Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 12, 2010

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THIS WEEK:

- Felony Murder, Involuntary Intoxication
- Statements; Hope of Benefit
- Sentencing; O.C.G.A. § 17-10-10
- Cross-Examination; Eligibility for Parole
- Out-Of-Time Appeal
- Mistrial; Double Jeopardy
- Jury Charges; Mistake of Fact
- Kidnapping
- Jury Charges; Rule of Lenity
- Search & Seizure; Inventory
- Withdrawal of Guilty Plea; Merger
- DUI; Self-Incrimination
- Jury Charges; Coercion
- Search & Seizure
- Hearsay; *Crawford*

Felony Murder, Involuntary Intoxication

Guyse v. State, S09A1903

Appellant was convicted of felony murder and five counts of aggravated assault. The evidence showed that appellant, while intoxicated, chased one vehicle before ramming it from behind and then appellant deliberately turned his vehicle into oncoming traffic, barely missing two vehicles before slamming into a third vehicle, killing one passenger and permanently disabling another. Appellant contended that he was guilty of first degree vehicular homicide, but not felony murder. The Court disagreed. Felony murder does not require proof of malice or intent to kill. Thus, if the State proved appellant had the mental state necessary to support a conviction for aggravated assault against the one dead victim, it also satisfied its burden to prove the mens rea element of felony murder. An automobile can constitute an offensive weapon within the meaning of OCGA § 16-5-21 (a) (2) and the Court held, there was "no doubt" that appellant used his vehicle as an offensive weapon. Therefore, Appellant committed aggravated assault if he committed a simple assault with his vehicle in a manner likely to, or actually resulting in serious bodily injury. The Court held that appellant's act of deliberately swerving into oncoming traffic and hitting the victim's car provided sufficient proof of aggravated assault and thus his conviction for felony murder was upheld.

Appellant also argued that he was too drunk to form the intent necessary to commit aggravated assault and felony murder. The Court held that one cannot be convicted of a crime where, due to *involuntary* intoxication, he or she lacks sufficient mental capacity to distinguish between right and wrong in relation to the actus reus. Involuntary intoxication means intoxication caused by consumption of a substance through excusable ignorance, or the coercion, fraud, artifice, or contrivance of another person. OCGA § 16-3-4 (b) (1), (2). However, voluntary intoxication is not an excuse for any criminal act or omission, except in the extreme situation where the intoxication has resulted in the alteration of brain function so as to negate intent, and in such cases, the brain function alteration must be more than temporary. Here, there was no evidence of brain damage, temporary or permanent.

Statements; Hope of Benefit

Canty v. State, S09G1465

Appellant was convicted of criminal attempt to commit armed robbery and aggra-

vated assault. In *Canty v. State*, 297 Ga. App. 725 (2009), the Court of Appeals determined that the trial court did not err by denying appellant's motion to suppress his confession as involuntary and induced by an improper hope of benefit. The Supreme Court granted certiorari and reversed. The evidence showed that appellant was being held in jail on unrelated charges involving robbery and damage to property. Two detectives called him in for an interview regarding these charges. At one point, one detective asked if he knew anything about the attempted robbery for which he was subsequently convicted. Appellant first denied involvement, but the detective "advised him that if we could put every —if he was involved in any other incidences, that we could put everything together and that the DA's office could work it altogether as one charge rather than putting them as separate charges, which is what I referred to as the shorter time, rather than each —each incident being separated." Essentially, appellant could hope for a "shorter term." The Court held that it is evident that appellant was told much more than simply that his cooperation would be made known to the prosecution. He was told that confessing to the crime could result in a "shorter term," which is exactly the hope of benefit which is prohibited under Georgia law.

Sentencing; O.C.G.A. § 17-10-10

Rooney v. State, S09A1604

Appellant appealed from an order denying his motion to correct a void sentence. Specifically, he contended that his consecutive sentences were void because O.C.G.A. § 17-10-10 was unconstitutional. This statute provides as follows: "Where at one term of court a person is convicted on more than one indictment or accusation, or on more than one count thereof, and sentenced to imprisonment, the sentences shall be served concurrently unless otherwise expressly provided therein." The Court first denied appellant's contention that the statute was void for vagueness because generally, statutes which afford discretion to a sentencing court to impose consecutive sentences do not violate due process. Nor does the statute conflict with any specific sentencing provisions in Title 16. Appellant's argument that the statute violates the rule of lenity was also meritless. The Court held that the rule cannot itself render any statute unconstitutional and in fact, its application may render a statute constitutional. Citing *Apprendi v. New Jersey*, 530 U. S. 466, 120 SC 2348, 147 LE2d 435 (2000) appellant also argued that the statute violated the Sixth Amendment requirement that any fact exposing a defendant to a greater potential sentence must be found by a jury and not by a judge. However, the Court held, *Apprendi* does not apply here because the imposition of consecutive sentences did not depend on the finding of a statutorily prescribed fact. Moreover, even if OCGA § 17-10-10 (a) did require such factfinding, the Sixth Amendment would not mandate jury determination of any fact declared necessary to the imposition of consecutive, in lieu of concurrent, sentences. Appellant further argued that the statute violated his equal protection rights because whether similarly situated defendants receive consecutive or concurrent sentences depends on the particular sentencing court. But, the Court found, defendants sentenced under the statute are not a suspect class, physical liberty in this sentencing context, is not a fundamental right and the statute has a rational basis because discretion in fixing sentences furthers the goal of retaining some flexibility and individualized treatment at the punishment stage. Finally, the Court held that the statute does not violate the Eighth Amendment proscription against cruel and unusual punishment.

Cross-Examination; Eligibility for Parole

Manley v. State, S10A0136, S10A0137

Appellants were convicted of murder. They argued that the trial court erred by narrowly restricting their cross-examination of a co-defendant regarding the changes in her eligibility for parole resulting from the plea and sentencing deal she entered into with the State in return for her testimony and cooperation. The record showed that, pursuant to her plea and sentencing agreement, the co-defendant pled guilty to aggravated assault and received a sentence of 6 years in prison for her role in the crimes against the victim. This sentence, however, did not require her to serve any specific time in prison before she was eligible for parole consideration. On the other hand, if she had been convicted of murder like her co-defendants, she would have received a mandatory life sentence, and she would not become eligible for parole until she had served at least 30 years in prison. At trial, appellants were allowed to ask her about the length of her sentence as a result of the deal, but were not allowed to question her about any parole differential.

Citing Judge Nahmias' recent special concurrence in *Mikell v. State* , S09A1766 (February 1, 2010), the Court held that the prohibition against asking a witness about parole eligibility is not a bright line rule; simply because authority to grant parole rests with the Board of Pardons and Paroles and not the district attorney's office, does not mean that cross-examination about parole is irrelevant on the question of a witness's potential bias in testifying favorably for the district attorney. In some cases, the opportunity for earlier release from prison, even if not guaranteed, is an important consideration for a witness facing time behind bars and therefore is an appropriate subject for cross-examination. There will be cases where a significant difference in parole eligibility can be objectively shown under existing law and practice, notwithstanding the Parole Board's independence and discretion.

The Court held that this was one of those cases. The disparity in this case, eligibility for parole after 30 years of incarceration versus no required time served before eligibility, might have provided the testifying co-defendant with bias in favor of or motivation to assist the State. Accordingly, the trial court erred by denying appellants any chance to proffer evidence that she was aware of this disparity and, instead, summarily excluding any evidence of her parole. Moreover, under the facts of this case, the error was not harmless. Appellants were prevented from fully exploring the possibility that the co-defendant was biased in favor of the State due to her parole disparity, while, at the same time, the State was allowed to argue in its closing that she would spend six years in jail for her crimes. "This evidentiary whipsaw potentially mislead the jurors, and, as a result, requires that both convictions be reversed."

Out-Of-Time Appeal

Walsh v. State, A09A2231

Appellant was convicted of four counts of child molestation in 1997. His attorney filed a timely notice of appeal, but the costs for that appeal were never paid. As a result, his appeal was not sent to the Court of Appeals. After about 10 years, appellant sought

to find out about the status of his appeal. He eventually filed a motion for an out-of-time appeal which was denied without a hearing. The Court held that a defendant has the absolute right to file a timely direct appeal from a judgment of conviction and sentence. 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. It is the remedy for a frustrated right of 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. The Court remanded the case so the trial court may conduct the requisite inquiry as to who ultimately bore the responsibility for the failure to file a timely appeal. 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. In so holding, the Court rejected the State's contention that appellant slept on his rights by waiting 10 years before inquiry as to his appeal and as a consequence, he waived his right to a direct appeal.

Harwood v. State, A10A0031

Appellant appealed from the denial of his motion for an out-of-time appeal. The record showed that he was originally charged with malice murder and other crimes and the State sought the death penalty. Thereafter, he entered into a negotiated plea to voluntary manslaughter. A motion for an out-of-time appeal can be reversed only if the questions appellant seeks to raise on appeal may be resolved by facts appearing in the record. Moreover, the denial of a motion for an out-of-time appeal falls within the trial court's discretion, and may not be reversed absent an abuse of that discretion. Appellant raised three issues: (1) the State's notice of intent to seek the death penalty was untimely; (2) his re-arraignment "had no legal meaning," since it did not cure the State's procedural error; and (3) his guilty plea was coerced by the trial court, the State, and his attorneys with the false threat that he faced the death penalty.

The Court held that the first two enumerations of error were not proper subjects of a motion for an out-of-time appeal. Once a defendant has solemnly admitted in open court that he is in fact guilty of the offense charged, he may not thereafter raise independent claims alleging the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. Thus, only appellant's third enumeration of error could be construed as raising a proper issue for an out-of-time appeal. In it, he argued that he was coerced by trial counsel into pleading guilty by the threat of a death penalty trial —when the State's death penalty notice was untimely and therefore invalid. But, the Court noted, because he pled guilty, his appeal was limited to whether he received ineffective assistance of counsel. Here, the Court first found that the State was not barred from seeking the death penalty where the death penalty notice was untimely, inasmuch as his re-arraignment cured the error. Consequently appellant failed to show that he was misinformed about possible sentencing for the charged offenses. Second, even assuming, that his lawyers' advice could be deemed coercive, he failed to show by reference to the record that his attorneys misinformed him regarding possible sentencing. Therefore, the trial court did not abuse its discretion in denying the motion.

Mistrial; Double Jeopardy

Bruce v. State, A09A2111

Appellant appealed from the denial of his plea in bar following the grant of a mistrial in his DUI trial. The Court stated that if the trial court declares a mistrial over the defendant's objection or without his consent, the defendant may be retried, but only if there was a "manifest necessity" for the mistrial. Manifest necessity can exist for reasons deemed compelling by the trial court, especially where the ends of substantial justice cannot be attained without discontinuing the trial. Manifest necessity may also exist when the accused's right to have the trial completed by a particular tribunal is subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. The trial court's judgment that there was a manifest necessity to grant a mistrial is entitled to great deference.

Here, appellant did not have the trial taken down so there was not a transcript available for review. The limited record showed that the trial court granted the mistrial when, over the State's objection, appellant's attorney asked a State's witness about a conversation the attorney had with the witness. The conversation concerned plea negotiations. The Court found that the trial court could not be found, due to the limited record, as having abused its discretion in granting a mistrial.

Jury Charges; Mistake of Fact

Price v. State, A09A2025

Appellant was convicted of burglary and criminal trespass. He contended that the trial court erred in failing to give, sua sponte, a jury charge on mistake of fact. The Court stated that while a trial court is required to charge on a criminal defendant's sole defense of mistake of fact even absent a request to do so, such a charge is not required where it is not authorized by the evidence. A mistake of fact is defined as "a misapprehension of fact which, if true, would have justified the act or omission." OCGA § 16-3-5. It is a defense to the extent ignorance of some fact negates the mental state required to establish a material element of the crime.

Here, appellant admitted entering the house, but he denied committing the burglary and maintained that he believed the house was for sale. The Court held that one cannot deny committing an act, while at the same time arguing he committed the act by mistake. Moreover, because appellant admitted to being inside the victim's house his defense went to the intent element of the burglary charge, specifically that he did not intend to commit a theft or felony inside the house, and that he did not have an unlawful purpose for entering the victim's house. The Court found that this defense was fairly covered by the jury instructions which explained that, with respect to the burglary, "intent to commit a theft is an essential element of the criminal offense of burglary and must be proven by the State of Georgia by evidence beyond a reasonable doubt." Accordingly, a charge on mistake of fact was not authorized by the evidence, and appellant's defense was fairly covered by the charge on the elements of the burglary.

Kidnapping

Decoteau v. State, A09A2074

Appellant was convicted of burglary, aggravated assault, kidnapping, entering an automobile with the intent to commit theft,

and possession of a firearm during the commission of a crime. He argued that the evidence was insufficient to support his conviction for kidnapping. The evidence showed that the victim was at home when appellant and a co-defendant broke into the home. The victim told appellant he had money in his truck outside the house. Appellant forced the victim at gunpoint out of the house and over to the truck to look for the money. The victim was able to use the truck to get away.

The Court held, under *Garza*, that the evidence of asportation was insufficient to support the kidnapping conviction. Here, the appellant's movement of the victim was brief, occurred during and incidental to the aggravated assault, and did not enhance significantly the risk the victim already faced as a victim of aggravated assault. In fact, taking the victim to his truck actually allowed him to escape.

Jury Charges; Rule of Lenity

Poole v. State, A09A2366

Appellant was charged and convicted of trafficking methamphetamine (OCGA § 16-13-31 (f)) and possessing methamphetamine (OCGA § 16-13-30 (a)). The evidence showed that law enforcement found the makings of a lab in appellant's home and appellant admitted he had been "cooking." Appellant contended that the trial court should have given his requested charge of manufacturing methamphetamine (OCGA § 16-13-30 (a)) as a lesser included offense of trafficking methamphetamine (OCGA § 16-13-31 (f)). The Court stated that where the State's evidence establishes all of the elements of an offense and there is no evidence raising the lesser offense, there is no error in failing to give a charge on the lesser offense. Where, however, a case contains some evidence, no matter how slight, which shows that the defendant committed a lesser offense, then the court should charge the jury on that offense. Under OCGA §16-13-31 (f), a person who "knowingly manufactures" methamphetamine commits the felony offense of trafficking methamphetamine. OCGA § 16-13-30 (b) makes it "unlawful for any person to manufacture, deliver, distribute, dispense, administer, sell, or possess with intent to distribute any controlled substance." OCGA § 16-13-30 (b) is a lesser included offense of OCGA § 16-13-31 (f). The Court found that there was evidence appellant manufactured methamphetamine (as prohibited by OCGA § 16-13-30 (b)), and therefore, the trial court was required to charge the jury on OCGA § 16-13-30 (b) as a lesser included offense to OCGA § 16-13-31 (f).

However, in this particular case, the Court concluded that the trial court's failure to give the requested instruction did not contribute to the verdict. The Court noted under the facts of this case, there was no relevant difference between the two statutes because the sole distinction is that OCGA § 16-13-31 (f) prohibits the "knowing" manufacture of methamphetamine, while OCGA § 16-13-30 (b) prohibits the manufacture of a controlled substance. Here, the evidence clearly established that appellant manufactured methamphetamine, and his admission that he was "cooking" showed that he knowingly manufactured methamphetamine. Thus, the jury could have found him guilty of both offenses or not guilty of both, but the evidence would not have supported a split verdict as to these two Code Sections. If the jury had found appellant guilty of both charges, the trial court would have been required to merge the lesser included charge of manufacturing methamphetamine into the greater offense of trafficking methamphetamine for sentencing purposes. Under these circumstances, therefore, the trial court's failure to charge the jury on OCGA § 16-13-30 (b) was harmless. Nevertheless, the Court stated, its "holding in this case is limited to these particular Code Sections."

Appellant also argued that the trial court erred in sentencing him under OCGA § 16-13-31 (f) (1) rather than OCGA § 16-13-30 (b) because the rule of lenity requires that he be sentenced under the less harsh Code Section. The Court held that the rule applies when a penal statute provides two possible grades of punishment or penalty for the same offense (i.e., one as a felony and one as a misdemeanor). In such cases, the defendant is entitled to the lesser of the two penalties contained in the statute. However, the rule of lenity was inapplicable here because violations of both OCGA § 16-13-30 (b) and OCGA § 16-13-31 (f) are classified as felonies.

Search & Seizure; Inventory

Bell v. State, A10A0195

Appellant was convicted of possession of cocaine. He argued that the trial court erred in denying his motion to suppress based on an unlawful inventory of his vehicle. The evidence showed that appellant was stopped for an expired tag and subsequently arrested for suspended license. An inventory of his vehicle resulted in the discovery and seizure of the cocaine. Appellant contended that the officer should have allowed him to have a friend come and get the car instead of impounding it.

The Court held that law enforcement may perform an inventory search of a car in preparation for impounding it. To justify an inventory search, however, the impoundment of the vehicle must be reasonably necessary. Impoundment is valid only if there is some necessity for the police to take charge of the property. The ultimate test for the validity of the police's conduct in impounding a vehicle is whether, under the circumstances then confronting the police, their conduct was reasonable within the meaning of the Fourth Amendment. The determinative inquiry, therefore, is whether the impoundment was reasonably necessary under the circumstances, not whether it was absolutely necessary. Here, citing OCGA § 40-2-8 (b) (1), the Court held that appellant's request that a friend be allowed to pick up the vehicle could not be honored because the vehicle had an expired tag and thus could not be lawfully driven by anyone. Moreover, the police are not required to ask whether an arrestee desires to have someone come and get the car, nor are they required to accede to an arrestee's request that they do so.

Withdrawal of Guilty Plea; Merger

Wilson v. State, A09A1559

Appellant appealed from the denial of his motion to withdraw his guilty plea to three counts of possession of a firearm by a convicted felon. The record showed that the State offered 5 to do 3 on the charges. Appellant wanted 5 to do 2. After consulting with his attorney, appellant entered a non-negotiated plea in the hopes that he would receive the lighter sentence. The trial court accepted his plea and sentenced him to 5 years incarceration on each count to run concurrently.

Appellant contended that his plea was not voluntary and that he was essentially duped into it. A guilty plea may only be withdrawn if the defendant establishes that such withdrawal is necessary to correct a manifest

injustice —ineffective assistance of counsel or an involuntary or unknowingly entered guilty plea. The State must show that the plea was knowingly, voluntarily, and intelligently entered into by showing through the record of the guilty plea hearing that (1) the defendant has freely and voluntarily entered the plea with (2) an understanding of the nature of the charges against him and (3) an understanding of the consequences of his plea. The Court, after reviewing the record and the plea colloquy, found that the trial court did not abuse its discretion in denying appellant's motion.

Appellant also argued that his convictions constituted a double jeopardy violation because he was convicted of three counts of being a felon in possession of a weapon based on a single instance of behavior. The Court found that appellant's argument was essentially that the counts should have merged. A criminal defendant who pleads guilty to counts of an indictment alleging multiple criminal acts, and who willingly accepts a specified sentence as to properly charged counts, waives any claim that there was in fact only one act and that the resulting sentence is void on double jeopardy grounds. Therefore, appellant's claim was without merit.

DUI; Self-Incrimination

Bramlett v. State, A10A0397

Appellant was convicted of DUI. He argued that the trial court erred in denying his motion to suppress the results of his field sobriety tests. The evidence showed that appellant was stopped for speeding. The officer observed manifestations of intoxication. The appellant refused a preliminary breath test, but agreed to take a couple of field sobriety tests. Appellant contended that these tests violated his constitutional right against self-incrimination under our State Constitution. The Court disagreed. Ga. Const. of 1983, Art. I, Sec. I, Par. XVI provides that "[n]o person shall be compelled to give testimony tending in any manner to be self-incriminating." The term "testimony" in this constitutional provision includes all types of evidence. Thus, it protects against oral confessions or incriminating admissions of an involuntary character, or of doing an act against his will which is incriminating in its nature. Citing *Montgomery v. State*, 174 Ga. App. 95 (1985), and *Clark v. State*, 289 Ga. App. 884, 885 (1) (2008), the Court found that appellant was neither threatened with criminal sanctions for his failure to perform the tests nor was he physically forced to do the tests. There was no show of force tantamount to an actual use of force and he did not refuse to perform the tests. Moreover, under Georgia law, an investigating officer is not required to advise a suspect that his performance of field sobriety tests is voluntary. Therefore, the evidence authorized the trial court to find that appellant voluntarily performed the field sobriety tests after being asked by the officer to do so.

Jury Charges; Coercion

Clausell v. State, A10A0663

Appellant was convicted of aggravated assault with a deadly weapon, hijacking a motor vehicle, and armed robbery. The evidence showed that he and a co-defendant approached the victim at a gas station just as the victim got into his vehicle. While the co-defendant pointed a gun at the victim, appellant let himself into the passenger side of the vehicle and then pushed the victim out of the driver's side. The co-defendant then got into the passenger side, another co-defendant jumped in, and the three drove off.

Appellant contended that the trial court erred in failing to give the jury an unrequested charge on his sole defense of coercion. The Court held that a trial court must charge the jury on a defendant's sole defense if the evidence supports the charge, even without a written request, but such a charge is not required if the evidence does not support it. Here, there was no an evidentiary basis for a coercion instruction. Appellant did not testify and there was no other admissible evidence showing that the co-defendant with the gun threatened appellant with violence or that he feared that co-defendant. In fact, the Court noted, the third co-defendant testified that the gunman never pointed a gun at him or appellant and that the gunman and appellant decided to go to the gas station to "get a car." In addition, the victim testified that the gun was constantly pointed at him. Finally, police officers testified that while appellant told them that he was the driver who pushed the victim out of the car, he never stated that he acted under gunpoint. Although appellant asserted that a letter he had written to the victim stating that he was forced at gunpoint to steal the vehicle provided the evidentiary basis for a coercion charge, the Court rejected his arguments for two reasons. First, the letter was never admitted into evidence and second, it was inadmissible self-serving hearsay.

Search & Seizure

Burke v. State, A10A0319

Appellant was convicted of three counts of armed robbery. Citing *Georgia v. Randolph,* 1547 U. S. 103, 126 SC 1515, 164 LE2d 208 (2006), he contended that the trial court erred in denying his motion to suppress the evidence found in his mobile home. In *Randolph*, the Supreme Court held that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident. Here, the evidence showed that the officers located the vehicle allegedly used in the robberies at a mobile home. The officers surrounded the house and knocked on the door. Appellant's wife came to the door. The officers saw one male individual and asked him to come outside. The officers then asked the wife for permission to look inside for other individuals. She consented and the officers found appellant and another individual and took them outside and arrested them. The officers then asked the wife for permission to search and she consented. Appellant was outside but under arrest and he was never asked for consent to search. Appellant contended that he told the officers that they could not search his home.

The Court found that the issue was one of credibility and the trial court's finding that appellant did not voice an objection would not be disturbed on appeal. The police officers were not required to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received. Appellant's wife's consent was sufficient to allow the officers to search the residence. Moreover, the Court noted, this was also not a case where the officers removed appellant from the home in order to avoid his objection to the search.

Hearsay; Crawford

Boyd v. State, A09A2127

Appellant was convicted of armed robbery and robbery by force. He argued that the trial

court erred in admitting a detective's testimony over his *Crawford* objection. At trial, the investigating detective testified that the victim of the armed robbery told him that appellant, who had previously worked at the location of the robbery, had come into the location and she considered it strange. The Court stated that in *Crawford*, the U. S. Supreme Court ruled that the State's admission of a testimonial statement against the accused, who had no opportunity to cross-examine the witness, violated the Sixth Amendment. But, *Crawford* does not apply when the witness testifies. Thus, the Court held, pretermitting whether the victim's statement to the police was "testimonial" or not, since the victim appeared at trial for cross-examination, the Confrontation Clause placed no constraints on the use of the victim's prior testimonial statements.