

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 16, 2007

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THIS WEEK:

- **Sentencing- Recidivist**
- **Rule of Lenity**
- **Discovery- Death Penalty Case- Criminal Justice Act of 2005**
- **Withdrawal of Guilty Plea for Ineffective Assistance of Counsel**
- **Character of Defendant**
- **Expert Opinion**
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SUPREME COURT DECISIONS

Sentencing- Recidivist

Butler v. State, S06A0786, 281 Ga. 310 (2006)

The Supreme Court granted certiorari in this case to determine whether the Court of Appeals erred in affirming the trial court's order sentencing appellant to life without parole as a recidivist under O.C.G.A. § 16-13-30 (d) and O.C.G.A. § 17-10-7 (c). On July 22, 1994, appellant sold cocaine to an undercover police officer and was subsequently indicted. The record shows that the State filed notice of intent to seek recidivist punishment pursuant to the general recidivist statute, O.C.G.A. § 17-10-7 (c), and the specific recidivist statute, O.C.G.A. § 16-13-30 (d), for persons with prior felony convictions who are convicted of violating O.C.G.A. § 16-13-30 (b). In March of 1996, appellant was convicted, and the State introduced certified copies of appellant's three prior convictions for sale of cocaine during sentencing. Under O.C.G.A. § 16-13-30 (d)

in effect at the time the offense was committed, life imprisonment was the only punishment prescribed for a defendant with one or more prior felonies. The trial court also applied the provisions of O.C.G.A. § 17-10-7 (c), which provides that upon conviction of a fourth felony offense that the defendant serve the maximum sentence given by the judge without parole. Thus, the trial court sentenced appellant to life without the possibility of parole.

Appellant argues that only the specific recidivist statute, O.C.G.A. § 16-13-30 (d), applied at the time of his offense because the Legislature did not indicate its intent for the general recidivists provisions in O.C.G.A. § 17-10-7 to prevail over the specific statute until July 1, 1996, the effective date of the amendment to O.C.G.A. § 16-13-30 (d) that expressly references O.C.G.A. § 17-10-7. Appellant's argument relies on the traditional principle that "a specific statute will prevail over a general statute, absent any indication of a contrary legislative intent." The State countered by arguing that the Legislature had previously expressed its intent that O.C.G.A. § 17-10-7 prevail over specific recidivist statutes in the language of O.C.G.A. § 17-10-7 (e). Subsection (e) provides that O.C.G.A. § 17-10-7 is *supplemental* to other provisions relating to recidivious offenders.

The Court reviewed the legislative history of O.C.G.A. § 17-10-7, and found that in 1994 the Legislature struck O.C.G.A. § 17-10-7 in its entirety. In its place the Legislature enacted the current version of O.C.G.A. § 17-10-7 which includes subsection (e). The Supreme Court concluded that the Legislature intended that after July 1, 1994 the general recidivist provisions in O.C.G.A. § 17-10-7 supplement all existing specific recidivist

provisions, including the version of O.C.G.A. § 16-13-30 (d) in effect on July 22, 1994, the date of appellant's offense. Therefore, the Court of Appeals properly affirmed the order of the trial court sentencing appellant to life without parole.

Rule of Lenity

Banta v. State, S06A2032 (02/05/07)

Appellant appeals his conviction for felony false statement to a governmental agency, O.C.G.A. § 16-10-20, for which he received a sentence of five years to serve. On appeal, appellant argues that he should have been sentenced as for a misdemeanor. Appellant asserts that his act met the definition of misdemeanor obstruction of a police officer under O.C.G.A. § 16-10-24 (a). The rule of lenity applies when a statute, or statutes, establish different punishments for the same offense, and provides that the ambiguity is resolved in favor of the defendant, who will then receive the lesser punishment. The rule does not apply, however, when the statutes are not ambiguous. In this case, after applying the traditional canons of statutory construction, the Supreme Court found that nothing in O.C.G.A. § 16-10-20 rendered it ambiguous. The Court wrote that "simply put the two statutes do not define the same offense." Obstruction of a police officer under O.C.G.A. § 16-10-24 (a) may be violated in numerous ways and does not require deception or deceit. On the other hand, the State must establish a deceitful act in order to prove that O.C.G.A. § 16-10-20 has been violated. Furthermore, the State must prove that the deceit concerned a material fact, an element not required in establishing the offense of misdemeanor obstruction of a police officer. The two defined crimes do not address the same criminal conduct. Therefore, the rule of lenity did not apply.

Discovery – Death Penalty Case – Criminal Justice Act of 2005

Stinski v. State, S06A1455 (02/05/07)

This case came before the Supreme Court for interim review. In June of 2002,

appellant filed written notice of his election to participate in reciprocal discovery pursuant to O.C.G.A. § 17-16-1 et seq.. While appellant's pre-trial motions were pending, the Criminal Justice Act of 2005 amended the discovery procedure. Appellant argues that the amended discovery procedure is unconstitutional and, alternatively, that he should be permitted to opt out. The Supreme Court first addressed appellant's argument that he should be permitted to opt out. The act specified that the amendments "shall apply to all trials which commence on or after July 1, 2005." In view of the General Assembly's clear intent, the Court held that the amendments apply to appellant's case because his trial has not yet begun. Furthermore, the Court held that the appellant's election to participate in reciprocal discovery continues to be binding upon him.

The Supreme Court then addressed appellant's argument that the amended discovery procedure is unconstitutional because it imposes on a defendant certain discovery burdens without imposing reciprocal burdens on the State. Specifically, appellant challenges O.C.G.A. § 17-16-4 (b) (3), O.C.G.A. § 17-16-4 (b) (3) (B), and O.C.G.A. § 17-16-4 (b) (3) (C), which requires a defendant to produce certain specific types of evidence and disclose the identity of witnesses, that a defendant intends to introduce into evidence or call in the sentencing phase. Appellant urges that a criminal defendant's highly specific duties of disclosure with regard to mitigation evidence exceed that imposed on the State with regard to non-statutory aggravating evidence. Citing O.C.G.A. § 17-16-2 (f) and reading the entire discovery procedure as a whole, the Supreme Court concluded that the State's duties are fully reciprocal. Appellant further argued that even if the State's duties are facially reciprocal to his, his duties are still greater due to the vastly unrestricted scope of mitigation evidence. The Supreme Court found the scope of non-statutory aggravating evidence to be similarly broad. The Court held that any difference in the scope of mitigating evidence and the scope of non-statutory aggravating evidence is too minimal to be of constitutional significance.

COURT OF APPEALS DECISIONS

Withdrawal of Guilty Plea for Ineffective Assistance of Counsel

Muckle v. State, A06A2391, (02/01/07)

Appellant entered a guilty plea to charges of kidnapping, armed robbery, possession of firearm during commission of a felony, and possession of a firearm by a convicted felon. The prosecutor gave a factual basis for the plea and the court informed appellant of his charges, the possible sentences, and the rights that were being waived by entering into a guilty plea. The appellant stated that he understood, and then agreed that he was entering the plea freely, voluntarily, and without force or threats. Appellant further stated that he was satisfied with his lawyer's representation of him. Appellant later moved to withdraw his guilty plea on the basis that his motion for appointment of new counsel was still pending at the time he entered his plea. At the motion hearing, appellant testified that he felt coerced into entering into the guilty plea because the prosecution represented that the plea offer was only valid for that day and his only other alternative was to proceed to trial with an unprepared lawyer representing him. The trial court denied the motion and appellant challenged the trial court's judgment. In affirming the trial court's denial of appellant's motion, the Court of Appeals noted that although the State bears the burden of proving that a defendant's guilty plea is knowing, intelligent, and voluntary, when the basis of the motion for withdrawal is ineffective assistance of counsel, the defendant must show that but for the deficient representation there would have been a reasonable probability that defendant would have proceeded to trial. Hill v. State, 267 Ga. App. 357, 599 S.E.2d 307(2004). Because the appellant could not meet that burden, the trial court properly denied his motion to withdraw his guilty plea.

Character of Defendant

Harris v. State, A06A1904 (02/01/07)

Appellant was convicted of rape, aggravated assault, and possession of firearm

by a convicted felon. On appeal, appellant challenges the admission of testimony by a police detective that he had previously been incarcerated in prison. The victim testified that appellant had learned that the victim and her ten-year old daughter had filed a complaint with the police regarding the appellant allegedly fondling the daughter's buttocks. Appellant appeared at the victim's residence armed with a firearm, forced the victim to have sex with him at gun-point, and informed the victim that he was not going back to jail. The State's theory of the case was that appellant was attempting to scare the victim so that she would no longer participate in the investigation involving her daughter. On cross-examination, the defense attempted to discredit the victim's version of events, trying to show that her account was a fictionalized attempt at revenge for appellant's relationship with another woman. The State elicited testimony from a police detective that appellant had previously been in prison. The trial court overruled appellant's objection and motion for mistrial, but instructed the jury that the testimony could only be considered for appellant's motive and victim's credibility. In affirming the lower court's ruling, the Court of Appeals held that because the testimony was relevant to show appellant's motive, it was not inadmissible because it may have incidentally placed appellant's character at issue. Napier v. State, 276 Ga. 769, 583 S.E. 2d 825 (2003). Because the evidence was relevant for purposes other than character, and the jury was so instructed, the trial court was correct in admitting the evidence and overruling appellant's objection and motion for mistrial.

Expert Opinion

Harris v. State, A06A1904, (02/01/07)

Appellant was convicted of rape, aggravated assault, and possession of firearm by a convicted felon. On appeal, appellant challenges the admission of certain opinion testimony from a state's witness who was tendered as an expert on rape recovery. The victim testified at trial. On cross-examination, the defense suggested that the allegations of rape were fabricated in order to seek revenge

on appellant. The State offered the testimony of an expert on rape recovery who opined that it is a common misconception that allegations of rape are frequently fabricated for the purpose of revenge. The Court of Appeals held that this testimony was improperly admitted as it went to the ultimate issue of whether the victim was fabricating her testimony. The Court reasoned that it was not beyond the ken of the average juror to determine whether the victim's testimony should be believed or not. Therefore, expert testimony on the topic is not admissible. However, the Court determined that a retrial was not warranted in the case because it was "highly probable that the error did not contribute to the judgment."

Restitution

In the Interest of R.V. A06A2333, (01/31/07)

Appellant was adjudicated delinquent for the offense of burglary and was ordered to pay an amount of money to the victim after a restitution hearing. Appellant challenges the judgment of the juvenile court, contending that the court failed to include required findings of fact, and that the court relied on improper evidence of damages. In vacating the judgment of the juvenile court, the Court of Appeals held that the juvenile court failed to make written factual findings showing that the court considered factors enumerated by O.C.G.A. § 17-14-10. Furthermore, the Court held that the trial court relied almost solely upon the testimony of the victim as to original cost or replacement cost for the items damaged. A court cannot simply rely on testimony of the victim as to the original cost or replacement cost for damaged property. Gray v. State, 273 Ga. App. 747, 615 S.E.2d 834 (2005); Cardwell v. State, 225 Ga. App. 337, 484 S.E. 2d 38 (1997). Therefore, the judgment of restitution was vacated and remanded for a new hearing.