

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 16, 2009

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THIS WEEK:

- **Juveniles; Crawford**
- **Jury Charges**
- **Sentencing; Merger**
- **Identification; Similar Transactions**
- **Identification; Jury Charges**
- **Right to be Present at Trial; Restitution**
- **Involuntary Manslaughter; Homicide by Vehicle**

Juveniles; Crawford

In The Interest of T. F., A09A0292

Appellant contended that under *Crawford v. Washington*, the juvenile court violated his constitutional right to confront witnesses by admitting hearsay evidence given by law enforcement during his hearing on whether to transfer his charges to superior court pursuant to OCGA § 15-11-30.2. The Court disagreed. It held that our Supreme Court recently held that the holding in *Crawford* is not applicable to preliminary hearings. Thus, the Court held, “[g]iven that the right of confrontation is a trial right that does not apply to preliminary hearings or suppression hearings, we see no reason to apply that right to the transfer hearing at issue here.”

Appellant also contended that the juvenile court erred in finding that a weighing of his interests versus the community’s interests required that his case be transferred to the superior court. Specifically, he argued that the juvenile court failed to consider the testimony of a psychologist, who stated that appellant was amenable to treatment and would benefit from additional therapy, substance abuse treat-

ment, and vocational counseling. However, the juvenile court noted in its order that appellant had a long history of offenses and that attempts at rehabilitation through the juvenile system had not been successful. Appellant had been given several opportunities to participate in substance abuse treatment programs but had failed to successfully complete any of them. The juvenile court further noted that based on appellant’s history of offenses and the fact that he was now 17 years old, alternative treatment and rehabilitation programs within the juvenile system in which to place him would be difficult, if not impossible, to find. Thus, the trial court’s finding that the community would be better served if the case were transferred to the superior court was not an abuse of discretion.

Jury Charges

Pincherli v. State, A09A0247

Appellant was convicted of trafficking in cocaine. He contended that the trial court erred by improperly instructing the jury on the definition of trafficking in a manner different from that charged in the indictment. The indictment accused appellant of “knowingly possess[ing] four hundred (400) or more grams of a mixture containing at least 10 percent (10%) Cocaine. . . .” At trial, the jury charge on trafficking included the following additional, emphasized language (which was taken from the statute): “Any person who *knowingly delivers or brings into this State*, or who is knowingly in possession of four hundred grams or more of cocaine, or any mixture with a purity of 10 percent or more of cocaine, commits the offense of trafficking in cocaine.” The Court agreed with appellant that the jury charge included a method for committing the offense, know-

ingly delivering or bringing cocaine into the state, that was not included in the indictment. However, the Court noted that appellant's written charge request included the very language (delivering or bringing into the state) he found objectionable on appeal. Since induced error is impermissible, and appellant requested the challenged language, any error in the charge could not be relied upon to seek a reversal.

Sentencing; Merger

Jackson v. State, A08A2326

Appellant was convicted of trafficking in cocaine, possession of cocaine with intent to distribute, possession of marijuana, and five counts of obstruction. He appealed contending that the trial court erred by refusing to merge the charges of trafficking in cocaine and possession with intent to distribute cocaine. The Court agreed. To prove possession of cocaine with intent to distribute under OCGA § 16-13-30 (b), the State had to show that appellant "possess[ed] with intent to distribute any controlled substance" of any purity and of any amount. To prove trafficking in cocaine under OCGA § 16-13-31 (a) (1), the State had to show that appellant was "knowingly in possession of 28 grams or more of cocaine or of any mixture with a purity of 10 percent or more of cocaine. . . ."

The "intent to distribute" which is necessary to the crime of possession of a substance under § 16-13-30 (b) is satisfied by the reasonable inference that a person who possesses more than the 28 grams of cocaine under § 16-13-31 intends to distribute it. Therefore, as the distribution offense contains no unique elements not satisfied by a trafficking offense, the distribution offense was included in the trafficking offense.

Appellant also contended that the trial court erred in failing to merge the five obstruction counts. The evidence showed that appellant separately hindered each of the five officers during his arrest: jerking away and fleeing from the first officer who attempted to pat him down; breaking a handhold by a second officer attempting to restrain him; breaking from, evading, and running from a third officer who performed the lawful search; running into and struggling with a fourth officer who then attempted to subdue appellant; and jerking away from and wrestling with a fifth officer on the ground who was attempting to handcuff

him after he was tackled. Each officer explicitly testified that appellant's specific efforts to fight against or flee from him hindered that officer's own efforts to lawfully search, subdue, or arrest appellant. Therefore, as the evidence showed that each charge of obstruction was separate and distinct with independently supporting facts, there was no merger.

Identification; Similar Transactions

Wallace v. State, A08A2413

Appellant was convicted of armed robbery and aggravated assault. He contended that the trial court erred in allowing the one-on-one show-up identification testimony of his first victim. Although a one-on-one show-up is inherently suggestive, identification testimony produced from the show-up is not necessarily inadmissible. A two-part test is used to determine whether the show-up was impermissibly suggestive. If the show-up was impermissibly suggestive, the totality of the circumstances must be considered to determine whether a "very substantial likelihood" existed of irreparable misidentification. The Court held that on-the-scene show-up identifications, like the one in this case, are often necessary "due to the practicabilities inherent in such situations." Thus, as long as this type of show-up was reasonably and fairly conducted at or near the time of the offense, it would not impermissibly suggest and the Court need not reach the second part of the test.

Here, police responded to the scene within five minutes and based on the identifications given by the victims, immediately began looking for a black male wearing blue pants and no shirt. Officers spotted appellant, who was wearing blue pants and running, ordered him to stop, and pursued him when he fled and tried to conceal himself. Within 20 minutes, the two victims and appellant's neighbor individually identified appellant while he was in police custody. The record shows that the first victim saw appellant when she turned around to face him, struggled with him while he grabbed both her and her purse, observed him flee into a trailer park, described the clothing he was wearing to police officers, and identified him within 20 minutes of the robbery. The trial court therefore did not err in finding that the show-up conducted with the first victim was reasonably and fairly conducted at or near the

time of the offense and that the first victim's identification was reliable.

Appellant also contended that the trial court erred in admitting a prior robbery as a similar transaction. Appellant did not dispute that the evidence was admitted for a proper purpose or that he committed the prior robbery. Instead, he contended that the state failed to show a sufficient similarity between the prior armed robbery and the crime charged so that proof of the former tends to prove the latter. He further argued that the similar transaction was so removed in time that its prejudicial effect outweighed any probative value. The record showed that both robberies occurred in Savannah, both robberies occurred outside, both robberies involved victims just sitting or waiting outside, Appellant threatened both sets of victims with a pistol, and the property taken in both robberies included a purse or wallet. In addition, while the robberies occurred eight years apart, appellant remained in prison on the first robbery until seven months before the second robbery occurred. Lapse of time is merely one factor to be taken into consideration when balancing the probative value of the evidence against its prejudicial impact, and this is especially true when the defendant has not had the opportunity to commit another offense because he has been incarcerated. Therefore, the trial court did not abuse its discretion in admitting the similar transaction evidence.

Identification; Jury Charges

Fuller v. State, A08A2308

Appellant was convicted of armed robbery. He contended on appeal that the trial court erred in allowing the state to introduce evidence of the pretrial photographic identifications. Convictions based on a pretrial identification by photograph and a subsequent identification at trial will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. But, a court need not consider whether there was a substantial likelihood of misidentification if it finds that the identification procedure was not impermissibly suggestive. Here, the record showed that the victims were shown a photographic array that contained six photographs, one of which was appellant. All of the individuals in the

photographs were young black males who had short, close-cropped hair and moustaches. In addition, the photographs had the same background, were all the same size, and all showed head shots with the person looking straight at the camera. None of the photographs was distinctive or marked in any way. Furthermore, the victims were shown the photographic line-up separately. The victims were not told they must choose one of the persons depicted, nor did anyone inform them that a person had been arrested or suggest to them in any way which photograph, if any, they should select. Therefore, the trial court did not err in finding that the photographic line-up was not impermissibly suggestive.

Appellant also contended that the trial court erred in refusing to give his requested jury charges regarding photographic line-ups. One request stated as follows: "The pictures presented in a photographic lineup should be of the same . . . kind, size and appearance. If any photograph in the photographic lineup is impermissibly suggestive the identification should not be considered by the jury." The other request stated: "If the identification was impermissibly suggestive[,] and under the totality of circumstances the suggestiveness gave rise to a substantial likelihood of misidentification[,] the in Court identification of the Defendant by a witness shall not be considered by the jury." The Court held that both of these jury instructions were based on law regarding the admissibility of a photographic line-up, an issue to be determined by the trial court judge, not the jury. The trial court therefore did not err in refusing to give these instructions.

Appellant further contended that the trial court erred when it instructed the jury that, when considering the reliability of an eyewitness identification, the jury could "consider the level of certainty that is shown by the witness about his or her identification." The Court agreed, noting that the Georgia Supreme Court had advised trial courts to refrain from giving this pattern jury instruction on eyewitness identification. However, the Court found that given the overwhelming evidence of guilt, the giving of the charge in this case was harmless error.

Right to be Present at Trial; Restitution

Taylor v. State, A08A2406

Appellant was convicted by a jury of reck-

less driving (OCGA § 40-6-390), involuntary manslaughter (OCGA § 16-5-3), serious injury by vehicle (OCGA § 40-6-394), and other traffic offenses. She was acquitted of homicide by vehicle in the first degree. Appellant contended that the trial court violated her constitutional rights by imposing its sentence outside of her presence. A defendant has the constitutional right to be present during all portions of her trial and her absence during a critical stage of her criminal proceedings, without a valid waiver of those rights, constitutes a violation of her right to be present which is presumed prejudicial and is not subject to a harmless error analysis under Georgia law. Sentencing is a critical stage at which a defendant is generally entitled to be present under the Georgia Constitution. The record showed that the trial court held a sentencing hearing and a restitution hearing, and then issued a written sentencing order three days after the restitution hearing. The court never pronounced sentence while appellant was present in open court. Instead, appellant subsequently received a copy of the sentencing order while she was incarcerated. Therefore, the Court held, since it was undisputed that the trial court denied appellant the right to be present when it imposed its sentence, the sentence must be vacated and the case remanded for resentencing.

Appellant also contended that the trial court erred in sentencing her to pay \$547,000 in restitution to the victim's estate. Appellant argued that the trial court could not order restitution because she had already settled all civil claims with the victim's estate. The Court held that the state's restitution mechanism is an attempt to avoid the necessity of a separate civil action and to determine the amount of loss caused by the criminal act in the usually earlier criminal proceedings rather than in a second and more protracted civil suit. Consequently, the amount of restitution ordered may not be more than the victim's damages. Moreover, OCGA § 17-14-6 (b) specifically provides that "[t]he ordering authority shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive full compensation for that loss from the offender as a result of a civil proceeding." Here, the record showed that the victim's estate dismissed its claims against appellant with prejudice after the parties settled. The estate, therefore, was estopped as a matter of law from seeking any

additional compensation from appellant in a future civil proceeding. Thus, pursuant to OCGA § 17-14-6 (b), the trial court was not authorized to order appellant to pay the estate restitution and the restitution order was accordingly reversed.

Involuntary Manslaughter; Homicide by Vehicle

Taylor v. State, A08A2406

Appellant was convicted by a jury of reckless driving (OCGA § 40-6-390), involuntary manslaughter (OCGA § 16-5-3), serious injury by vehicle (OCGA § 40-6-394), and other traffic offenses. She was acquitted of homicide by vehicle in the first degree. Appellant contended on appeal that her conviction for involuntary manslaughter is void because, under Georgia law, a homicide caused by reckless driving must be prosecuted as vehicular homicide and that the trial court erred when it sentenced her to 15 years imprisonment for homicide by vehicle in the first degree, even though the jury had acquitted her of that offense. The record showed that Count 5 of the indictment charged appellant with homicide by vehicle in the first degree, alleging that she caused the victim's death without malice aforethought by committing an act of reckless driving. Count 6 charged her with involuntary manslaughter, alleging that she unintentionally caused the victim's death "while in the commission of the unlawful act of Reckless Driving." The jury acquitted appellant on Count 5, but found her guilty on Count 6. The trial court, however, in its sentence, wrote the following: "Court finds that Count VI is actually [an] indictment for first degree vehicular homicide." Then, pursuant to that finding, the court sentenced appellant to 15 years, the maximum sentence for homicide by vehicle in the first degree. The maximum sentence for involuntary manslaughter is 10 years.

The Court held that the trial court erred in entering judgment and imposing a sentence on Count 6 under the guise that the jury had found appellant guilty of homicide by vehicle in the first degree instead of involuntary manslaughter, when the jury had specifically acquitted her on a charge of homicide by vehicle in the first degree based upon the same act and against the same victim. Thus, appellant's conviction and sentence for homicide by vehicle in the first degree was reversed.