Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 30, 2011

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THIS WEEK:

Out-of-Time Appeal

Whitfield v. State, A11A1226; A11A1656 (12/14/11)

Appellant was convicted of DUI. He filed a pro se motion for new trial which was denied. He did not timely appeal following the entry of this order, but subsequently filed a motion for an out-of-time appeal, alleging that he was not timely notified of the denial of his motion. The trial court denied the motion.

OCGA § 15-6-21 (c) states, in pertinent part, "[I]t shall be the duty of the judge to file his or her decision with the clerk of the court in which the cases are pending and to notify the attorney or attorneys of the losing party of his or her decision." Where a party is appearing pro se, the trial court must notify the party. Under *Cambron v. Canal Ins. Co.*, 246 Ga. 147 (1980), a trial court must determine whether the defendant received notice and delayed taking action, in which case he has forfeited his right to appeal, or whether there was no timely notice, in which case either the judgment should be set aside and a new judgment entered from which a timely appeal might be taken or an out-of-time appeal should be considered. Here, the Court was unable to determine whether the trial court's denial of the motion for an out-of-time appeal was proper under *Cambron*. Therefore, the trial court's order denying the motion for an out-of-time appeal was vacated, and the case remanded to the trial court with direction that it make the necessary findings under *Cambron*. The Court stated that if the trial court finds that appellant received no notice of the entry of the order denying his motion for new trial, then the motion for an out-of-time appeal must be granted.

Jackson v. State, A11A1533 (12/8/11)

Appellant appealed from the denial of his pro se motion for out-of-time appeal. The record showed that following his conviction, he filed a notice of appeal from the trial court's order denying his motion for new trial. Although the trial court's order was entered on April 22, 2010, appellant's notice of appeal was not filed until June 8, 2010. Since his notice of appeal was filed untimely, the court dismissed his appeal.

Appellant contended that he tried three times to mail his notice of appeal along with other documents and that the first two times, they came back for insufficient postage. He argued that because he placed the notice of appeal in the mail within 30 days of the denial of his motion for new trial, the Court should apply the mailbox rule of *Massaline v. Williams*, 274 Ga. 552, 554 (2001) and find his appeal timely filed. The Court disagreed because the *Massaline* mailbox rule "does not exempt a pro se prisoner from complying with the statutory

requirements to file a timely notice of appeal in any non-habeas criminal or civil filing." Moreover, the evidence showed that appellant himself weighed and placed the improper amount of postage on his package prior to it being mailed. Since his own conduct caused the loss of his right to direct appeal, the trial court did not abuse its discretion in denying his motion for an out-of-time appeal.

Search & Seizure; Probation Revocation

Avery v. State, A11A1837 (12/8/11)

Appellant argued that the evidence was insufficient to support his probation revocation for the new offense of obstruction of an officer. Specifically, he argued that when the officer approached him, it was a first tier encounter and thus, he was justified in refusing to speak with the officer and running away, ignoring the officer's order to stop.

The Court stated that a citizen's ability to walk away from or otherwise avoid a police officer is the touchstone of a first-tier encounter. Even running from police during a first-tier encounter is wholly permissible. Second-tier encounters occur when the officer actually conducts a brief investigative *Terry* stop of the citizen. In this level, a police officer, even in the absence of probable cause, may stop a person and briefly detain him if the officer has a particularized and objective basis for suspecting the person is involved in criminal activity.

Here, the officer testified that he stopped appellant because he was in the area of a robbery that had occurred that day and because he matched the description of the be-on-the-lookout briefing. This, the Court held, amounted to a particularized and objective basis for suspecting that appellant may have been involved in criminal activity. Consequently, the Court concluded that the trial court did not abuse its discretion in finding that the State proved by a preponderance of the evidence that appellant committed the new offense of obstructing an officer.

Search & Seizure

Johnson v. State, A11A0941 (12/1/11)

Appellant was convicted of VGCSA. He contended that the trial court erred in denying his motion to suppress. Specifically, appellant contended that his consent to search was tainted and invalid because it was obtained while he was illegally detained by police for questioning and for the pat-down in violation of the Fourth Amendment protection against unreasonable search and seizure. Briefly stated, officers responded to a call of a suspicious person, found appellant, and patted him down for weapons. None was found, but other officers arrived, and appellant was asked to give consent to search for drugs. He consented and drugs were found on his person.

The very divided en banc Court found no error. The evidence was sufficient to show that the officers who stopped and questioned appellant had a basis for a reasonable suspicion that appellant was, or was about to be, engaged in criminal activity, and had a reasonable belief that he posed a threat to their safety. Appellant matched the description of a man seen by restaurant employees hiding or loitering at 3:00 a.m. behind the restaurant where they worked and at which an armed robbery had recently occurred. Given these circumstances, it was reasonable for the officers to suspect that appellant was about to engage in criminal activity and to stop him to investigate what he was up to. In response to initial questions about why he was there, appellant responded that he was there "to get the phone number of a cab company." In light of the report that he was seen loitering or hiding behind the restaurant, this improbable response could only have served to heighten reasonable suspicions that he was about to engage in some type of illegal activity. The Court found the fact that one of the officers who stopped him subjectively characterized his explanation for being present there as "probable" was irrelevant to the Fourth Amendment inquiry. An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action. Thus, it is a court's duty to determine whether the officers' actions were reasonable under the Fourth Amendment in light of all the objective facts, including appellant's unlikely explanation that he was moving about in the area at that hour "to get the phone number of a cab company." Under the circumstances, the Court held, the officers' general questions about what he was doing and the specific question related to narcotic activity were reasonably within the scope of the investigative detention. Moreover, given appellant's suspicious activity behind the restaurant and the prior armed robbery at the restaurant, it was also reasonable for the officer who initially stopped him to believe that he could be armed and to pat him down for weapons. But even assuming the pat-down was not supported by a reasonable belief that he was armed and posed a danger, because it was brief, yielded no evidence, and was not a basis for the further investigative detention, it did not taint his subsequent consent to the search. Therefore, appellant's consent to the officer's request to search his person for narcotics was valid, and the trial court correctly denied the motion to suppress.

Restitution

Elsasser v. State, A11A1774 (12/8/11)

Appellant was convicted of two counts of simple battery, as lesser included offenses of aggravated battery; criminal damage to property in the second degree; and disorderly conduct. He contended that the trial court erred in ordering him to pay restitution for medical costs associated with the victim's injuries.

OCGA § 17-14-9 provides that the amount of restitution ordered shall not exceed the victim's damages. For purposes of restitution, OCGA § 17-14-2 (2) defines damages as all damages which a victim could recover against an offender in a civil action based on the same act or acts for which the offender is sentenced. Appellant was convicted of simple battery. OCGA § 16-5-23 (a) provides that a person commits the offense of simple battery when he intentionally makes physical contact of an insulting or provoking nature with the person of another or intentionally causes physical harm to another. Thus, the trial court was authorized to order appellant to pay restitution for damages caused by his simple battery of the victim. Proximate cause is a question of fact for the factfinder. Here, the trial court found as fact that the victim was injured by and had incurred costs as a result of appellant's criminal behavior toward the victim and the Court determined that this finding was not clearly erroneous.

Moreover, the Court found that appellant's reliance on *Rider v. State*, 210 Ga. App. 802, 803 (2) (1993), to argue that he cannot be held liable for any restitution because he was acquitted of aggravated battery, was misplaced. Unlike the defendant in *Rider*, appellant was not acquitted of all acts that caused the vic-

tim's injuries. Even if, as appellant suggested, others at the scene may have also kicked the victim, that fact does not negate his liability for damages caused by his role in the attack since there can be more than one proximate cause of an injury.

Finally, appellant's further argument that the trial court erred in failing to sua sponte consider OCGA § 51-12-33, concerning the apportionment of an award in a civil action, was not raised in the trial court and was an improper attempt to expand his enumerated errors. But, even if properly raised, restitution is a penalty to be determined by the court in a criminal case and is not synonymous with civil damages. The statutory framework for restitution in criminal cases is not found in the tort statutes, but is set forth in OCGA § § 17-14-1 et seq., and the factors that a court must consider in determining the amount of restitution are found in OCGA § 17-14-10. Because it was undisputed that the trial court's order of restitution for medical costs did not exceed the amount of costs incurred by the victim, the order was not erroneous.

Search & Seizure; Roadblocks

Martin v. State, A11A1922 (12/7/11)

Appellant was convicted of DUI. She contended that the State failed to prove that the highway roadblock that led to her arrest had a legitimate purpose at the programmatic level, and therefore, the trial court erred in denying her motion to suppress evidence obtained as a result of that roadblock. The evidence showed that the chief deputy of the Sheriff's Office testified that he was authorized to approve roadblocks, although he normally became involved only in large scale operations that required extensive personnel overtime. According to him, the roadblock at issue in this case was part of a large coordinated effort among the Sheriff's Offices of his county, another county and the Governor's Office of Highway Safety. The purpose of the operation was highway safety and driver sobriety. The Chief Deputy approved his department's participation in the operation and directed that the exact location and hours of operation of the various roadblocks would be determined by unit commanders, who also had authority to implement roadblocks on their own. The officer who initially spoke with appellant at the roadblock, and a second officer who completed the DUI investigation, testified that, at the time and place where appellant was stopped, they were participating in that particular roadblock under the direction and supervision of a sergeant, who was the commander of the H.E.A.T. (Highway Enforcement of Aggressive Traffic) unit. Although the State did not offer the testimony of the sergeant regarding his authority to implement roadblocks or his purpose in implementing the roadblock at issue, "we decline to hold that the testimony of the supervisory officer who orders a roadblock is required to prove these facts." Here, the State offered the testimony of the sergeant's superior officer and supervisor as well as the testimony of two of the officers the sergeant directly supervised in conducting the roadblock. The Court concluded that the evidence taken as a whole authorized the trial court to find that the sergeant had authority to implement roadblocks and that he had a legitimate primary purpose for implementing the roadblock at issue. Further, there was no evidence that the roadblock had any characteristic of an impermissible roving patrol. Therefore, because appellant raised no argument with regard to any of the other factors that are relevant to whether a roadblock was reasonable under the Fourth Amendment, the Court affirmed the trial court's order denying her motion to suppress.

Sentencing

Phillip v. State, A11A2148 (12/14/11)

Appellant appealed from the trial court's order denying his motion to correct a void sentence on the basis that the motion was untimely. The record showed that in September 2009, appellant entered a non-negotiated guilty plea to 14 counts of dogfighting, OCGA § 16-12-37 (b), and two counts of aggravated cruelty to animals, OCGA § 16-12-4 (c). The trial court sentenced him to 17 years imprisonment, with 10 to serve; the final judgment includes the phrase "each ct. [sic] concurrent." In July 2010, appellant filed a motion to correct a void sentence, asserting that his sentence was void because it exceeds the maximum of five years imprisonment for each count. Specifically, because the judgment indicated that each sentence was to run concurrently with the others, his 17-year sentence exceeds the maximum statutory punishment for the offenses and is, therefore, illegal and void. The trial court denied the motion on the basis that it was filed outside the term of court in which the sentencing occurred and, as a consequence, the court lacked jurisdiction to vacate the sentence.

The Court stated that generally, a trial court has no jurisdiction to modify a sentence after the term of court ends or 60 days has past. Where a sentence is void, however, the court may resentence the defendant at any time. A sentence is void if the court imposes punishment that the law does not allow. Moreover, a defendant's acquiescence to an illegal sentence, either through plea negotiations or a failure to object to the sentence, cannot render an otherwise illegal sentence valid through waiver. That is because a void sentence in law amounts to no sentence at all.

The Court found that the maximum prison sentence for each count of the indictment is five years. Therefore the sentence imposed on appellant, 17 years of imprisonment with all counts to run concurrently, was illegal and void. Accordingly, the trial court erred in finding that it lacked jurisdiction to consider appellant's motion to vacate his sentence. Thus, the court's order was reversed, appellant's sentence was vacated, and the case remanded to the trial court for resentencing.

Child Molestation; Prior False Accusations

Mauldin v. State, A11A2105 (12/7/11)

Appellant was convicted of five counts of child molestation. He contended that the trial court erred in excluding evidence that the victim had made a prior false accusation against her grandfather. The Court stated that evidence that the victim made prior false accusations of sexual misconduct against a third party is admissible to attack the credibility of the victim and as substantive evidence tending to prove that the instant offense did not occur. Before admitting evidence of the victim's prior accusation, however, the trial court must conduct a hearing, outside the presence of the jury, to determine whether a reasonable probability exists that the victim made a prior false accusation of sexual misconduct. "Reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." The defendant bears the burden of coming forward with evidence that the prior accusation was false at the hearing. A defendant

will not held to have met his or her burden of proving that the victim's prior accusation was false merely by showing that the accused third party has denied the victim's allegations, when that denial is not supported by other evidence, or by showing that the third party was never prosecuted for the alleged sexual misconduct.

Here, the transcript of the hearing on the State's motion in limine to exclude evidence of the alleged prior false accusation showed that it was during his non-custodial statement to the police that appellant first asserted that the victim had told him that her grandfather had molested her. There was nothing in the record to show that the victim ever made the allegation to anyone else; thus, there was never an investigation into such allegation. The Court therefore concluded that appellant failed to meet his burden on appeal of showing that, even if the victim had made a prior accusation of sexual misconduct against her grandfather, there was a reasonable probability that the prior accusation was false. Accordingly, the trial court did not abuse its discretion in excluding the evidence.

Immunity

Dennard v. State, A11A2334 (12/8/11)

Appellant was convicted of criminal attempt to commit armed robbery. He argued that the trial court should have granted immunity to a jail inmate so he could testify as a defense witness without compromising his right against self-incrimination. However, the Court held, under OCGA § 24-9-28, only the district attorney has discretion to grant immunity to witnesses. Our law provides no such discretion to the trial court and, further, makes no provision for a grant of immunity to defense witnesses. Accordingly, the trial court did not err in refusing to grant use immunity to defense witness.