Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 18, 2009

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THIS WEEK:

Speedy Trial

State v. Pickett, A09A1285

The State appealed from an order granting Pickett's motion for discharge and acquittal on constitutional speedy trial grounds. Constitutional speedy trial claims must be analyzed under the four-part balancing test of *Barker v. Wingo*. Under this test, a trial court considers: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the right to speedy trial; and (4) the prejudice to the defendant. The trial court determined that the length of the delay was in excess of five years and presumptively prejudicial. As to the reasons for the delay, the Court held that a lapse of three years between arrest and indictment was no fault of Pickett's. The Court noted that there was no evidence that the State deliberately attempted to delay the trial in order to hamper the defense; but, neither was there evidence of a valid reason for the delay. This supported the conclusion that the State's inaction or negligence caused the delay both before and after the indictment, which conferred a relatively benign but negative weight against the State. Pickett did not move to dismiss the indictment until five years after his arrest and thus, this factor was weighted against him. As to the prejudice prong, the trial court found that the delay of over five years was presumptively prejudicial and in such cases, a defendant is relieved of the burden of showing specific instances of impairment of his defense. The Court found that the trial court did not abuse its discretion in dismissing the indictment.

Search & Seizure

State v. Hogans, A09A1455

The State appealed from an order granting appellant's motion to suppress. The evidence showed that an officer stopped appellant's vehicle for a window tint violation. Appellant was driving the vehicle with a passenger, Blakely. Although appellant owned the vehicle, when the officer asked, Blakely said she owned it. The vehicle had a drive-out tag. The officer arrested appellant for driving with a suspended license. The officer agreed to Blakely's request that she be allowed to follow him to the police station. Shortly after the officer arrived at the station with appellant, Blakely pulled up in the vehicle and parked on the side of the building. The officer then asked Blakely if he could search the vehicle and she allegedly agreed.

The trial court found that the evidence

should be suppressed because "once they arrested [appellant], moved him into the car under arrest, that was the end of that. They had no right to then come back and ask, without some reasonable suspicion, to search the car." The Court found that the trial court erred in concluding that the officer was prohibited from asking Blakely for consent to search the vehicle. Here, Blakely voluntarily followed the officer to the police station. She was not detained when the officer approached her and asked for consent to search the vehicle. In a police-citizen encounter involving no coercion or detention, or "first-tier encounter," an officer's request for consent to search does not require articulable suspicion of criminal activity. Nevertheless, the Court remanded the case to the trial court. Appellant contended that Blakely was coerced into giving consent. The trial court did not make any findings in this regard and the testimony regarding this issue was disputed. It was for the trial court, not the appellate court to make credibility choices regarding the issues of consent.

Merger; Double Jeopardy

Howard v. State, A09A1089

Appellant was charged with reckless driving, two counts of aggravated assault against two children and other offenses. He was convicted of the reckless driving, two counts of reckless conduct, and the other offenses. The evidence showed that appellant, in attempting to elude the police, led them on a high speed chase that went through a mobile home park where appellant nearly hit two children. Appellant argued that the reckless conduct charges should have merged into the reckless driving.

The Court stated that the prohibition against double jeopardy has two separate aspects. The first, embodied by OCGA § 16-1-8, amounts to a prohibition against successive *prosecutions* for the same offense. This has been referred to as the procedural bar against double jeopardy. The second, embodied by OCGA § 16-1-7, amounts to a prohibition against successive *punishments* for the same offense. This has been referred to as the substantive bar against double jeopardy. For claims raising substantive double jeopardy, Georgia uses the test under *Drinkard v. Walker*, 281 Ga. 211, 217 (2006). Under this test, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Reckless conduct under OCGA § 16-5-60 (b) requires proof of harm or an actual threat of harm to the bodily safety of another person, and does not require that the crime be committed while driving a motor vehicle. On the other hand, reckless driving under OCGA § 40-6-390 does not require that there be an injured or threatened party, but instead merely requires that the State prove a general disregard for the safety of persons or property while driving a motor vehicle. To establish a violation of OCGA § 40-6-390, the State needed only prove that defendant drove his car in a manner exhibiting reckless disregard for the safety of persons or property. Therefore, because each code section has a provision that requires proof of a fact which the other does not, the two offenses do not merge for sentencing under *Drinkard*.

Probation Revocation

Laytart v. State, A09A0955

Appellant contended that the trial court erred in revoking his probation. Appellant, a convicted child molester, argued that the special condition of probation that prohibited him from being around minors was too vague and over broad to be enforced. The court held that a trial court has broad discretion in sentencing to impose conditions reasonably related to the nature and circumstances of the offense and the rehabilitative goals of probation. Such conditions must be stated with "reasonable specificity" to afford the probationer notice of the groups and places he must avoid. But, the conditions must not be so broadly worded as to encompass groups and places not rationally related to the purpose of the sentencing objective. Here, the language in the special condition proscribing "be[ing] around minors without an approved supervisor" could be interpreted to prohibit appellant from walking down a street where a minor is walking or going to the mall where minors might be shopping and thus overly broad. But, the Court determined, as applied to appellant, it was not unconstitutionally vague or overly broad because he was not accused of violating his probation by walking near a playground or going to the mall. Instead, he was accused of violating his probation because he was living with minors. Regardless of whether the condition could be interpreted in an overly broad manner, it was sufficient to put appellant on notice that he could not reside with minors without supervision and approval.

Ineffective Assistance of Counsel

Johnson v. State, A09A2347

Appellant contended that the trial court erred in denying his motion for new trial based on ineffective assistance of counsel. Specifically, he argued that his counsel rendered deficient performance by failing to inform him of the possible consequences of his rejection of the State's plea offer. Here the evidence showed that appellant was not informed of the possibility of life without parole if convicted until after a calendar call and before trial. The Court held that even if trial counsel's failure to advise him earlier of the mandatory sentence facing him constituted deficient performance, appellant had not shown prejudice. The proper question at the prejudice step is whether appellant demonstrated that, but for counsel's deficient performance, there was a reasonable probability that he would have accepted the State's plea offer. The record reflected, however, that even after appellant was informed of the mandatory sentence, he still rejected the State's offer and counter-offered with a lesser sentence. Thus, there was no reasonable probability that appellant would have pled guilty but for counsel's ineffectiveness. The trial court therefore did not err in rejecting his claim of ineffective assistance of counsel.

Stalking: Recidivism

Krepps v. State, A09A2404

Appellant was convicted of stalking and sentenced as a recidivist based on a prior conviction for aggravated stalking. He argued that he was improperly sentenced as a recidivist stalker. OCGA § 16-5-90 (c) provides that "[u]pon the second conviction, and all subsequent convictions, for stalking, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one year nor more than ten years." Appellant asserted that he could not be sentenced pursuant to OCGA § 16-5-90 (c) because his prior conviction was for *aggravated* stalking, not "stalking." The Court found appellant's argument "misguided."

First, stalking is a lesser included offense of aggravated stalking, given that a person commits the crime of aggravated stalking pursuant to OCGA §16-5-91 (a) when he or she stalks another person while under a court order not to do so. In addition, the State must "prove a pattern or course of conduct as part of establishing the harassing and intimidating element of aggravated stalking" just as it must do for stalking. While the language of OCGA § 16-5-90 (c) does not explicitly mention "aggravated stalking" in addition to "stalking," "it would be an absurd and contradictory result for this Court to hold that a prior misdemeanor stalking conviction could trigger the applicability of recidivist stalker sentencing pursuant to OCGA § 16-5-90 (c) while an aggravated stalking conviction could not."

Fatal Variance

Green v. State, A09A2354

Appellant was convicted of fraud in obtaining public assistance pursuant to OCGA § 49-4-15. She argued that the trial court erred in failing to find a fatal variance between the allegations contained in the indictment and the proof offered at trial. The indictment alleged that between August 1, 2005 and January 31, 2007, appellant "failed to disclose that Willie Heath was living in her home and failed to disclose information about his income and resources, thereby receiving public assistance to which the accused was not entitled, to wit: food stamps in an amount in excess of $500." She claimed that a fatal variance existed because the indictment did not allege whether she was eligible to receive any amount of food stamps during the period at issue, and that the evidence showed that during six months of that time she was eligible to receive some, albeit a lesser amount of assistance. The Court held that it does not adhere to an overly technical application of the fatal variance rule, focusing instead on materiality. The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the accused. It is the underlying reasons for the rule which must be served: 1) the allegations must definitely inform the accused as to the charges against him so as to enable him to present his defense and not to be taken by surprise, and 2) the allegations must be adequate to protect the accused against another prosecution for the same offense. Here, the indictment put appellant on notice as to the actions she allegedly took that violated the law so that she could present her defense. Regardless of whether her fraud remained ongoing during months in which she was otherwise eligible for some amount of public assistance, any variance between the indictment and the evidence presented at trial was not sufficient to mislead or surprise her; nor did it subject her to the risk of being prosecuted again for the same offense. Since she was not prejudiced, she has failed to show that any variance between the allegations and the proof was fatal to her conviction.

Probation Modification; Banishment

Tyson v. State, A09A1463

Appellant was convicted of burglary. Thereafter the trial court modified his probation to include banishment from the subdivision in which he committed the burglaries from the subdivision in which he committed the burglaries. He argued that the trial court lacked the authority to modify his sentence because the order was not entered during the same term of court in which the original sentence had been rendered. A trial court's authority to vacate or modify a sentence ends when the term of court in which the judgment was entered expires. Here, however, the Court found that the Georgia Legislature has expressly authorized a trial court "to revoke any or all of the probated sentence, rescind any or all of the sentence, or, in any manner deemed advisable by the judge, modify or change the probated sentence . . . at any time during the period of time prescribed for the probated sentence to run." OCGA § 42-8-34 (g). Moreover, although the trial court's order modifying his probated sentence was not entered until the subsequent term of court, the State filed its motion to modify the sentence within the same term in which the sentence was originally rendered. "Georgia courts have long held that while a trial judge loses the inherent right to modify a judgment after the term expires, a motion made during the term serves to extend the power to modify."

Appellant also argued that the trial court's modification banishing him from the subdivision where the burglaries occurred constituted an unlawful increase in his sentence. A sentencing court may not increase a sentence once the defendant begins serving it without violating the prohibition against double jeopardy. But, the Court determined, citing OCGA § 42-8-35 (6) (A), our legislature has expressly provided that banishment, used reasonably within the trial court's discretion, is a valid term and condition of probation. Here, the banishment provision was reasonable, narrow in scope, and included only the subdivision in which the victims resided. Under such circumstances, the banishment provision served valid rehabilitative purposes.

Sentencing; Mandatory Fines

Strickland v. State, A09A1885

After appellant was convicted of one count of trafficking in methamphetamine under OCGA § 16-13-31 (f) (1), the trial court sentenced her to ten years confinement. Thereafter, the trial court held a hearing and resentenced her to ten years confinement and a $200,000 fine. Appellant contended that the trial court erred in increasing her sentence after she had already begun to serve it. The Court found that a person convicted of the offense of trafficking in methamphetamine, where the quantity of a mixture of methamphetamine is less than 200 grams, "shall be sentenced to a mandatory minimum term of imprisonment of ten years and shall pay a fine of $200,000.00[.]" OCGA § 16-13-31 (f) (1). Nothing about the imposition of the fine is negotiable and the amount of the fine is specifically directed in plain language. The record showed that the trial court inadvertently failed to impose the mandatory $200,000 fine when it sentenced appellant to 10 years incarceration. Though it was undisputed that appellant had already begun serving her sentence when she was resentenced, it was inconsequential because the fine was statutorily mandated and the sentence as initially imposed was void. Thus, the re-sentence did not result in an increase in her sentence because the trial court merely corrected the sentence in accordance with OCGA § 16-13-31 (f) (1). Nevertheless, appellant argued, the trial court could have suspended her fine. The Court disagreed. The trial court had no authority to suspend her fine because the suspended sentence provisions of OCGA § 17-10-1 (a) are inapplicable to the mandatory sentence provisions of OCGA § 16-13-31 regarding trafficking in methamphetamine.

Probation Revocation; Right to Transcript

Miller v. State, A09A2405

In this case of first impression, appellant was convicted of possession of cocaine. Thereafter, the State successfully sought to revoke his probation. Appellant argued that the trial court erred in denying his motion for a State-provided transcript of the revocation hearing for use in his motion for new trial. The Court noted that probation revocation is not a stage of a criminal prosecution. Thus, a probationer facing revocation is not entitled to the full panoply of constitutional due process rights which attach to an accused in a criminal prosecution. Nevertheless, probation revocation proceedings are also not perfectly analogous to civil proceedings. In looking for a legal proceeding with which to make an analytical comparison, the Court determined that a probation revocation is similar to a hearing on a habeas corpus petition. Both proceedings occur after a defendant has been previously found guilty beyond a reasonable doubt. Additionally, with both of these proceedings, appellate review is not gained by filing a direct appeal, but must be sought by means of an application for review. Since the Georgia Supreme Court has held that an indigent is not entitled to a transcript in collateral post-conviction proceedings, the Court saw "no reason why a probationer should be afforded a benefit not afforded to an incarcerated appellant seeking to reverse his original conviction." Therefore, it held, appellant was not entitled to a transcript of his probation-revocation hearing.

Appellant also argued that because he was entitled to appointed counsel in a probation-revocation hearing, he must also be entitled to a free transcript of the hearing. The Court disagreed. Appellant's absolute entitlement to appointed counsel in a probation-revocation hearing is a right only recently conferred upon him by statute, OCGA § 17-12-23 (a) (2). Prior to the enactment of that statute, the right to counsel in such proceedings was not absolute. The Court stated that "any argument that a probationer should be absolutely entitled to a free transcript is more appropriately addressed to the General Assembly." Accordingly, the trial court did not err in denying appellant's motion for a State-provided transcript of his probation-revocation hearing.

Accusations; Dismissal

State v. Brooks, A09A0937

The State appealed from an order dismissing its accusation against Brooks for disorderly conduct and simple battery. The record showed that Brooks got into a fight at a local high school. A videotape of the incident had not been preserved and was no longer available. After a lengthy pre-trial hearing at which the trial court questioned the prosecutor and the witnesses about the videotape, the trial court decided to place the case on a "judicial hold" and stated it would dismiss the accusation if Brooks, among other things, attended anger management. When Brooks satisfied the trial court's requests, the trial court dismissed the accusation.

The Court first held that the trial court was not authorized to dismiss the accusation with prejudice because the State allegedly violated Brooks' due process rights by failing to preserve the videotape of the incident. Although the State has a constitutional duty to preserve evidence which may be exculpatory; here, Brooks never filed a motion to dismiss the accusation based on an alleged due process violation, and when she appeared for trial, her counsel did not move for or request imposition of penalties on the State based on the destruction of the videotape. Further, the record showed that, although it voiced concerns over the videotape's unavailability, the trial court made no findings as to whether the videotape of the fight was material or the police acted in bad faith. Thus, the Court held, it could not conclude that the trial court intended to dismiss the accusation against Brooks with prejudice based on a violation of her due process rights or that it had the authority to do so.

To the extent the trial court was attempting to dismiss the accusation without prejudice, the Court held that the trial court abused its discretion. While a trial judge has a duty to control the conduct of its officers and all other persons connected with a judicial proceeding before it, this power may be abused. Thus, the power to control the proceeding of the court is subject to the proviso that in so doing a judge does not take away or abridge any right of a party under the law. A trial court abuses its discretion when it interferes with the State's right to prosecute by dismissing an accusation without a legal basis to do so. The record here showed no want of prosecution and the State did not agree to leave the disposition of the charges against Brooks to the trial court's discretion. While its sentencing recommendation stated that it would consider a judicial hold, the State did not represent that it would consent to a judicial hold, and, in fact, the State objected to the judicial hold order entered by the trial court. The only apparent basis for the trial court's decision to enter a judicial hold followed by a dismissal was its opinion that forestalling further inquiry into the videotape's unavailability would be "best for everybody." The Court stated that "[w]e have located no authority for the proposition that a trial court, having stopped short of deciding whether destruction of evidence amounted to a due process violation, is nonetheless authorized to dismiss criminal charges without prejudice due to the unavailability of evidence." Accordingly, it held that the trial court abridged the State's rights and its dismissal order constituted an abuse of discretion.

Search & Seizure; Venue

Kimble v. State, A09A1266, A09A1267

Appellants, Kimble and Loury, were convicted of trafficking in cocaine. Additionally, Loury was convicted of other drug offenses. Loury contended that the trial court erred in denying his motion to suppress because the search warrant affidavit failed to set forth sufficient facts to support issuance of a "no knock" warrant. In executing a search warrant, officers are generally required to make a good faith attempt to give verbal notice of their authority and purpose prior to gaining entry by the use of force. The requirement may be excused when police officers have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile. The standard for establishing the reasonable suspicion necessary to justify a no-knock entry, as opposed to the standard for establishing probable cause, is "not high." In support of his request for a no-knock warrant, the affiant stated that Loury's criminal history indicated that Loury had previously been convicted of theft by receiving stolen property and possession of marijuana with intent to distribute, and further, that Loury was charged with possession of a firearm by a convicted felon. The affidavit also alleged that Loury had a pending weapons charge in Atlanta. The Court held that, especially in light

of the pending weapons charge against Loury, the trial court was authorized to conclude that the information in the affidavit was sufficient to authorize the no-knock provision in the search warrant.

Kimble argued that the State failed to prove venue in Chatham County. Here, an agent with the drug task force testified that he had been employed with the task force since February 2004 and that his duties involved trying "to identify and go after major drug dealers within the borders of Chatham County." The Court held that in light of the well-settled principle that public officials are believed to have performed their duties properly and not to have exceeded their authority unless clearly proven otherwise, the jury was authorized to find that the agent, in participating in the investigation of the location at issue, was acting within his jurisdiction. While this agent's testimony, standing alone, may not have been enough to establish venue beyond a reasonable doubt, the State also introduced into evidence, without objection, the search warrant. The warrant was issued by the Recorder's Court of Chatham County, which has jurisdiction only within the county's borders and reflects legal authority to search the targeted premises. Therefore, the Court found, the search warrant, together with the agent's testimony, provided sufficient evidence of venue.

DUI; Implied Consent

England v. State, A09A2181

Appellant was convicted of DUI (less safe) and DUI (per se). He contended that the trial court erred in denying his motion to exclude the results of the State-administered blood test from evidence because he requested an independent blood test, which was not granted. The evidence showed that appellant first mentioned that he wanted a blood test when the officer asked him to submit to the alco-sensor test. After the officer read appellant the implied consent notice and asked him if he would submit to a State-administered test of his breath, appellant responded that he had concerns about the accuracy of the breath test and stated that he would rather submit to a blood test. Consequently, the officer reread the implied consent notice and asked him if he would submit to the State-administered tests of his blood, to which appellant agreed. The Court found that at no point did appellant request another, independent test of his blood. Therefore, since appellant was not requesting an independent blood test but was requesting that the officer designate a blood test, rather than a breath test, as the State-administered chemical test, the trial court did not err.

Child Molestation; Right to Fair Trial

Purvis v. State, A09A0839

Appellant was convicted of child molestation. He argued that the evidence was insufficient to convict because the only evidence was the victim's earlier statements which she recanted at trial. Here, the Court found, the victim made a voluntary outcry to a counselor at her school and repeated the allegations to her mother, her step-sister, and a forensics interviewer. The weight to be given her purported recantation at trial was a credibility determination within the jury's province. Therefore, from the evidence adduced at trial, any rational trier of fact could have found defendant guilty, beyond a reasonable doubt, of child molestation.

Appellant also argued that his constitutional rights were violated because his trial was conducted in the county jail courtroom rather than the county courtroom. The Court, citing *Drake v. State*, 231 Ga. App. 776, 781 (4) (1998), held that OCGA § 15-6-18 (a) contemplates that cases tried at places other than at a courthouse shall be valid. A verdict returned in the superior court by a jury sitting in a building, located at the county site, which has been provided by the proper county authorities as the place for holding that term of such court, is not void. There is nothing within the wording of OCGA § 15-6-18 (a) which requires that an alternative place for holding court other than the county courthouse be designated the place for holding the court by some formal order or resolution and to give timely notice of the place provided by advertisement or in some other public and formal manner. The statute simply declares that it shall be lawful to hold the court "at such place or places as the proper county authorities . . . may from time to time *provide* for such purpose." Appellant has made no showing that the jail was not located in the county or that the facility had not been provided by the proper county authorities as a place for holding that term of the Superior Court of the county. Further, appellant had not shown that the trial itself was conducted in a manner not befitting a judicial body. Under the Sixth Amendment, in order for a defendant to establish the denial of his right to an impartial jury, he must show either (a) actual juror partiality or (b) circumstances inherently prejudicial to that right. Since no such showing had been made, appellant did not show circumstances that were so inherently prejudicial as to pose an unacceptable threat to his right to a fair trial.

Jury Charges; Garza

Moore v. State, A09A1047

Appellant was convicted of aggravated assault, kidnapping, aggravated sexual battery, aggravated sodomy, terroristic threats and robbery. He contended that the trial court's charge to the jury on similar transaction evidence impermissibly commented on the evidence. Although the trial judge first referred to the "perpetrator of the crime" he quickly corrected it to state *"alleged* crime charged in this case now on trial." Also during the same charge, he referred to the "perpetrator," of the crime charged in this case, he immediately corrected himself to say "alleged perpetrator." The Court held that these slips of the tongue, quickly corrected, afford no basis for reversal because mere verbal inaccuracy resulting from a slip of the tongue which does not clearly mislead or confuse the jury is not reversible error.

Appellant also challenged under *Garza* the sufficiency of the evidence of his kidnapping conviction. The evidence showed that after appellant forced the victim off the road, he pulled the victim out of her vehicle and she was standing out by the driver's side of her vehicle. After she informed him she didn't have any money, he threatened her and forced her into a ditch and forced her to commit oral sodomy. The Court held that the movement here was minimal in duration and was clearly done in commission of the other offenses. Further, because the crime occurred beside a dark and deserted rural road in the middle of the night, moving her into a ditch to perpetrate the sexual assault did not significantly increase the danger to her. Accordingly, the Court reversed appellant's conviction for kidnapping.