

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 23, 2009

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THIS WEEK:

- **Gang Statute; Constitutionality**
- **Lesser Included Offenses; Jury Charges**
- **Character; Jury Charges**
- **Severance**
- **Restitution**
- **Statements**
- **Search & Seizure**
- **Opinion; Hearsay**

Gang Statute; Constitutionality

Rodriguez v. State, S08A1928

Appellants and several others were jointly indicted on multiple counts, including alleged violations of the Georgia Street Gang Terrorism and Prevention Act, OCGA §§ 16-15-1 et seq. They contended that the statute was unconstitutionally vague, overbroad, and violated their rights to freedom of association. The trial court denied appellants' motions to dismiss the indictment and the Supreme Court affirmed. Appellants first argued that OCGA § 16-15-4 (a), does not contain any requirement that a defendant actively participated in the "gang", had any knowledge of its illegal activities, or had any specific intent to further those activities. The Court disagreed. It dissected the statute and held that the term "criminal street gang activity" mentioned in OCGA § 16-15-4 (a) does not refer to the commission of an enumerated offense by a single individual acting alone. Also, OCGA § 16-15-4 (a) is most naturally read to require that the defendant conducted or participated in the criminal gang

activity of the criminal street gang with which he was associated. Thus, the Court held, under its most natural reading, OCGA § 16-15-4 (a) requires gang participation by the defendant which is active by any measure.

The Court found that the statute was not unconstitutionally vague. "Reading OCGA § 16-15-4 (a) according to the natural and obvious import of its language and in conjunction with the specific definitions in OCGA § 16-15-3, we conclude that it provides a sufficiently definite warning to persons of ordinary intelligence of the prohibited conduct and that it is not susceptible to arbitrary and discriminatory enforcement." The Court also concluded that the statute was not overbroad because of the combination of the following four factors found included in the legislation: The aforementioned requirements of active participation with knowledge and specific intent; a legislative declaration of a compelling state interest; a legislative exclusion of constitutionally protected activities; and definitions of key terminology. Finally, the Court held that OCGA § 16-15-4 (a), as properly construed, does not directly or indirectly infringe upon the First Amendment right to freedom of association because to support a conviction, the accused must be shown to have conducted or participated in criminal street gang activity through the commission of an actual criminal act. Mere association is insufficient.

Lesser Included Offenses; Jury Charges

Bell v. State, S08A1785

Appellant was convicted of malice murder, burglary, armed robbery, aggravated assault, and forgery. He contended that the trial court should have entered a directed verdict

of acquittal on all counts except burglary. The Court disagreed but found that the crime of aggravated assault should have been vacated. To establish the crime of malice murder, the State proved that appellant, with malice aforethought, caused the victim's death by striking her about the head and face with a tree limb to which a piece of metal was attached. To establish the crime of aggravated assault, the State proved that appellant caused serious bodily injury to the victim by striking her about the head and face with an instrument that caused serious bodily injury—a tree limb to which a piece of metal was attached. Because OCGA § 16-1-7(a)(1) prohibits a defendant from being convicted of more than one crime where one crime is included in another, the conviction for aggravated assault must be vacated.

Appellant also argued that his right to a fair trial was violated by the trial court's instruction to the jury regarding its consideration of the credibility of his testimony. After instructing the jury that it was to determine the credibility of the witnesses and, in passing on their credibility, the jury could consider a number of factors, including a witness's "interest or lack of interest," the trial court told the jury that "when the accused testifies, he at once becomes the same as any other witness and his credibility is to be tested by and subject to the same tests as are legally applied to any other witness. In determining the degree of credibility that should be accorded his testimony, you may take into consideration the fact that he is interested in the result of the prosecution." The Court noted that the contested instruction made it plain that the defendant's testimony was not to be given different treatment from that of the other witnesses and merely stated the self-evident fact of his interest in the outcome of the case. Therefore, the trial court's instruction was not error because it stated a correct statement of law that, in assessing the credibility of witnesses, the jury may take into consideration the fact that the defendant who testifies is interested in the outcome of the prosecution.

Character; Jury Charges

Sanford v. State, S08A1636

Appellant was convicted of numerous crimes including malice murder. He contended on appeal that the trial court erred in failing to redact the "irrelevant, argumentative,

and prejudicial" portions of his videotaped interview with police. The record showed that the interview in question consisted of two tapes and resulted in a substantive transcript of 76 pages. Following a hearing, the trial court suppressed 40 pages of the interview, which contained references to appellant's drug use and an apparent suicide attempt, resulting in a redacted version of the interview comprising 36 pages of transcript. Contrary to appellant's argument, it was not error for the trial court to refuse to suppress this remaining portion of the interview on the basis that the statements about his alcohol consumption improperly placed his character at issue because generally an adult's consumption of alcohol is irrelevant to the issue of character. As to his claim that any probative value of this evidence was outweighed by its prejudicial effect, there was no abuse of discretion by the trial court. Appellant's own statements about the crimes on trial were relevant. He admitted taking the victim's car, explaining that he did so while on a drinking binge, and that his intoxication prevented him from remembering certain aspects of the events surrounding his theft of the vehicle. Finally, the officer's statements during the interview did not invade the province of the jury. "What [appellant] characterizes as the officer's inadmissible statements regarding his theory of the crimes 'was nothing more than police questioning aimed at eliciting responses from a defendant in custody.'"

Appellant also challenged on appeal the trial court's jury instruction on alcoholism. The Court found there was evidence of his alcoholism presented at trial. Even though appellant's express admission that he was an alcoholic was contained in the portion of the interview that was suppressed, there was ample evidence in the redacted interview, including his repeated characterization of his drinking as excessive and the officer's unrefuted reference to appellant's "relapse," to enable the jury to make the reasonable inference that appellant had a problem with alcohol consumption. The jury charge on alcoholism was therefore appropriate under the facts.

Severance

Bailey v. State, A08A2312

Appellant was convicted of armed robbery. He contended that the trial court erred in denying his motion to sever his trial from

his co-defendant's, arguing that the only testimony against him came from his co-defendant, whose defense was antagonistic to his own. A trial court has discretion to try defendants jointly or separately. OCGA § 17-08-4. A defendant seeking severance must show prejudice amounting to a due process denial, and in determining whether to grant a motion to sever, the trial court must consider (1) whether there are so many defendants that the jury would be confused as to what law and facts apply to whom; (2) whether evidence admissible against one defendant would be considered against another; and (3) whether the defenses were antagonistic to each other. Here, the Court found, there were only two defendants who were also charged as parties to the crime. The evidence and law against each of them was nearly identical and all of the evidence admissible against one was admissible against the other. While their defenses were antagonistic, that fact alone was not sufficient to warrant the grant of a separate trial absent a showing of harm, such as the inability to call a co-defendant as a witness. Thus, given the evidence presented, the trial court did not abuse its discretion in denying appellant's motion to sever.

Restitution

McClure v. State, A08A2236

Appellant pled guilty to theft by taking of copper wire. After a hearing, the trial court ordered her to pay \$6,470 as restitution to the owner of the stolen wire. She appealed the restitution order, challenging the fair market value used in determining the award. The sufficiency of evidence to support an order of restitution is measured by the civil standard of preponderance of the evidence. Since OCGA § 17-14-9 requires that the amount of restitution ordered is not to exceed the victim's damages, the determination of the amount of damages must be based upon fair market value, which must be determined exactly. Appellant argued that that the copper sold to a third party should be valued at the amount that the third party paid her for it. The Court, however, found that such evidence would be irrelevant to the issue because it is the fair market value of the copper when appellant stole it, not when she presented it for sale to the third party, which is the proper subject of the restitution order.

Statements

Inman v. State, A08A2150

Appellant was convicted of child molestation and aggravated sexual battery. He argued that the trial court erred in admitting his in custody statements because they were involuntarily induced by a promise of benefit. The evidence showed that appellant initially denied touching the female victims in any way, but then stated that he may have accidentally fondled one victim's chest and that, while bathing another victim, he may have accidentally inserted his finger into the child's vagina. Appellant told the detectives that he knew he would be found guilty and that he wanted to know if he could be sent to a mental hospital or clinic because he knew what happened to child molesters in prison. The detectives told appellant that the only thing they could do was tell the district attorney that he was cooperative "and then it would be up to the discretion of the judge and the jury as to what happened to [him]." The Court found no error because there was no evidence that the detectives offered appellant a hope of benefit. Rather, the Court held, it appeared that appellant sought treatment in lieu of imprisonment, and that the detectives told him they could make no promises.

Search & Seizure

Coursey v. State, A08A1921

Appellant was convicted of DUI. He contended on appeal that the trial court erred in denying his motion to suppress based on an improperly constituted roadblock. A roadblock in Georgia is valid when it meets five requirements: (1) supervisory officers decided where and when to implement it for a legitimate purpose; (2) all vehicles were stopped; (3) the delay to motorists was minimal; (4) the operation was well-identified as a police checkpoint; and (5) the screening officer was competent to determine which motorists should be given field tests for intoxication. Appellant contended that the first requirement was not met for the initiation of the roadblock. First, he argued that the officers in the field were unaware of the roadblock's primary purposes and therefore its purpose could not have been legitimate. However, the Court found that the evidence showed that the officers were briefed before the roadblock, and the field officer

testified about the specific, legitimate tasks he undertook at each stop. The purposes about which the field officer testified —checking for valid licenses, insurance, impaired drivers, and safety concerns were consistent with the purposes set forth in the roadblock initiation form generated by the supervising officer. The trial court's finding that the roadblock was conducted for a legitimate primary purpose was therefore not clearly erroneous.

Appellant also contended that the field officers did not conduct the roadblock at a location approved by the supervisor, because the roadblock was not set up on the highway as indicated on the roadblock initiation form. The Court held that this difference in location is insignificant and does not invalidate the roadblock because supervisory personnel need not direct the precise location for a roadblock, so long as supervisory personnel and not field officers decided to implement the roadblock, which was the case here.

Opinion; Hearsay

Griffin v. State, A08A1629

Appellant was convicted of two counts of selling cigarettes to a minor. He contended on appeal that the trial court erred in admitting the opinion testimony of the officer concerning the age of the buyers because such evidence was inadmissible hearsay. The Court disagreed. The officer testified at trial concerning the two male juvenile purchasers (neither of whom testified). The officer testified that he recognized the older juvenile, knew his name and nickname, and had spoken to him 20 or 30 times. He testified that through his face-to-face dealings with the male in question, he had had opportunities to determine whether or not the male was a minor. Based on his physical observations of the young man, he testified that the juvenile "appeared to me to be less than 18." As to the younger juvenile, he testified that he was "definitely less than 18." The officer's testimony about his own observations of the juveniles was not hearsay because its value did not rest on the veracity or competency of the juveniles. Rather, the officer's testimony was a conclusion or opinion based upon his personal observations of the juveniles' characteristics. The Court held that a description of one's physical observations and opinions logically flowing therefrom have long been admissible in this state. Accordingly, the

trial court did not err in overruling appellant's hearsay objections to the officer's testimony regarding the juveniles' ages.