

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 9, 2009

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THIS WEEK:

- **Out-of-Time Appeal**
- **Guilty Plea**
- **Sufficiency of Evidence; Attempted Manufacture of Methamphetamine**
- **DUI; Search & Seizure**
- **Lesser Included Offenses; Merger**

Out-of-Time Appeal

Nesbitt v. State, A08A1884

Appellant appealed the denial of his motion for an out-of-time appeal. In December 1989, appellant was convicted of VGCSA. In March 2008, he filed a pro se motion for an out-of-time appeal, asserting that his trial attorney had told him that he would file a direct appeal, but neither filed an appeal nor informed him of his right to a direct appeal. He claimed that he had lost the right to file a timely direct appeal as a result of the ineffective assistance of his trial counsel. Without conducting a hearing, the trial court denied the motion.

A criminal defendant has the absolute right to file a timely direct appeal from a judgment of conviction and sentence entered after a jury or bench trial. When the defendant loses that right as a result of the ineffective assistance of his counsel, he is entitled to an out-of-time appeal. However, an out-of-time appeal is not authorized if the loss of the right to appeal is not attributable to ineffective assistance of counsel but to the fact that the defendant himself slept on his rights. Here, the Court held that the trial court erred in denying appellant's motion because it failed to

hold an evidentiary hearing to determine who ultimately bore the responsibility for the failure to file a timely appeal. The Court further held that if, after conducting the hearing, the trial court finds that appellant lost his right to a direct appeal as the result of the ineffectiveness of his trial counsel, it should grant the motion for an out-of-time appeal.

Guilty Plea

Tomlin v. State, A09A0230

Appellant appealed from the denial of his motion to set aside his guilty plea under Alford to voluntary manslaughter. He contended that the plea was involuntary because he was not informed that intent was an element of the offense. The Court found that the record in this case included a transcription of Defendant's Plea of Guilty Form, which was signed by appellant and in which he acknowledged that he understood that he was being charged with voluntary manslaughter, that the charge had been satisfactorily explained to him, and that the terms of the negotiated plea were clear to him. Additionally, at his plea hearing, appellant responded affirmatively when the trial court asked if he understood the questions on the plea form and also acknowledged that he had discussed the nature of the voluntary manslaughter charge with his counsel and that he understood the rights he was waiving by pleading guilty. The Court held that a plea statement form signed by a defendant can be used to show that a guilty plea is knowingly and voluntarily entered, when the plea statement is placed into the record and combined with a colloquy like the one that occurred here between the trial court and appellant. The record therefore supported a determination that appellant's guilty plea was a voluntary

and intelligent choice among the alternative courses of action open to him and thus, the trial court did not abuse its discretion in denying his motion to withdraw his guilty plea.

Sufficiency of Evidence; Attempted Manufacture of Methamphetamine

Thurman v. State, A08A2277

Appellants, husband and wife, were convicted of attempt to manufacture methamphetamine. On appeal, the Court reversed. The evidence showed that appellants were stopped for speeding. The officer then arrested the driver after determining that his license was revoked. While the officer was talking to the driver, he noticed a chemical odor which he associated based upon his experience and training with a methamphetamine lab. The officer testified that methamphetamine manufacture was a common problem in the area and he recognized the odor immediately. The officer put the driver in the back of his patrol car and then asked the other appellant to get out of the car. He noticed the same odor of methamphetamine on her. An inventory of the vehicle revealed an unopened bottle of Heet, one pack of cold pills containing pseudoephedrine, a large unopened bottle of iodine, and some plastic tubing. The driver later admitted to the use of methamphetamine four or five days earlier.

The Court found that the evidence was insufficient to support the conviction. Although the officers stated that both appellants smelled like a methamphetamine lab, the officer acknowledged that they never questioned them about the smell. The officer also testified that no one investigated further as to whether there was any suspicious activity at the appellants' home. As to the items found in the vehicle, the Court found that there are recognized legal uses for all four items found in the truck; the officer acknowledged that the items were only a small portion of the ingredients and materials necessary to manufacture methamphetamine; and the quantity of each item found constituted only a small portion of the amount of the ingredients and materials needed to manufacture methamphetamine. Moreover, since appellants were convicted of attempting a "future" crime, neither the odor of methamphetamine production in their clothes and about their persons nor the driver's admission that he had

used methamphetamine in the past week were probative of the crime charged. The evidence was therefore insufficient because there was at best mere preparation and no substantial step toward the commission of any crime.

DUI; Search & Seizure

Gilliam v. State, A08A2207

Appellant was convicted of DUI. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant failed to yield and made an illegal left turn in front of another vehicle causing an accident which rendered him unconscious. An investigating officer and an EMT treating appellant both smelled alcohol on his breath, but because of his unconsciousness, no field sobriety tests were conducted. While appellant was still unconscious at the hospital, his blood was drawn and sent to the GBI for chemical testing. Appellant argued that because the only information the officer had concerning appellant's possible impairment was the smell of alcohol allegedly coming from him, the trial court erred in denying his motion to suppress the blood test results because the police officer did not have probable cause to believe that he was driving under the influence of alcohol.

The Court disagreed. Not only did the officer and the EMT treating appellant testify concerning the strong odor of alcohol emanating from his body, but the officer further testified that he had probable cause to believe appellant had been driving while under the influence of alcohol because appellant had caused the collision by his unsafe act of failing to yield to the oncoming vehicle. Thus, the Court held, where an individual has been involved in a traffic accident resulting in serious injuries or fatalities and the investigating law enforcement officer has probable cause to believe that the individual was driving under the influence of alcohol or other drugs, the chemical testing of the individual's blood is both warranted and constitutional.

Lesser Included Offenses; Merger

Hill v. State, A09A0031

Appellant was indicted on multiple charges against two 14-year-old victims including a charge for the forcible rape of one of them. The jury convicted him of statutory rape of

that victim. Appellant contended that the trial court erred in charging the jury that it could find him guilty of a lesser included charge of statutory rape because statutory rape is not a lesser included offense of forcible rape; therefore, having not been indicted for statutory rape against the victim, the court could not instruct the jury that he could be found guilty of such over his objection. The Court agreed that forcible rape does not necessarily include within itself all of the essential ingredients of statutory rape, as statutory rape requires proof of an element (the victim must be under 16) that forcible rape does not. Nevertheless, even if a lesser offense is not included in a charged offense as a general matter because the two offenses have different elements, the lesser offense may be an included offense in a particular case if the facts alleged in the indictment and the evidence presented at trial to establish the charged offense are sufficient to establish the lesser offense as well. Whether a lesser offense is included in a greater offense as a matter of fact must be determined on a case-by-case basis, depending upon the facts alleged in the indictment and the evidence presented at trial. Here, the evidence presented at trial regarding the alleged forcible rape of the victim established the offense of statutory rape involving her, as she testified to appellant's having intercourse with her when she was 14 years of age. The only issue therefore was whether the facts alleged in the indictment put appellant on notice "that statutory rape could be considered a factually lesser included offense, depending on the jury's interpretation of the facts of the assault." The Court found that the indictment did put appellant on notice because there were factual allegations in the indictment that the victim of the rape was a female under the age of 16.

Appellant also contended that during sentencing, the trial court should have merged the two child molestation offenses into the two statutory rape offenses. The rule prohibiting more than one conviction if one crime is included in the other does not apply unless the same conduct of the accused establishes the commission of multiple crimes. OCGA § 16-1-7 (a) (1). However, if the evidence shows that one crime was complete before the other occurred, the crimes do not factually merge. In other words, where the crimes are separate and sequential, even though following one another by only minutes if not mere seconds,

they are not based on the same conduct. Here, the Court found, the child molestation convictions were based upon appellant's fondling the breasts and private areas of the two young girls, whereas the statutory rape convictions were based upon appellant's having subsequent vaginal intercourse with the young girls. Thus, the crimes were sequential and separate and not based on the same conduct. Accordingly, the trial court did not err in failing to merge the crimes at sentencing.