Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 30, 2009

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THIS WEEK:

Search & Seizure

Spence v. State, A08A1915

Appellant was convicted of VGCSA and other offenses. He contended on appeal that the trial court erred in denying his motion to suppress. The Court disagreed. The evidence showed that a patrol officer observed a car exceeding the speed limit on an urban roadway and put out a call for assistance to stop the car. The officer had probable cause to effect a traffic arrest at this point. A sergeant, within a mile of the patrol officer, saw a car resembling the car described and followed it into a motel parking lot to investigate. The sergeant had a reasonable and articulable suspicion of criminal activity having occurred. The sergeant asked for appellant's driver's license, which he had the right to do, and reached into his own car to call the patrol officer to verify this was the speeding car. At that point, appellant ran away. Because appellant fled when the sergeant had a particularized and objective basis for suspecting that he was the person recently seen by the patrol officer violating the law, the sergeant was authorized to chase and briefly detain appellant to complete his investigation. A second patrol officer had to tackle appellant to stop him and had probable cause to arrest him for obstruction. Since appellant was arrested lawfully for misdemeanor obstruction, the officers could search the interior of the car. Therefore, there was no error in the trial court's denial of appellant's motion to suppress.

Culpepper v. State, A08A2089

The State appealed from an order granting the defendant's motion to suppress. The evidence showed that officers went to a particular apartment to investigate an alleged armed robbery. He handcuffed the defendant who came out of the apartment but thereafter released him after determining that he was unarmed and the resident of the apartment. The defendant also told the officers that the robbers had already fled. The officers nevertheless then entered the apartment without consent to sweep it for suspects. There was no evidence that the officers heard a commotion or other sound inside the apartment that would have indicated the existence of an emergency inside the apartment. While in the apartment, the officers saw marijuana and used this knowledge to get a search warrant.

The State argued that the entry was justified by exigent circumstances because the defendant's girlfriend's teenaged child was inside and the officers had a fear for the child's safety if there were suspects in the

apartment. The trial court determined that, because there was no commotion inside the apartment and because the defendant, who had just emerged from the apartment, asserted that the robbers had fled, "the officer did not have a reasonable belief that entry into the apartment was necessary."

The Court found that because there was evidence to support the trial court's findings, its order must be affirmed. However, the Court stated, "[w]e emphasize that we are not ruling that, as a matter of law, the police may *never* enter a dwelling without a warrant, following a report of an armed robbery in progress when someone asserts that the robbers have fled and the police hear no "commotion" inside the dwelling. We are obviously not ruling as a matter of law that the police may *always* enter a dwelling without a warrant if there was a report of an armed robbery in progress and there might be a teenaged person inside the apartment. Indeed, as in so many appeals of a ruling on a motion to suppress, we are not making any ruling whatsoever as a matter of law. We are merely affirming a factual decision made by the trial court. In the case at bar, we might well have affirmed, even if the trial court had ruled for the state."

Venue, False Statements

Tesler v. State, A08A2190

Appellant, an Atlanta Police Officer, was convicted of making false statements to a state or local government agency or department in violation of OCGA § 16-10-20. The false statements concerned an investigation of a search warrant based on false information which when executed, resulted in the death of the senior citizen resident of the home searched. Appellant contended that his conviction must be reversed because the State failed to prove that the false statement was made in Fulton County and therefore failed to prove venue. The Court agreed. Under OCGA § 16-10-20, a person may commit the crime of giving a false statement in one of three ways: (1) by using "any trick, scheme or device" to falsify or conceal a material fact; (2) by affirmatively making a false statement or representation; or (3) by knowingly making or using a false writing. The indictment specifically charged appellant with violating OCGA § 16-10-20 by using a scheme (an agreement to cover up the falsification of the warrant application) to conceal or falsify a material fact. Thus, the criminal conduct charged occurred at the time and place where appellant actually lied to investigators which in this case was at the offices of the FBI. However, the State never proved that these offices were located in Fulton County and therefore appellant's conviction was reversed.

Nevertheless, the Court held that appellant can be re-tried because the failure to establish venue does not bar re-trial in a court where venue is proper and proven. Therefore, the Court addressed Appellant's sufficiency of evidence argument. Specifically, appellant argued that OCGA § 16-10-20 is designed to punish only those false statements made directly to a department or agency of state or local government and thus, because he made his statement to federal agents, the statute cannot reach his conduct. The Court held that appellant's interpretation of the statute was too narrow. Using federal law as a guide, the Court held that there is nothing in the language of OCGA § 16-10-20 that requires the State to prove that appellant made his false statement directly to a department or agency of either the City of Atlanta or Fulton County. Instead, the State needed only show that the statement was made "in a matter within the jurisdiction" of one or more of those governments. Here, the evidence showed that the FBI interviewed appellant as part of a joint investigation with the APD, the GBI, and the Fulton County District Attorney's Office, into the facts surrounding the issuance and execution of the search warrant. The Fulton County District Attorney's Office had the power to exercise its authority to indict and prosecute any crimes uncovered during that investigation that occurred in Fulton County. In other words, the Court held, the District Attorney's Office had "the power to act upon information" received as a result of the joint investigation and therefore, appellant's false statements to the FBI, made as a part of that investigation, were made in a matter within the jurisdiction of the District Attorney's Office. As a result, those false statements violated OCGA § 16-10-20.

Discovery

Theophile v. State, A08A1711

Appellant was convicted of armed robbery, hijacking a motor vehicle and attempted theft by taking. On appeal from the order denying his motion for a new trial, he argued that the trial court erred in refusing to allow an alibi witness to testify. The record showed that appellant opted into the reciprocal discovery provisions of OCGA § 17-16-1 et seq. According to OCGA § 17-16-5 (a), appellant was required to disclose to the state ten days prior to trial "the names, addresses, dates of birth, and telephone numbers of the witnesses, if known to [him], upon whom [he] intend[ed] to rely to establish such alibi." Appellant did not provide the name of the proffered witness to the state until the middle of trial. Over the state's objection, the witness' testimony was excluded. The trial court expressed in its order denying appellant's motion for a new trial that there was evidence of bad faith by the defense in failing to disclose the alibi witness in a timely fashion. The defense asserted that it was unaware of the witness (a high school student) until the middle of trial, yet he was the son and brother of the two disclosed alibi witnesses and had been at home on the night in question. The defense further asserted that it could not locate the witness's mother and sister, but the witness testified that he believed that they were at home at the time of the trial. In addition, the belated notice precluded the state from adequately investigating the witness, thereby satisfying the prejudice requirement. Although the trial court did not make specific findings of fact regarding bad faith and prejudice, such findings are not required. Implicit in the trial court's decision to exclude this witness was the determination that prejudice and bad faith were shown. The trial court therefore did not abuse its discretion in excluding the witness's testimony.

Double Jeopardy

State v. Stepp, A08A1600

The defendant filed a plea in bar, arguing that her convictions in the Recorder's Court for violation of certain county ordinances regulating her responsibilities as a pet owner barred a subsequent prosecution in state court upon two counts of misdemeanor reckless conduct pursuant to OCGA § 16-5-60 (b). The state court granted the motion, finding that both prosecutions arose out of the same conduct. The State appealed, contending that the prosecution of the reckless conduct charges in state court was not barred by the double jeopardy rule. The Court agreed. The

constitutional prohibition is against being twice placed in jeopardy for the "same offense." Under *Blockburger v. U. S.*, 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. Here, the Court held, violation of the relevant county ordinance required proof of a fact that the misdemeanor reckless conduct charges did not, and vice versa. To prove the misdemeanor reckless conduct charges under OCGA § 16-5-60 (b), the State was required to prove that appellant's acts or omissions in controlling her pet constituted a "gross deviation from the standard of care" rather that ordinary negligence responsible for the conduct causing the harm at issue. To show a violation of the county ordinance, the State was required to prove not that appellant's actions constituted a "gross deviation from the standard of care" as required to prove the reckless conduct charges, but that she owned the pet and failed to exercise ordinary care in controlling it for the protection of others. Accordingly, the charge for violating the ordinance was sufficiently separate from the misdemeanor reckless conduct charges, and successive prosecutions were not barred under the *Blockburger* test.

Contempt

Morris v. State, A082243

Appellant, an attorney who was representing a parent in a juvenile court proceeding was held in contempt of court. The evidence showed that during the course of the trial, appellant stated that the trial court judge should find her "ineffective." Thereafter, the trial court found that any attorney who raises a claim of ineffectiveness against oneself is "per se" contempt of court. The Court reversed. An attorney may be held in contempt for statements made during courtroom proceedings only after the trial court has found (1) that the attorney's statements and attendant conduct either actually interfered with or posed an imminent threat of interfering with the administration of justice and (2) that the attorney knew or should have known that the statements and attendant conduct exceeded the outermost bounds of permissible advocacy. Because contempt is a crime, the evidence must support these findings beyond a reasonable doubt. Here, the Court held that while the evidence in this case may have supported a finding of contempt, the juvenile court's adjudication of contempt cannot stand because the judge's ruling made it clear that the judge did not weigh the evidence but applied an erroneous per se rule. Such a per se rule has no place in an adjudication of contempt and therefore appellant's conviction must be reversed.

Sequestration, Jury Charges

Hollis v. State, A08A2313

Appellant was convicted of aggravated stalking, aggravated assault, burglary, kidnapping, and aggravated battery. He contended on appeal that the trial court violated the rule of sequestration by allowing an investigator to sit with the prosecutor and assist in the prosecution. Citing *Carter v. State*, 271 Ga. App. 588 (2005), appellant argued that an abuse of discretion occurs where the trial court allows an investigating officer to observe the trial prior to testifying, without requiring the State to make a "true showing" of its need for the detective's presence. The Court disagreed. It found that *Carter* did not establish a rule requiring the State to present evidence showing the necessity of having the investigating officer present during the entire trial. Instead, that decision applied the principle that when the prosecutor indicates that a witness is needed in the courtroom for the orderly presentation of evidence, there is no abuse of the trial court's discretion in permitting the witness to remain. Since the prosecutor in this case made such an assertion, the trial court here did not err in allowing him to remain in the courtroom.

Appellant also argued that the trial court erred in instructing the jury on the crime of aggravated stalking by not also charging on the statutory definition of "harassing and intimidating," found in OCGA § 16-5-90. The Court first determined that appellant never requested such a charge and that though he "reserved" his right to object, the Court could find no argument or legal authority to support his implied assertion that such a reservation also applies to the trial court's "failure" to give a jury charge that was never requested. Moreover, the Court found that the trial court was not required to give such a charge sua sponte because the words "harassing and intimidating," as used in OCGA § 16-5-91 proscribing aggravated stalking, are not words of art but rather are words of common understanding and meaning which require no definition themselves for understanding by the jury.

Competency to Stand Trial

Wadley v. State, A08A2400

Appellant was convicted following a bench trial of aggravated assault. She argued that the trial court erred in denying her motion for a second, pretrial evaluation of her competence to stand trial. The evidence showed that following her indictment, the trial judge originally assigned to the case ordered her to undergo a competency evaluation. That evaluation was performed in January, but the results were inconclusive. Then in May, her case was called for trial. Defense counsel moved for a postponement of trial and for a second competency evaluation, claiming that she could not assist counsel in preparing the defense of her case. The trial court conducted a brief hearing, after which it found appellant competent. The following day defense counsel renewed his motion which the court denied and then after speaking with appellant and her counsel, appellant waived her right to a jury trial.

Competency involves a defendant's mental state at the time of trial. The threshold for competency is easily met in most cases; it exists so long as a defendant is capable at the time of the trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense to the indictment preferred against him demands. The Court noted because appellant did not file a special plea of incompetence to stand trial pursuant to OCGA § 17-7-130, she waived her right to a special jury trial on the issue of her competency. But, even so, where a question about a defendant's competence is raised, the trial court must hold an "adequate hearing" on the issue. If, during that hearing, the trial court receives information which, objectively considered, should reasonably raise a doubt about the defendant's competence, it should conduct a civil proceeding before a special jury, even where state procedures for raising the issue are not followed.

Here, the Court conducted an extensive review of the proceedings and discussions

between the trial court and appellant and determined based on its review that the trial court did not err. Furthermore, the Court noted, appellant, who did not challenge the legality of the bench trial on appeal, "fails to explain how she could have been competent to freely, voluntarily, and intelligently waive her right to a jury trial but nevertheless be incompetent to stand trial."

Severance

Lankford v. State, A09A0208

Appellant and his co-defendants were convicted on a multitude of offenses following there perpetration of a home invasion. Appellant contended that the trial court erred in denying his motion to sever. The Court found no error. First, the number of defendants (three) was sufficiently small so that the danger of confusion appeared minimal, especially as the three were charged with jointly participating in the same offenses and as the offenses were committed as part of the same criminal scheme. Second, there appeared to be no danger that the evidence against one would be considered against the others, as the testimony showed the roles of each of the men to be fairly well-defined. Even if, as appellant asserted, the evidence tying his co-defendant to the crime was stronger than that against him, the fact that the evidence as to one of two co-defendants is stronger does not demand a finding that the denial of a severance motion is an abuse of discretion, where, as here, there is evidence showing that the defendants acted in concert. Finally, appellant conceded that at the outset of trial, he and his co-defendants' defenses were not antagonistic. The fact that one of his co-defendants decided during the course of trial to "switch sides" and testify against him does not create an abuse of discretion because one "can hardly expect trial judges to be clairvoyant and to predict that defendants who are presenting complimentary defenses will later turn on each other."

Evidence

Ortiz v. State, A08A2263

Appellant was convicted of child molestation. He contended that the trial court improperly admitted certain testimony of a sexual assault nurse who examined the victim. The nurse testified that the examination showed that parts of the child's hymen were damaged or missing and that the injuries could have been caused by penetration of a penis, finger or "any penetrating object" into the child's vagina. Appellant argued that the indictment did not charge him with any penetration of the victim's vagina, but only with "placing his penis on her vagina," and that there was no evidence of penetration other than the nurse's testimony. Therefore, he contended, the trial court abused its discretion in admitting the evidence regarding damage to the victim's hymen because it was irrelevant and prejudicial. The Court, however found that appellant failed to show that the trial court abused its discretion in admitting evidence that tended to prove that he placed his penis "on" the child's vagina simply because that evidence *also* indicated that some penetration may have occurred at that time or that he *also* may have touched the child's vagina with his hand, even though the State did not charge Ortiz with those crimes. Any evidence is relevant which logically tends to prove or disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant. Moreover, even though a defendant is not charged with every crime committed during a criminal transaction, every aspect of it is relevant to the crime charged and may be presented at trial.

DUI, Implied Consent

State v. Quezada, A08A1803

The trial court granted the defendant's motion in limine to suppress the results of the defendant's breath test and the State appealed. The Court reversed. The evidence showed that the defendant unequivocally refused to take a breath test when initially read her implied consent rights. She was transported to the jail and placed in a holding cell. The arresting officer then proceeded to prepare the intoxilyzer at the jail, telling the defendant that if she changed her mind, she could still submit to a breath test. The officer then filled out the form for suspending her driver's license. When the officer advised the defendant that he needed her signature on that form, she told him that she had "changed her mind" and would take the breath test. Although the defendant said that she was coerced into taking the test, the trial court found that she was not threatened or coerced in taking the test. However, the trial court granted the motion because it believed that under the decision of *Howell v. State*, 266 Ga. App. 480 (2004), once a suspect has refused to submit to chemical testing, the State may not thereafter ask the suspect a second time if she will submit to such testing.

The Court held that *Howell* did not stand for such a proposition. The *Howell* Court recognized that a police officer may attempt to persuade a suspect to rescind her initial refusal to submit to chemical testing, so long as any "procedure utilized by [an] officer in attempting to persuade a defendant to rescind his refusal [is] fair and reasonable." The *Howell* Court concluded that under the facts of that case, merely sitting the defendant down and telling him that he needs to blow into the machine was hardly to be considered a fair and reasonable procedure. Here, however, the officer asked the defendant if she wanted to submit to chemical testing or told her that she could take the test if she changed her mind. The defendant, by her own admission, then changed her mind and agreed to take the test. Therefore, in the absence or any threats or inducements by the officer, the Court concluded that the officer did not act unreasonably and that the trial court erred in granting the defendant's motion.

DUI

State v. Rish, A08A1922

The trial court granted the defendant's motion to suppress the results of the defendant's breath test and the State appealed. The Court reversed. In granting the motion to suppress, the trial court made specific findings of fact to support its conclusion that the defendant exhibited no signs of impairment and that the police therefore lacked probable cause to arrest him. The Court stated that given that there was some evidence in the record to support these findings, it had to affirm them. However, those findings only addressed the question of whether the State had probable cause to arrest the defendant for DUI-less safe. The trial court's order did not address the issue of whether the officer had probable cause to arrest the defendant for DUI-per se.

If the evidence shows only that a driver is intoxicated and does not show that his consumption of alcohol has impaired his ability to drive, there is no probable cause to arrest

for DUI-less safe. Conversely, probable cause to arrest for DUI-per se exists where an officer has a reasonable basis to believe that: (1) the suspect has, within the previous three hours, been in physical control of a moving vehicle; and (2) the suspect's current blood alcohol concentration is greater than .08 grams. Here, the record showed that the defendant admitted having had three to four drinks prior to driving and that he had consumed the last of those approximately thirty minutes before the traffic stop. Additionally, two alco-sensor tests administered to him showed that he had a blood alcohol concentration of greater than 0.08 grams. These facts established a reasonable probability that the defendant was in violation of OCGA § 40-6-391 (a) (5) and gave the officer probable cause to arrest him. Accordingly, the trial court's grant of the defendant's motion to suppress was reversed.

Sentencing; Recidivist

Crutchfield v. State, A08A1652

Appellant was convicted of sale of cocaine and other offenses. He contended that the trial court erred in sentencing him under the recidivist statute, OCGA § 17-10-7. At the sentencing hearing, appellant conceded one conviction. But, the State introduced evidence that on December 19, 1986, appellant entered guilty pleas on an additional two separate indictments, one for selling cocaine and the other for possession of a firearm by a convicted felon. Appellant was sentenced to four years in prison and six years probation for selling cocaine and, by a separate sentencing order, received a consecutive sentence of five years probation for possession of a firearm by a convicted felon. Appellant argued that these two convictions were consolidated for trial and his convictions for those offenses constituted only one conviction pursuant to OCGA § 17-10-7 (d). The Court disagreed. Although the trial court accepted guilty pleas on both charges and imposed sentences on the same date, the record here indicated there was no consolidation, because there were separate indictments and separate sentencing orders entered as to each indictment. Also, the fact that the sentences for these two offenses ran consecutively rather than concurrently further supported the conclusion that there were two separate convictions. Finally, the two convictions arose from different crimes committed on different dates, which also militated against finding consolidation.

Hearsay, Conspiracy

Fisher v. State, A08A2334

Appellant, who was tried separately from his co-indictee, was convicted of armed robbery and possession of a firearm during the commission of a crime. He contended that the trial court erred in allowing a witness to testify as to statements allegedly made by appellant's co-indictee, implicating appellant in the crimes when the State had failed to make a prima facie showing of a conspiracy between appellant and his co-indictee. The State offered the testimony of the witness in reliance on OCGA § 24-3-5, the co-conspirator exception to the hearsay rule. OCGA § 24-3-5 states that "[a]fter the fact of conspiracy is proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." The State may not rely on the co-conspirator exception in OCGA § 24-3-5 unless it makes a prima facie showing of the existence of the conspiracy without resort to the declarations of the alleged co-conspirator. Here, apart from the witness's testimony, the State offered no evidence of a conspiracy between appellant and his co-indictee and therefore the trial court erred in allowing this hearsay evidence. However, a trial court's error in admitting hearsay is harmless when the inadmissible testimony is cumulative of legally admissible evidence of the same fact, where it does not touch on the central issue of the case, or it could not have contributed to the verdict in light of eyewitness testimony regarding the crime. In light of the overwhelming evidence against appellant, the Court found that the error was harmless.

Self-Incrimination

Williams v. State, A08A1203

Appellant was convicted of armed robbery and other offenses. He argued that that the trial court erred by allowing one of his witnesses to refuse to testify after the witness invoked his Fifth Amendment right against self-incrimination. In a hearing conducted outside the jury's presence, the witness, who was facing robbery charges in another county, informed the trial court that he did not want to testify. The Court found that the appropriate course where, as here, a witness invokes his right to remain silent is as follows: First, the trial court must determine if the answers *could* incriminate the witness. If so, then the decision whether it *might* must be left to the witness. On the other hand, where the trial court determines the answers *could not* incriminate the witness, he must testify (or be subject to the court's sanction). It is for the court to decide if the danger of incrimination is real and appreciable.

The Court found that the trial court followed the proper procedure. First, outside the jury's presence, the prosecutor described a letter the witness had written to appellant, parts of which could be interpreted as incriminatory toward the witness with respect to his charges in the other county. The prosecutor informed the court that she intended to use the letter for impeachment if the witness testified before the jury. After the trial court informed the witness that he could testify at appellant's trial, but that he did not have to do so and that anything revealed at trial could be used against him later, the witness elected not to testify. The Court found that based on the evidence presented, the trial court resolved this issue correctly.

Character, Expert Testimony

Washington v. State, A09A0185

Appellant was convicted of aggravated assault and other offenses. He contended that the trial court erred by (1) failing to grant a mistrial after a witness interjected allegedly improper character evidence, and (2) refusing to make funds available for an expert witness. At trial, the victim, Appellant's former girlfriend, was asked if he had made any specific threats against her. Her response was as follows: "On the phone early —when he dropped his sister off at my residence, because he wanted to talk to me at my residence and I told him I didn't want to discuss it, I was through with it, the relationship was over, it was nothing else, that I had found out some stuff on his —on his record that he had did —". Appellant's counsel then objected and the trial court instructed the jury to disregard the comment. The Court found that the trial court's failure to grant appellant's motion for a mistrial was not an abuse of its discretion. The witness's mention of appellant's "record" was a spontaneous comment and not responsive to

the State's question, which was unrelated to appellant's character. A nonresponsive answer that impacts negatively on a defendant's character does not improperly place the defendant's character in issue. Similarly, a passing reference to a defendant's criminal record does not place his character in evidence.

The Court also held that the trial court did not err by refusing to grant appellant's request for funds to hire an accident reconstruction expert witness. A motion on behalf of an indigent criminal defendant for funds with which to obtain the services of a scientific expert should disclose to the trial court, with a reasonable degree of precision, why certain evidence is critical, what type of scientific testimony is needed, what that expert proposes to do regarding the evidence, and the anticipated costs for services. The decision whether to grant or deny an indigent criminal defendant's motion for the appointment of an expert rests within the trial court's sound discretion, and the trial court's decision will be upheld in the absence of an abuse of discretion. Here, appellant's pre-trial motion was a generically phrased request for funds to hire a criminal investigator. The motion did not mention accident reconstruction and made no effort to demonstrate to the trial court what type of expert was needed, nor the qualifications of this expert, nor what tests the expert would perform, nor why the evidence to be examined was critical. Nor did the motion identify any evidence or scientific test that would be subject to varying opinion.

At trial, appellant renewed his request and proffered his theory that an expert accident reconstruction witness would provide evidence that the automobile collision between him and the victim was not the result of an intentional act on his part. However, the Court found, even assuming this renewed request was timely, appellant was able to cross examine and challenge the State's two eyewitnesses who stated that he intentionally caused the collision, and the State's evidence of appellant's guilt did not involve any expert accident reconstruction testimony or scientific evidence concerning the collision site. Under these circumstances, the Court could find no abuse of the trial court's discretion.