

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 13, 2009

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THIS WEEK:

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- Equal Access
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Alford; Restitution

Cameron v. State, A08A1736

Appellant plead guilty under *Alford* to theft by receiving and was ordered to pay a specific amount of restitution. He contended on appeal that the trial court erred in accepting his plea and that the restitution order was improper because no restitution hearing was held. Under *Alford*, a trial court may accept a guilty plea from a defendant who maintains his innocence if the defendant has intelligently concluded that it is in his best interest to plead guilty and the court has inquired into the factual basis for the plea and sought to resolve the conflict between the plea and the claim of innocence. The Court reviewed the record and determined that the State's summary of

the facts provided a factual basis for the trial court to accept appellant's plea and the court fulfilled its obligation to attempt to resolve the conflict between appellant's claim of innocence and his decision to plead guilty.

The Court also determined that the restitution order was proper. The record showed that appellant consented to the amount of restitution in exchange for a more lenient sentence than the one the prosecutor recommended. "[Appellant] cannot submit to a ruling or acquiesce in the holding, and then complain of the same on appeal."

Equal Access

Xiong v. State, A08A1720

Appellant was convicted of possession of methamphetamine and marijuana and other offenses. At trial, the state relied on constructive possession and the defense was premised upon equal access. Where the State prosecutes only one of two or more people who had equal access to the contraband, the State must show sole constructive possession by the defendant. For the equal access rule to rebut the inference of possession of contraband, affirmative evidence must show that a person other than the defendant or a member of his immediate household had equal access to the specific location where the contraband was found. Here, there is no evidence connecting appellant to the methamphetamine or marijuana other than his own equal access. The evidence showed that appellant's cousin had the same access to the contraband, baggies, scales, and a notebook containing references to "ice." Although appellant's cousin had left the residence, there was affirmative evidence that his possessions were still in the home and that he still had a key. None of the items were found in

an area exclusively used by appellant. Instead, most were in “open, notorious and easily accessible areas.” Also, the methamphetamine was in a closet in the bedroom most recently occupied by the cousin and there was evidence that the handwriting in the notebook was not appellant’s. Therefore, the Court concluded, the evidence was insufficient to show that appellant possessed either the methamphetamine or the marijuana and his convictions on those counts were overturned.

Disorderly Conduct; Probable Cause to Arrest

Steillman v. State, A08A1623

Appellant was convicted of disorderly conduct and obstruction. He contended on appeal that the officer did not have probable cause to arrest him. The evidence showed that an officer noticed appellant, who was on a bicycle, looking into parked cars as he rode through a parking lot. The officer asked appellant some questions to which appellant replied with foul language and obscenities. In response to the officer’s request for identification, appellant shouted more obscenities, attempted to leave and then fought with the officers who arrested him. The Court held that in a face-to-face confrontation with an officer, certain language can constitute a breach of the peace. Here, the officer had probable cause to arrest appellant for disorderly conduct when appellant began to curse loudly at the officer, refused to stop cursing, refused to show any identification and pedaled away from the officer, refusing to stop and continuing to swear.

Judicial Notice; Search & Seizure

Cantrell v. State, A08A1605

Appellant was convicted of possession of cocaine with intent to distribute. The trial court found that the officers conducted a warrantless non-consensual search of appellant. But, the trial court upheld the search because at the time, appellant was out on bond and although the officers were unaware of it, the bond contained a Fourth Amendment waiver clause. Appellant contended the trial court erred in denying his motion to suppress because the court failed to follow required procedures in taking judicial notice of the bond order’s waiver provision, and the officers’

search of him cannot be justified by a waiver of Fourth Amendment rights of which they were unaware. The Court agreed with both arguments. First, the Court held that judicial notice may be used to eliminate formal proof as to: (1) matters of which the general public has common knowledge; (2) facts which are readily ascertainable by reference to some reliable source, and are beyond dispute; and (3) matters which are within the special province of the judge. However, if a trial court intends to take judicial notice of any fact, it must first announce on the record its intention to do so, and afford the parties an opportunity to be heard regarding whether judicial notice should be taken. Here, appellant had challenged in the trial court the validity of his waiver of Fourth Amendment rights and the reasonableness of imposing such a waiver as a condition of his pretrial release. Thus, it was not proper for the trial court to take judicial notice of the bond order’s waiver provision without first stating its intention to do so. The failure to follow the procedure deprived appellant of the opportunity to challenge whether the trial court had properly taken judicial notice of the Fourth Amendment waiver.

The Court also held that the trial court erred because the officers could not rely upon a Fourth Amendment waiver to which they were unaware at the time of the search. The Court stated that “[a] contrary holding would give police broad license to engage in legally unjustified searches in the hope that the subjects fall within the increasingly broad category of persons who have been called upon to waive their Fourth Amendment rights. We would abdicate our responsibility in enforcing the equal protection provisions of the federal and state constitutions by condoning a search that would permit such a practice.”

Statements; Right to Counsel

Stone v. State, A08A1587

Appellant was convicted of numerous offenses stemming from his violent attack on his girlfriend. He argued that the trial court violated his Sixth Amendment right to counsel by admitting a recorded custodial statement he made to an investigator following his initial appearance with a public defender before a magistrate. The Court agreed and reversed his convictions. The record showed that following

his arrest, he appeared before a magistrate and, at his request, was represented by a public defender. Appellant filled out prior to the hearing several forms provided by the public defender. On one form, the following statement was marked: “I wish for the Public Defender to represent me on my first appearance only.” Based on that request, an assistant public defender represented him. Shortly after the appearance, a second statement on the same form was marked: “I wish for the Public Defender to represent me in my first appearance and in any other hearings relating to this case.” The following day, an investigator interviewed appellant and recorded his statement which was later admitted into evidence at his trial. Where a defendant asserts his right to counsel at his initial appearance, his Sixth Amendment right to counsel attaches at that time. In order for a defendant’s subsequent statement to be admissible, the defendant must initiate the further contact with the police. The Court held that appellant’s Sixth Amendment right had attached because he had sought representation by a public defender and appeared with a public defender at his initial appearance hearing before a magistrate. Moreover, because the uncontested evidence showed that appellant did not initiate the subsequent custodial interrogation, the trial court erroneously admitted the custodial statement at trial.

Insanity

Bonney v. State, A08A1812

Appellant was found not guilty of aggravated stalking by reason of insanity. The trial court then conducted a hearing and civilly committed her. Appellant contends that she did not meet the criteria for civil commitment and that therefore she should have been released. Under state law, appellant, who was found not guilty by reason of insanity, is to be evaluated to determine whether she should be involuntarily committed (to either inpatient or outpatient services) or discharged. Here, the trial court found that appellant should be involuntarily committed to inpatient treatment. The criteria for finding inpatient commitment are satisfied upon a showing that the person is mentally ill and is one who presents a substantial risk of imminent harm to that person or others, as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury

to that person or other persons; or who is so unable to care for that person's own physical health and safety as to create an imminently life-endangering crisis, and who is in need of involuntary inpatient treatment. Evidence was presented that appellant suffers from a delusional compulsion which caused her to commit the criminal acts and that she also suffers from "schizophrenia —disorganized type." The Court found, after reviewing all the evidence that while it was a "close case," appellant had not met her burden of showing that she should be discharged.

Speeding; Evidence

Chism v. State, A08A2415

Appellant was convicted of speeding. She contended that the trial court erred in admitting evidence of the speed detected through a laser device. The court held that the only foundation required for the entry of evidence of speed obtained by a laser detection device is the certified copy of the DPS's list of approved laser speed detection devices. Here, that foundation was met by the State's tendering of the 2007 and 2003 administrative orders approving the use of the Pro Laser III as a speed detection device. Appellant also contended that her conviction was barred by the statute of limitations. The Court, however, held that prosecution "commences" when a charging instrument, such as an accusation, indictment, or Uniform Traffic Citation ("UTC"), is issued. Since appellant was issued UTC's on the day she was stopped for speeding, no violation occurred.

DUI; Search & Seizure

McGlon v. State, A08A1994

Appellant was convicted of DUI. He argued that the trial court erred in denying his motion to suppress. The evidence showed that appellant was stopped at a roadblock. Appellant argued that the state failed to prove that his stop occurred during an authorized roadblock because the state failed to prove when he was stopped and failed to show the duration of the roadblock. The Court disagreed. The evidence showed that the roadblock was authorized for June 9 beginning at 8:00 and that the roadblock began at that time. The Intoxilyzer report indicated that appellant committed a violation on June

9 at 8:17. Thus, the Court held, even without evidence establishing the exact ending time for the roadblock, the evidence was sufficient to show that appellant was stopped 17 minutes after the roadblock began. The trial court, therefore, was authorized to find that appellant was stopped within the time period for which the roadblock was authorized and did not err in denying his motion to suppress.

Motor Vehicle Theft

Harris v. State, A08A2157

Appellant was convicted of motor vehicle theft after he stole a riding lawn mower. He contended that the evidence was insufficient to support his conviction because a riding lawn mower is not a "motor vehicle" under OCGA § 16-8-12 (a) (5) (A). The Court noted that it had not specifically addressed the issue of whether a lawn mower may be classified as a "motor vehicle." It found that a four-wheeler and a self-propelled tractor are "motor vehicles" as defined by OCGA § 40-1-1 (33), but that a skid steer is "special mobile equipment" as defined by OCGA § 40-1-1 (59) and was not a "motor vehicle." A golf cart is both a "vehicle" under OCGA § 40-1-1 (75) and a "motor vehicle" under OCGA § 40-1-1 (33), because it is a device in which a person may be transported upon a highway, and it is self-propelled. Thus, the Court determined, while a riding lawn mower, unlike a golf cart, is not a device in which a person may be transported upon a highway, it is a self-propelled vehicle, more analogous to a tractor and a four-wheeler than to a skid steer. Accordingly, the Court held that a riding lawn mower is a self-propelled vehicle within the definition of OCGA § 40-1-1 (33), and that the jury was authorized to convict appellant of motor vehicle theft.

Jury Charges

Wilcox v. State, A08A2135

Appellant was convicted of hijacking a motor vehicle and possession of a firearm during the commission of a felony. He contended that the trial court did not adequately respond to the following question posed by the jury during its deliberations: "If Wilcox did not have knowledge that the gun was present in the car, is that considered possession?" The record showed that the attorneys and trial court all presumed the question related to the offense of

possession of a firearm during the commission of a felony, although possession of a firearm is also an essential element of hijacking a motor vehicle. The State suggested a re-charge on actual and constructive possession but defense counsel objected. The trial court finally gave an agreed upon instruction as follows: "[A] person commits the offense of possession of a firearm during the commission of a crime when the person has on or within arm's reach of his person a firearm during the commission of any crime against or involving the person of another and which crime is a felony. . . . [A]rmed robbery is a felony." Appellant argued that the trial court should have simply answered the question in the negative, or recharged the jury on the definition of hijacking a motor vehicle, or given an instruction on actual and constructive possession.

When a jury requests the court to re-charge them on any point, it is the court's duty to do so. It is further the obligation of the court to instruct the jury in plain, clear language. A court is not required to engage in a question and answer session with the jury or instruct the jurors individually on how to apply the law to the facts. Thus, it might not have been an error for the court to answer the jury's questions directly, that is, without relying on a pattern charge. However, the charges as repeated were legally sufficient. Appellant also failed to demonstrate that the court abused its discretion in failing to recharge the jury on the crime of hijacking a motor vehicle because the original charge defined possession of a firearm. Finally, appellant was precluded from arguing that the court failed to re-charge on constructive and actual possession because he objected to it.

Statements

Henry v. State, A08A2119

Appellant was convicted of statutory rape. He contended that his confession and consent to DNA testing were not freely and voluntarily made because they were induced through deception by the interviewing officers. The evidence showed that when the officers interviewed appellant, they told him of the allegations of the 12-year-old victim that he had forcibly raped her and fathered her child. Appellant contends that he was deceived because he had no idea that he was being investigated for statutory rape as he was

subsequently indicted; that he was under the impression that the police wanted to know whether he had forcibly raped the victim; and that he had discerned that the police wanted a DNA sample to determine merely whether he was the child's father, which under some circumstances is not evidence of any crime. The Court found that the officers had not misrepresented the victim's status and that appellant was told that the victim had alleged that appellant raped her and fathered her child. Although forcible rape carries a higher penalty than that for statutory rape, the trial court was authorized to find that no promise, express or implied, was made to appellant that he would face a rape charge only if the investigation revealed he had committed forcible rape.

Appellant also contended that the trial court erred by not employing the explicit nine-factor analysis enunciated in *Riley v. State*, which must be applied when a court is faced with determining the voluntariness of juvenile confessions given outside the presence of the juveniles' parents. Here, the Court found, appellant may have been 17 years old at the time of the incident, but he was 18 when he was interviewed. Therefore, he was an adult and the *Riley* factors were not applicable.

Juveniles

In the Interest of P. S., A08A2095

Appellant appealed from an order denying his motion to modify his sentence, arguing that the juvenile court erred in determining that it did not have authority to modify the commitment order. In 2005, Appellant was sentenced to 24 months in the custody of the Department of Juvenile Justice. The sentence was specifically ordered to begin when appellant was released from restrictive custody on any existing order. When appellant moved after two years to have his sentence modified and reduced, the juvenile court denied his motion, concluding that OCGA § 15-11-40 (b) prohibited modification of the commitment order because he was in the physical custody of the Department. Appellant argued that OCGA § 15-11-40 (b) did not apply because he had not yet begun serving his sentence for the commitment order he sought to modify (appellant was still serving another sentence from a previous order). The Court disagreed. OCGA § 15-11-40 (b) sets forth the grounds for modification of juvenile court orders and

provides that an "order of the court may also be changed, modified, or vacated on the ground that changed circumstances so require in the best interest of the child, except an order committing a delinquent child to the Department of Juvenile Justice, after the child has been transferred to the physical custody of the Department of Juvenile Justice, or an order of dismissal." Applying this statute, the juvenile court's authority to modify the commitment order turns on whether appellant had been transferred to the custody of the Department. Here, it was undisputed that the Department had physical custody of appellant. Therefore, the juvenile court correctly determined that it was without authority to modify appellant's sentence.

Impeachment; Closing Arguments

Whatley v. State, A08A1866

Appellant was convicted of obstruction of a police officer, simple battery against a police officer, and riot in a penal institution. Appellant challenged the trial court's denial of his motion for a new trial, alleging that the trial court erred in allowing the state to impeach each of his defense witnesses with evidence of their prior convictions without following the requirements of OCGA § 24-9-84.1 (a) and in denying his motions for a mistrial during closing arguments. The evidence showed that appellant, an inmate in a county jail, got into an altercation with a jailer resulting in the charges for which he was convicted. During the trial, appellant called five defense witnesses, all of whom were fellow inmates. The prosecutor was allowed to impeach these witnesses with their various criminal pasts over the objection of appellant. OCGA § 24-9-84.1 (a) (1) provides that, for the purpose of attacking the credibility of a witness: "Evidence that a witness has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment of one year or more . . . if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the witness." After reviewing the transcript, the Court held that the trial court erred by expressly refusing to consider the balancing test it was required to apply under OCGA § 24-9-84.1 (a) (1). However, the Court found no reversible error under the facts of this case. Specifically, in

order to exclude the evidence of each witness' convictions pursuant to OCGA § 24-9-84.1 (a) (1), appellant would have had to show that the probative value of admitting the evidence outweighed its prejudicial effect to the testifying witness. But, no evidence indicated that such admission would have resulted in any prejudice. The witnesses were presented by appellant as fellow inmates at the jail, and no prejudice to either the witnesses or appellant resulted from the jury discovering the nature of the crimes that the witnesses had committed prior to being incarcerated. Thus, any error was harmless.

Appellant also argued that the trial court erred in failing to grant a mistrial after the prosecutor, in closing arguments, stated that the jury's verdict "will be known at the jail" because the statement was inflammatory and prejudicial. The trial court gave a curative instruction, telling the jury that they were "not responsible for the result of their verdict" and that "[t]heir job is to determine [appellant's] guilt or innocence . . ." A mistrial will be granted based on improper closing arguments only when it is clear that the action taken by the trial court did not eliminate the statement from the jury's consideration. Under this standard of review, the Court held, appellant was not entitled to a mistrial.

Prior Consistent Statements

Connelly v. State, A08A2253

Appellant was convicted of numerous counts of rape, incest, and child molestation of his daughter and stepdaughter. He argues that the trial court erroneously allowed the State to bolster the testimony of his stepdaughter by presenting inadmissible hearsay statements she made to a police officer in a pre-trial interview. A witness's prior consistent statement is pure hearsay evidence which cannot be admitted merely to corroborate the witness, or to bolster the witness's credibility in the eyes of the jury. However, if a witness's veracity has affirmatively been placed in issue, or a witness is alleged to have been motivated or influenced to testify falsely, his or her prior consistent statement may be introduced only if the prior statement was made before the alleged motive or influence came into existence. Appellant's defense was that the stepdaughter was motivated to testify falsely against him because she was a vindictive person who had made false

allegations of sexual misconduct against him for years prior to the present allegations. Thus, the Court found, the stepdaughter's pre-trial statements to law enforcement were made after the alleged motive for the false testimony came into existence, and the trial court erred by admitting the statements. Nevertheless, the Court concluded, no reversal was required under the facts of this case. When erroneously admitted hearsay is the prior consistent statement of a testifying witness and is a statement repetitive of that to which the witness has already testified, the error is reversible if it appears likely that the hearsay contributed to the guilty verdict. Here, however, the State's case was not based primarily on the testimony of the stepdaughter, whose ability to testify about the charged offenses was seriously compromised by her mental and physical handicaps. Instead, it was based primarily on the testimony of appellant's daughter, who not only testified that appellant raped and molested her, but also testified that she saw him commit the charged rapes against his stepdaughter. Considering this evidence, along with other incriminating evidence, the Court found the erroneous admission of the stepdaughter's pre-trial statements was harmless.

Search & Seizure; Child Testimony

Driggers v. State, A08A1903

Appellant was convicted of aggravated sodomy and aggravated child molestation. He contended that the trial court erred in denying his motion to suppress and allowing the victim's psychologist to remain in the courtroom while the victim testified. The evidence showed appellant, his girlfriend and the girlfriend's son, the victim, lived in an outbuilding of the landlord. After the victim was removed from the home, appellant and the victim's mother moved to Florida in December. In January, the landlord sent appellant a letter advising that neither he nor the victim's mother were to return to the outbuilding. The water was cut off to the outbuilding and the propane tank was not re-filled. In March, the landlord sent a second letter advising appellant that the outbuilding was going to be demolished and that he had thirty days to remove his belongings from the building. Appellant did not respond to either letter and never returned to the outbuilding for his belongings. As a result,

the landlord entered the outbuilding in April and began bagging up trash to discard and boxing up some of the items to store in preparation for the demolition. When certain items were discovered, the landlord notified law enforcement. An investigator then obtained consent from the landlord and searched the outbuilding. The Court held that a defendant who abandons seized property lacks standing to challenge the validity of the search and seizure. Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts. The issue is whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search. Here, the Court found, appellant had abandoned the property.

Appellant also argued that by allowing the psychologist to stay in the courtroom, the trial court violated OCGA § 17-8-54. The record showed that when the victim took the stand to testify at trial, the trial court cleared the courtroom of all spectators, with the exception of the victim's psychologist, who remained in the courtroom during the testimony. The Court held that "the purpose of [OCGA § 17-8-54] is to protect the interest of the child witness, not the defendant, and failure to follow the statute does not violate the defendant's rights." Moreover, there is no evidence in the record that the psychologist improperly influenced the testimony of the victim. Therefore, the Court held, appellant "failed to assert a valid basis for reversal."

Evidence

Weems v. State, A08A2013

Appellant was convicted of trafficking in cocaine and possession of a firearm during the commission of a felony. He contended that the trial court erred in admitting certain evidence at trial. First, appellant contended that an investigator's testimony concerning alleged drug sales that occurred at the residence a week before the execution of the search warrant should have been excluded because he was not charged with these offenses and the prosecutor did not follow the rules regarding similar transactions. The evidence showed that the investigator was an undercover officer to who

appellant tried to sell crack the week before the search warrant. The investigator declined appellant's offer and then observed appellant make apparent hand-to-hand sales to others. The Court held that the testimony concerning the previous drug sales was relevant and material to the drug trafficking and firearm charges to establish appellant's connection to the residence and to the large amount of cocaine seized from that location. Also, because the testimony was evidence of the circumstances surrounding the issuance and execution of the search warrant, the investigator's testimony was not similar transaction evidence, and so the state was not required to comply with the procedural rules set forth in USCR 31.3.

The evidence showed that during the execution of the warrant, a receipt from a locksmith bearing appellant's name was found in the residence. Appellant contended the trial court should have excluded the locksmith receipt because the receipt constituted inadmissible hearsay. As a fundamental rule, the definition of hearsay does not include out-of-court statements which are not offered as proof of the facts asserted in such statement, but are offered merely as proof that such a statement was made. Assuming that the proof is limited to merely showing that the statement was made and not as evidence of the truth of the fact asserted in the statement, the statement is admissible as original evidence and does not concern the hearsay rule. Here, the Court held, the receipt was not offered as proof of what was asserted therein—that appellant had a key made for a vehicle—but as evidence that a piece of paper with his name on it was found in the same residence where the cocaine and firearms were located, thereby linking him circumstantially to the residence and the contraband. As such, the receipt was properly admitted as original evidence.

The evidence also showed that during the execution of the warrant, several people came up to the residence asking for appellant by his nickname. Appellant contended that this testimony was also inadmissible hearsay. However, the Court held the statements regarding appellant's nickname were verbal acts not introduced for their truth but rather to connect appellant to the residence and the cocaine seized from that location. The trial court therefore committed no error in allowing the investigator to testify about those statements.