Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 15, 2016

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THIS WEEK:

Critical Proceedings; Right to be Present

Cesari v. State, A15A1389 (11/17/15)

Appellant and a codefendant were tried jointly and appellant was convicted of armed robbery, two counts of aggravated assault with intent to rob, carrying a weapon in a school safety zone, and battery. He argued that his constitutional rights were violated because he was denied the right to be present during a critical stage of the proceedings against him. The Court agreed and reversed his convictions.

The record showed that during the trial, the court declared a 10-minute recess. When court resumed 15 minutes later, appellant's attorney told the trial court that appellant had not returned and that she did not know where he was. Proceedings were paused briefly, and the court asked counsel if she knew where appellant was and if he was waiving his presence, noting that appellant had absented himself from the trial once already. When appellant remained missing, both defense counsel for the respective two defendants asked for a continuance until the following day so appellant could be located. Appellant's counsel noted that her client might be outside smoking and that he had a drug problem; but she said she did not know if that was why he had disappeared. The court denied the motion for a continuance, issued a bench warrant for appellant, and reconvened court approximately an hour-and-a-half after appellant had absented himself. His codefendant was called to testify, and his attorney completed direct examination. The State had begun cross-examination when appellant's attorney informed the court that "My client just walked in." She continued, "I need to talk to him because I would like to see if he's intoxicated." The trial court refused to interrupt the testimony for this reason, so appellant's attorney asked the court, "Can we ask the deputy to keep [appellant] outside until after the examination?" The court replied, "Yes." Sometime later, the State requested that appellant be let in, citing Confrontation Clause concerns. The trial court reasoned that appellant waived his right "by not being here. He doesn't have the right to interrupt the middle of examination questioning." However, the judge nevertheless immediately called a recess, after which appellant was brought in and seated next to his lawyer. The State's cross-examination of the codefendant then continued.

The Court noted that appellant did not contend that he was denied his right to be present during the time that he voluntarily absented himself from the courtroom. Rather, he argued that when he returned, he "regain[ed] the right to be present," but that such right was denied him. The Court agreed. The Court stated that a trial court is not required to make moment-by-moment inquiries as to whether a defendant who voluntarily absented himself later wishes to present. However, appellant returned and asked to be let in, and there was no evidence — despite his counsel's stated

fears that appellant might be intoxicated — that he was in fact disruptive in any way that would necessitate his being barred from the courtroom. Nor was there any evidence that he either authorized or subsequently acquiesced in what could be viewed as his counsel's attempt to waive his presence. Further, given that disruptive defendants may, under certain circumstances, reclaim their right to be present, the Court could not say that a non-disruptive defendant who voluntarily absents himself for a time may never regain his right to be present. Therefore, the Court concluded, appellant, upon returning to court and seeking admission to his own trial, should have been allowed to enter. Because he was absent from a critical part of his trial and did not acquiesce in any waiver by counsel once he made known that he was attempting to return to court, the judgment was reversed and the case remanded for a new trial.

Search & Seizure; Plain Feel

May v. State, A150887 (11/20/15)

Appellant was convicted of possession of methamphetamine. He contended that the trial court erred in denying his motion to suppress. A divided whole Court affirmed.

The evidence showed that officers responded to a domestic call. When they arrived, they found appellant on the porch of the house and claimed that his girlfriend had just left. Appellant allowed an officer to do a sweep of the interior to check that no one else was in the home. The officer noticed what he believed to be a meth pipe. Because he believed he was dealing with someone who may be under the influence, he did a pat-down of appellant. He testified, "I could tell as I *manipulated* it with my open hand that it was . . . some sort of baggie and it had some sort of hard substance in it, crystal substance. In my training and past experience, I knew that was probably going to be contraband, that it was going to be methamphetamine." (Emphasis supplied).The State then asked, "So as soon as you began the pat-down, you immediately realized that it was some type of drug or baggie?" The officer responded, "Controlled substance, yes, sir."

Appellant contended that 1) the pat-down was not justified; and 2) the officer improperly seized the contraband pursuant to the "plain feel" doctrine. First, the Court noted that in similar situations, it has found that investigating the report of a domestic violence situation supports an officer's reasonable belief that the suspect was a safety concern. And, suspicion of drug activity is a factor for a reasonable officer to believe that his safety was at risk. Accordingly, the trial court did not err in determining the pat-down was justified.

Second, the Court noted that the State asked the officer on direct whether as soon as he began the pat-down, he "immediately realized" that the object in appellant's pocket was "some type of drug or baggie," to which the officer responded, "Controlled substance, yes, sir." Since, appellant did not object to this question as leading or otherwise, the trial court was authorized to rely on the officer's testimony in this regard. Appellant's counsel further explored the specifics of the search during cross-examination, as did the State on re-direct. Although the officer used the word "manipulate" at one point in his testimony, the Court stated that it did not believe that his use of that word negated his other testimony that he immediately identified the object as contraband. Moreover, during cross-examination, the officer explained that he might have used the word "manipulate" incorrectly and stood up and showed the trial court how he performed the pat-down. Therefore, the Court held, it must defer to the findings of the trial court and thus, the evidence supported the trial court's findings that the search was constitutional.

DUI; Frost

Hammond v. State, A15A0798 (11/20/15)

Appellant was convicted of DUI (less safe), impeding the flow of traffic, and improper parking. The evidence showed that appellant was found asleep at the wheel of a vehicle that was sitting at a traffic light. Appellant refused to submit to field sobriety tests and after being read the Implied Consent warnings, refused to submit to a breath test. Appellant also told the office, "Man, this is my third DUI."

Appellant contended that the trial court erred by admitting the evidence of her two prior DUI convictions under O.C.G.A. § 24-4-417(a)(1) because they were not relevant to proving her guilt in this case. The Court disagreed. Quoting extensively from *State v. Frost*, 297 Ga. 296 (2015), the Court stated that the Supreme Court's analysis directly applied to this case, especially because appellant had undergone sobriety testing in the prior cases, and she refused in this case. When asked for a breath sample, appellant refused, spontaneously noting that "this is my third DUI." Accordingly, in light of the holding in *Frost*, the trial court did not abuse its discretion by allowing the State to introduce evidence of appellant's prior DUI convictions.

Prior Consistent Statements; O.C.G.A. § 24-6-613(c)

Walters v. State, A15A1471 (11/20/15)

Appellant was convicted of aggravated assault and possession of a knife during the commission of a felony. The evidence showed that the victim was pumping gas when appellant approached her and asked for a cigarette. When she said that she didn't smoke, appellant pulled a butcher knife and demanded money. The victim screamed and ran into the store. At trial, the responding officer testified that the victim was "almost crying, shaking, [and] upset," but he was able to calm her down so that she could tell him what had happened. The officer then related what the victim had told him — that she had been pumping gas when a man approached her and asked for a cigarette, then pulled out a knife and demanded money, after which she screamed and ran into the store.

Appellant argued that the trial court improperly allowed the State to introduce the victim's prior consistent statement to the officer. The Court stated that prior consistent statements are governed by O.C.G.A. § 24-6-613(c). According to its plain terms, this new rule allows the admission of prior consistent statements if they logically rebut any attack on a witness's credibility, except for attacks upon his character for truthfulness or evidence of his prior convictions. Accordingly, the Court stated, its inquiry was not limited to asking whether appellant impugned the victim's credibility by charging her with recent fabrication or improper influence or motive. Instead, it must also consider whether appellant attacked the victim's credibility on other grounds.

The Court then found that appellant attacked the victim's credibility in some

way other than by charging her with recent fabrication or improper influence or motive. Thus, the Court found, on cross-examination, defense counsel asked the victim about her 911 call, which had been played for the jury during her direct examination but apparently was unintelligible in parts. Defense counsel asked the victim several times whether she had told the 911 operator that appellant had a gun or a knife. Defense counsel also established that the victim was very upset by the incident. Later, appellant took the stand and testified that he had actually approached the victim for sex and had brandished his knife only when he thought she was reaching for a weapon of her own. During closing argument, defense counsel stated: "Was [the victim] lying? No. I don't say she's lying. I think she's convinced that what she said was the truth." Counsel suggested, however, that the victim became so upset when appellant approached her that she misinterpreted his intentions. Counsel further told the jury that they should acquit appellant "[i]f your mind is unsettled, wavering, or unsatisfied about whether or not [the victim] is believable or if her memory of events was faulty because of hysteria." Thus, while appellant did not call the victim a liar, he nevertheless attacked her credibility by suggesting that she had misidentified appellant's weapon during her 911 call and that her account of the events was not believable due to her heightened emotional state.

Accordingly, the Court stated, because the victim's credibility was attacked, her prior consistent statements to the investigating officer were admissible if they "logically rebut[ted]" the attack. The victim's prior statement that her assailant had wielded a knife logically rebutted appellant's suggestion that she had misidentified the weapon. And the victim's prior statement that she did not scream and flee until appellant pulled the knife logically rebutted his claim that she was so upset when he initially approached her that she misconstrued his intentions. Thus, the Court concluded that the portions of the officer's testimony recounting these statements were admissible under O.C.G.A. § 24-6-613(c).

The Court then looked at the remainder of the officer's statement – that appellant asked for a cigarette, then pulled out a knife and demanded money. The Court questioned whether the consistency between this part of the victim's account to the responding officer and her testimony at trial logically rebutted appellant's charge that her perception of the entire encounter was clouded by hysteria. But, the Court concluded, even if the admission of the remainder of the victim's prior consistent statement was erroneous, any error was harmless.

Stalking; Sufficiency of the Evidence

Moran v. State, A15A0795 (11/20/15)

Appellant was convicted of aggravated battery, aggravated assault, burglary, possession of a knife during the commission of a felony, and stalking. He contended that the evidence was insufficient to support his stalking conviction. Specifically, he contended that the victim never testified that she was in fear for her safety or intimidated by his behavior, there was no evidence that his contact with her was without her consent, and he had a legitimate purpose for communicating with her based upon their "anticipated plans" and "the nature of their relationship.

The evidence showed that the victim was appellant's girlfriend. She lived in the basement of her father's house. She told appellant that she was going to dinner with her father; but really, she was out with another guy and the two were at a bar, drinking. Appellant texted her about 50 times while she was out, stating that he knew she was not with her father and that he was essentially waiting in the driveway of her father's house until she came home and that he wanted her to tell him the truth about where she was and who she was with that night. When she got home, the male friend walked her into the house and into the basement. He fell asleep on the bed and when he woke up, appellant attacked him.

The indictment charged that appellant "follow[ed] and place[d] under surveillance and contact[ed] … [the victim] at a place, to wit: [her father's address where she resided], without the consent of … [the victim], for the purpose of harassing and intimidating … [the victim]." The Court stated that a person commits the offense of stalking when he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person. A defendant need not engage in unequivocally hostile conduct or make explicit threats in order to be convicted of stalking. Even behavior that is not overtly threatening can provide the requisite degree of intimidation and harassment if it is ongoing, repetitious, and engaged in despite the communicated wishes of the victim.

But, here, the Court found, the State failed to present sufficient evidence that the victim was placed in reasonable fear for her safety, an essential element of stalking. Citing *In the Interest of C. C.*, 280 Ga.App. 590, 591-592 (1) (2006), the Court found there was no evidence that the victim was afraid or had any emotional distress. While there was evidence that victim was "a little bit" afraid of appellant during a previous argument, there was no evidence showing that she was afraid for her safety from the charged conduct. Therefore, the Court reversed appellant's conviction for stalking.