Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 27, 2009

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THIS WEEK:

Confrontation; Hearsay

Deloatch v. State, A08A2436

Appellant was convicted of aggravated assault and armed robbery. He argued that his Sixth Amendment right to confront witnesses was violated when the trial court permitted the testimony of an alleged accomplice in two similar transactions. The Court agreed and reversed. When the accomplice was called to testify, he repeatedly invoked his 5th Amendment rights when asked by the state or defense counsel about the two similar armed robberies. Specifically, the state was allowed to ask him leading questions concerning appellant's involvement with the two similars (e.g. "isn't it true that the two armed robberies were [appellant's] idea?") to which the accomplice invoked the 5th. The Court found that appellant's right to confrontation was violated because this procedure permitted by the trial court placed before the jury the content of the accomplice's statement, from which the jury could infer that since appellant committed the two armed robberies with the accomplice, he committed the armed robbery at issue at trial. Although the trial court did instruct the jury that it was not to consider the questions asked by the state or the responses as evidence in the case, unless a statement is otherwise directly admissible against the defendant, the Confrontation Clause is violated by the admission of a non-testifying co-defendant's statement which inculpates the defendant by referring to the defendant's name or existence, regardless of the existence of limiting instructions.

Appellant also contended that the trial court improperly admitted hearsay evidence. At trial, an officer called as a similar transaction witness was allowed to testify that based on a description he received from a witness on the scene he concluded that appellant was a suspect in one of the similar armed robberies. He was also allowed to testify that he received phone calls from anonymous sources stating that appellant committed the similar robbery. The Court held that it was error to admit evidence of hearsay information provided by an anonymous source in order to explain police conduct.

Rule of Sequestration

Epps v. State, A08A2178

Appellant was convicted of three counts of armed robbery. He contended that the trial court improperly allowed the investigating detective to remain in the courtroom throughout the trial. The record showed that the trial court granted the state's request that

the detective be exempt from the rule to assist the prosecutor in the orderly presentation of evidence and that he not be required to testify first because then the evidence would "be out of sequence." The Court found that where the state indicates that the lead detective is needed in the courtroom and that requiring him to testify first would interfere with the orderly presentation of evidence, the trial court has discretion to except the detective from the rule of sequestration. Furthermore, although appellant argued that the detective could have testified first without hindering the state's case, the trial court did not abuse its discretion in rejecting this claim and permitting the detective to remain in the courtroom.

Jury Charges

Smallwood v. State, A08A2314

Appellant was convicted of burglary and possession of a firearm by a convicted felon. He argued that the trial court erred in charging the jury on impeachment. The trial court instructed the jury as follows: "To impeach a witness is to prove that a witness is unworthy of believe. A witness may be impeached . . . [b]y proof that the witness has been convicted of a crime of moral turpitude. A crime of moral turpitude is defined as a felony." Appellant contended that use of the phrase "moral turpitude" was in error and that the trial court should have charged the jury that "[a] witness may be impeached by . . . proof that the witness has been convicted of a felony, that is, a crime punishable by imprisonment of one year or more." The Court, however, found that since the trial court clearly stated that a felony conviction can be offered to impeach a witness, there was no error in the charge on impeachment.

Appellant also contended that the trial court erred in its charge on prior consistent statements. The trial court charged the jury as follows: "Should you find that any witness has made a statement prior to the trial of this case that is consistent with that witness's testimony from the witness stand, and such prior inconsistent statement is material to the case and the witness's testimony, then you are authorized to consider the other statement as substantive evidence." The Court found that the italicized word was a slip of the tongue and that the correct charge as written was taken to the jury room. Moreover, the Court found, an instruction on prior inconsistent statements is a truism because the jury may consider all the words it hears as substantive evidence. In fact, the Court stated, the better practice would be to give no charge at all on prior consistent statements and leave that matter to the arguments of counsel.

Similar Transactions

Pareja v. State, A08A1667

Appellant was convicted of child molestation. He contended that the trial court erred in admitting similar transaction evidence which was not allegedly similar and which occurred 26 years prior to the conviction. The Court disagreed. First, the Court held that similar transactions need not be identical to be admitted, and in cases involving sexual offenses, the rule is to be liberally construed. The sexual molestation of young children, regardless of sex or type of act, is sufficient similarity to make such evidence admissible. Thus, the evidence here was properly admitted because both the crime for which he was on trial and the similar involved an underage female in his home. Moreover, the gap in time between the similar and the trial did not render the similar inadmissible as a matter of law. The passage of time is but one factor to be considered and although the Georgia Supreme Court has held that a lapse of time of 31 years is too remote, similar transaction evidence has been admitted in other cases involving lapses of time of over 20 years. Thus, the trial court did not abuse its discretion in admitting the evidence.

Conspiracy; Lesser Included Offenses

King v. State, A08A2125

Appellant appealed from the trial court's denial of his motion to set aside a void sentence. The record showed that appellant and a co-defendant were jointly indicted for possession of cocaine with intent to distribute. A jury convicted him of the lesser included offense of conspiracy to possess cocaine with intent to distribute. Appellant contended that his sentence was void because it was based on a finding of guilt for an offense for which he was not indicted. The Court stated that where a jury acquits a defendant of the object of the conspiracy, the alleged conspiracy is a separate crime and must normally be charged in the indictment. However, under the specific circumstances in this case, the offense of conspiracy was as a matter of fact a lesser-included offense to the principal offense of possession with intent to distribute, because the indictment accused appellant in a manner that included the conspiracy offense, and because the evidence did not demand a finding that the full possession offense was completed. Therefore, the jury was authorized to find appellant guilty of conspiracy as a separate, lesser offense included in the indicted offense of possession with intent to distribute. Accordingly, the trial court did not err in denying appellant's motion.

Discovery

Hinds v. State, A08A1743

Appellant was convicted of first degree cruelty to children. She contended that the trial court erred in allowing a DFCS caseworker to testify about her interview with her. The state produced the caseworker's written report and her notes from the DFCS files in response to appellant's pre-trial discovery demands. After trial began and as the caseworker was preparing to testify, however, she remembered more than what she had written down about her interview with appellant. The caseworker notified the prosecutor who in turn made the court and appellant aware of these additional recollections. Appellant contended that the information recalled by the caseworker constituted a "statement of a witness" under OCGA § 17-16-1. The Court held that this information did not involve a written statement, a written summary of a statement, or a contemporaneous recording of a statement by the caseworker. Rather, it concerned additional recollections that had not been reduced to writing. These recollections did not constitute a "statement of a witness" under OCGA § 17-16-1 (2), and the state was not obligated to produce this information prior to trial under OCGA § 17-16-7.

Appellant also contended that the failure to produce this information prior to trial violated OCGA § 17-16-4 (a) (1), which imposes upon the state disclosure requirements for certain of a defendant's statements that are "within the possession, custody, or control of the state or prosecution." But, the Court held, the record showed that the state, upon learning of these recollections, promptly informed appellant of them and offered to make the

caseworker available for interview by defense counsel, and appellant had the opportunity at trial to cross-examine the failure to include the additional information in her written report. Therefore, even assuming that OCGA § 17-16-4 (a) (1) applied to statements made by appellant to the caseworker, the trial court did not abuse its discretion in the admission of this testimony.

Effective Assistance of Counsel

Hills v. State, A08A2338

Appellant appealed from the denial of his motion to withdraw his guilty plea to the rape of a child, arguing that he received ineffective assistance of post-conviction counsel at the hearing on his motion to withdraw the plea. The Court found that a defendant has a constitutional right to effective assistance from his post-conviction counsel during a hearing on his motion to withdraw his guilty plea. Allegations concerning the violation of the constitutional right to counsel should be made at the earliest practicable moment. Appellant could not challenge the effectiveness of the counsel he received at the plea withdrawal hearing prior to appeal, because his allegedly ineffective post-conviction counsel continued to represent him through the filing of a notice of appeal and could not have ethically presented a claim that he had provided appellant with ineffective assistance. Thus, the Court found, appellant properly asserted for the first time in this appeal that his post-conviction counsel provided ineffective assistance by failing to call witnesses, other than himself, at the hearing on his motion to withdraw the guilty plea. Because no hearing had been held on post-conviction counsel's ineffectiveness, and because the Court could not determine from the record that appellant was unable to show ineffectiveness, the Court vacated the order denying the motion to withdraw plea and remanded the case for an evidentiary hearing on this issue.

Jury Charges; Lesser Included Offenses

Paul v. State, A08A2058

Appellant was convicted of aggravated assault with intent to murder. He contended that the trial court erred by failing to charge the jury on the lesser included offenses of pointing a pistol at another, simple assault, and reckless conduct. Where even the slightest evidence shows that the defendant may be guilty of a lesser included offense, a requested charge on that offense must be given. But this rule does not obviate the necessity that the evidence actually warrant the requested charge. Where the evidence establishes either the commission of the completed offense as charged, or the commission of no offense, the trial court is not authorized to charge the jury on a lesser included offense. The Court held that the trial court did not err in refusing to give the lesser included offense charges. First, the evidence showed that if appellant committed a simple assault, it was done with a deadly weapon, making the crime an aggravated assault. Second, evidence that the victim tried to back up his car while nervously watching appellant extract a gun from his pocket, showed an apprehension of receiving a violent injury which precluded an instruction on pointing a pistol at another. Finally, a charge on reckless conduct was not warranted because the only inference that could have reasonably been drawn from the evidence was that in pointing the gun at the victim, appellant did so intentionally, not consciously disregarding a substantial and unjustifiable risk that his act or omission would cause harm or endanger the victim's safety.

Obstruction of an Officer

In the Interest of M.W., A08A2257, A08A2258

Appellants contended that their adjudication on the charge of felony obstruction of an officer pursuant to OCGA § 16-10-24 (b) must be reversed because the individuals who were assaulted were not officers protected by the statute. The evidence showed that at the time of the incident, appellants were in the custody of the Middle Georgia Wilderness Program, having been placed there by the Department of Juvenile Justice. The two "officers" obstructed were a team leader and a program manager of the MGWP. The Court found that the MGWP exists to effectuate the purposes of the DJJ, which is charged by law to "provide for the supervision, detention, and rehabilitation of juvenile delinquents committed to the state's custody." It therefore held that these individuals came within the ambit of OCGA § 16-10-24 (b) because they were "legally authorized persons" lawfully discharging their duties at the time of the incident.

In the Interest of D.S., A08A2297

Appellant contended that his adjudication on the charge of felony and misdemeanor obstruction of an officer pursuant to OCGA § 16-10-24 (b) must be reversed because the officer was not engaged in the lawful discharge of his official duties. The evidence showed that on the night of the incident, two city police officers were working as security guards at a local restaurant. The restaurant offered dancing from 11:00 p.m. to 3:00 a.m. for persons eighteen and over. The officers were responsible for checking identification at the door and determining who could be served alcohol. The owner also requested that an officer periodically check the restrooms because they had been used for drug transactions. The Court found that at the time the officer interacted with appellant, the officer was in the lawful discharge of his official duties because the officer was engaged in checking the identification of patrons to ensure that they were 18 years old or older as required by the restaurant owners. The officer recognized appellant and suspected that he was under the restaurant's age-limit. Thus, he also had a particular and objective reason to suspect appellant of being an unruly child, such that the officer was authorized to conduct a brief investigative stop to determine appellant's age.

Authority to Arrest

Griffis v. State, A08A2244

Appellant was convicted of DUI, laying drags and reckless driving. He contended that the arresting officer lack authority to arrest him. The evidence showed that a city officer was on line in a drive-thru lane at a restaurant in an unincorporated part of the county. The defendant pulled in behind him and then began laying drags in the lane. The officer called for back-up and a county officer responded. While the county officer stood by, the city officer conducted an investigation of the defendant and eventually arrested him for DUI. The Court held that generally, a municipal police officer is authorized to investigate crimes and/or arrest suspects only for those infractions that occur within that officer's territorial jurisdiction. However, a law enforcement officer has authority to arrest a person accused of violating any law or ordinance governing the operation of a vehicle if the of-

fense is committed in his presence, regardless of territorial limitations. Thus, the city officer had authority to arrest because he observed appellant laying drags and upon investigation, driving under the influence. Furthermore, the Court stated, even if the city officer "should be considered a private citizen because he was off-duty at the time of the incident, our holding remains the same because a private citizen also is authorized to make an arrest if the offense is committed in his presence."

Search & Seizure

Solano-Rodriquez v. State, A08A2218

Appellant was convicted of trafficking in cocaine. He contended that the trial court erred in denying his motion to suppress. The evidence showed appellant was a passenger on a bus traveling through Georgia. The arresting officer conducted his encounter with the passengers when the bus was stopped for a bona fide, legally authorized safety inspection. When he first boarded the bus, the officer specifically advised passengers that they could leave the bus at any time and did not have to speak with him or comply with his requests. When he spoke to them generally, he did so from where the driver sat so as to not block the aisle. After addressing passengers from the front of the bus, he then made a conscious decision to begin his inspection at the back of the bus, again so that he would not block the aisle if passengers wanted to exit. The Court found that the officer's encounter with appellant was brief and non-threatening. He simply asked appellant two questions: Did a particular bag belong to appellant and would he give consent for the officer to look inside. Appellant answered yes to each question. The officer estimated that from the time he boarded the bus until the time he discovered the cocaine, no more than two minutes had elapsed. The Court held that from the evidence adduced, the trial court did not err in finding that no seizure of appellant occurred and that a reasonable person in appellant's position would have felt free to decline the officer's requests or otherwise terminate the encounter.

McKnight v. State, A08A1912

Appellant was convicted of possession of methamphetamine with intent to distribute. She contended that the trial court erred in denying her motion to suppress. The evidence showed that she was stopped for a broken windshield and a missing tag light. The officer noticed that she was exceptionally nervous and for that reason he asked for consent to search, which she granted. He then found the methamphetamine in her purse located in her car.

Appellant contended that since the officer's interest in searching the vehicle was predicated on her nervousness alone and not because he had a reasonable suspicion justified by specific articulable facts, the trial court erred in denying her motion. The Court, relying on *Hayes v. State,* 292 Ga.App. 724 (2008), found "that the current state of the law allows police to 'lawfully ask questions during the course of the stop about [criminal activity unrelated to the stop], so long as the questioning does not prolong the stop beyond the time reasonably required to complete the purpose of the traffic stop." This is true even if the officer has 'no basis for suspecting that a person detained at a traffic stop is engaged in criminal activity.' Thus, while [appellant] is correct that … suspicion based solely on her nervousness would not have been sufficient to continue to detain her after the stop concluded in order to search the vehicle, the fact that [the officer] elicited her consent before completion of and without unreasonably prolonging the initial stop is dispositive."

First Offender; Sex Offender Registry

Planas v. State, A08A2222

Appellant plead guilty to statutory rape. At the time of the offense, he was 18 years old and 19 when he entered his plea. The victim was 13 years old at the time of the offense. Appellant contended that the trial court erred in finding that he was ineligible for first offender status and for finding that he must register as a sex offender. The Court found that a trial court has discretion to sentence a defendant as a first offender, but that discretion is abused if the court refuses to consider first offender treatment based upon an erroneous expression of belief that the law does not permit the exercise of such discretion. Interpreting OCGA § 42-8-60 and OCGA § 17-10-6.2, the Court held that a defendant who commits statutory rape is excluded from first offender consideration only if the defendant was 21 years of age or older. Since it was undisputed that appellant was under 21 years old, the trial court erroneously concluded appellant was not eligible for first offender consideration.

However, the Court found that appellant must register as a sex offender. A person must register as a sex offender if, among other things, he or she is convicted on or after July 1, 1996 of "a criminal offense against a victim who is a minor." OCGA § 42-1-12 (e) (1). For convictions occurring after June 30, 2001, "criminal offense against a victim who is a minor" is defined broadly to include any criminal offense under Title 16 of the Georgia Code that consists of "[c]riminal sexual conduct toward a minor." OCGA § 42-1-12 (a) (9) (B) (iii). Statutory rape falls within the broad category of criminal sexual conduct toward a minor. While true that "conduct which is punished as for a misdemeanor or which is prosecuted in juvenile court shall not be considered a criminal offense against a victim who is a minor," OCGA § 42-1-12 (a) (9) (C), the statutory rape admitted to by appellant did not fit within this exception because appellant was 18 years old and the victim was 13 years old. Moreover, appellant was prosecuted in superior court, not juvenile court. Consequently, appellant would be required to register as a sex offender.

UTC; Accusation

Switlick v. State, A08A1611

Appellant was convicted of driving through a safety zone. He contended that the trial court erred in denying his motion to dismiss because the uniform traffic citation ("UTC") did not list his name in the correct order and did not contain a date for his initial court appearance. The record showed that the officer who cited appellant for driving through a safety zone transposed appellant's middle and last names on the UTC and the date of appellant's initial court appearance did not appear on his copy of the UTC. Thereafter, the State filed an accusation (also labeled an amendment to the UTC) signed by the county solicitor, listing appellant's name in the correct order. The Court held that the State's accusation was sufficient. Although OCGA § 17-7-71 (b) (1) provides that in misdemeanor cases "arising out of violations of the laws of this state, relating to . . . the operation and licensing of motor vehicles and operators[,] the defendant may be tried upon the [UTC] . . .,"

the same Code section allows misdemeanor cases to proceed "upon an accusation framed and signed by the prosecuting attorney of the court." Thus, the State was allowed to proceed with the case solely on the accusation signed by the solicitor. Furthermore, appellant had not shown that he was misled by the UTC to his prejudice. The record showed that even though the UTC did not contain the date of his first scheduled court appearance, he appeared at court on the date in question and at all court dates scheduled thereafter. Additionally, having personally received from the officer a copy of the UTC, which also contained his driver's license number, home address, and birth date, he was aware of the charge against him. Thus, he was not prejudiced by the transposition of his name on the UTC or by the lack of a court date. Accordingly, the trial court did not err in denying the motion to dismiss.

Statute of Limitations

State v. Campbell, A08A1721

The state appealed from the trial court's grant of the defendant's plea in bar. The trial court found that the alleged thefts from the defendant's employer, which occurred between Jan. 2000 and Dec., 2002 were barred by application of the four year statute of limitations because the defendant was not indicted until July, 2006. In so holding, the trial court found that although an audit of the defendant's employer's books discovered the thefts in Aug. of 2002, the state failed to call the defendant's supervisor who, with reasonable diligence, should have known that the thefts were and had been occurring.

The Court of Appeals reversed, finding that the trial court applied an incorrect legal standard. The Court held that a crime victim's knowledge of the crime is imputed to the state. However, the tolling period is not extinguished where the victim should have known of the crime, but when the victim had actual knowledge of the crime. Thus, the trial court's speculation that the alleged thefts "could have easily been noticed" was an incorrect standard and placed an undue burden on the state.