breath test instead or as an additional test. Appellant took the blood test but not an additional breath test. Appellant's blood test results

came back three months later and the officer then took a warrant for him for DUI.

The Court held that the officer did not fail to reasonably accommodate appellant's alleged request for a breath test. First, appellant's fractured jaw made it unlikely that such a test could have been administered successfully. Second, appellant was not in the custody of the officer, but was a patient of the hospital waiting for x-rays and treatment for a fractured jaw. Thus, it was reasonable in this situation for the officer to leave him in the custody of the hospital as opposed to taking custody of him and transporting him, with an untreated broken jaw, to another location for a breath test, thereby disrupting his medical treatment and risking further injury.

The Court also rejected appellant's second contention regarding admission of his blood test results. If a person has been involved in a traffic accident resulting in serious injury or death and the investigating officer has probable cause to believe the person was driving under the influence of alcohol or other drugs, the State may require that person to submit to a blood test without first arresting the person. Here, the evidence of the accident and appellant's fractured jaw qualified as a "traffic accident resulting in serious injuries" under OCGA § 40-5-55 (c). Therefore, the officer did not have to arrest appellant before reading him the implied consent notice.

Custodial Statements; Batson Challenges

McKenzie v. State, A08A1047

Appellant was convicted of voluntary manslaughter of her husband. She argued that because her statements were made while she was hysterical and distraught after being "abruptly and bluntly" informed that her husband had died, she could not have understood either her *Miranda* rights or the consequences of her statements and that her statements were therefore not voluntarily made. The evidence showed that she was taken into custody and two hours later taken into an interview room where an officer informed her that her husband had died. Appellant became extremely upset, worried, and scared, but after about 30 minutes, calmed down and the officer decided to begin the interrogation. According to the interviewing officer, she understood the questions, was able to make coherent responses, and that at no time before or during the course of the interview did he threaten or coerce her to give a statement. The officer informed appellant of her *Miranda* rights, and she signed a form acknowledging that she understood these rights and wished to talk with the officer. The Court held that the trial court did not err in admitting the statements.

Appellant also claimed that the trial court erred in denying her *Batson* challenge to the prosecutor's alleged intentional discrimination in striking potential jurors on the basis of their race and gender. The evaluation of a *Batson* challenge involves a three-step process: (1) the opponent of a peremptory challenge must make a prima facie showing of racial or gender discrimination; (2) the proponent of the strike must then provide a race and gender-neutral explanation for the strike; and (3) the court must decide whether the opponent of the strike has proven discriminatory intent. A trial court's finding as to whether the opponent of a strike has proven discriminatory intent is entitled to great deference and will not be disturbed unless clearly erroneous. The Court, after reviewing the evidence, found no error because the prosecutor's strikes were race and gender neutral.

Res Gestae; Jury Charges

Waters v. State, A08A1108

Appellant was convicted of armed robbery, three counts of aggravated assault, burglary, and third degree cruelty to children. He contended that the trial court erred in admitting evidence as similar transaction and res gestae, and the trial court erred by not giving a charge on robbery by intimidation. The evidence showed that appellant attacked his girlfriend at her home when he discovered her relationship with another man. He then left to go to the other guy's house. Shortly after he left his girlfriend, however, he stopped and committed armed robbery at a gas station. He then proceeded to the other guy's house, located in another county, and shot the guy in the head, but didn't kill him. This occurred approximately 90 minutes after leaving his girlfriend's house. Appellant contends that the aggravated assault of the other guy should not have been admitted in his burglary and armed robbery case. The Court disagreed. It held that the other county incidents occurred within two hours of the attack and armed robbery and showed a pattern of conduct related to his criminal acts committed during the night in question. Furthermore, these acts were relevant to show appellant's frame of mind in the time period immediately preceding and following those crimes. When there is evidence of other criminal transactions "which show a course of conduct pointing toward and leading to the crime, such evidence is admissible as an exception to the general rule that evidence of independent crimes is inadmissible."

Appellant also contended that the trial court should have given his requested charge on robbery by intimidation. Specifically, he argued that as a lesser included offense of armed robbery, the charge should have been given because it was the sight of the gun, not the use of the gun which prompted the gas station attendant to give him the money. The Court found otherwise. Robbery by intimidation is the taking of another's property by the use of threats, coercion, or fear. Armed robbery is the taking of property by use of an offensive weapon. Where the evidence showed completion only of the greater offense, it is unnecessary for the trial court to charge on the lesser offense. Since the evidence showed a completed act of armed robbery, the trial court properly refused to instruct on robbery by intimidation.