Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 13, 2009

Legal Services Staff Attorneys

David Fowler
Deputy Executive Director

Chuck Olson
General Counsel

Lalaine Briones
Legal Services Director

Joe Burford
Trial Services Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Coordinator

Gary Bergman
Staff Attorney

Tony Lee Hing
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Brad Rigby
Staff Attorney

THIS WEEK:

Immunity; Rule of Lenity

Campbell v. State, A08A2188

Appellant was convicted of felony involuntary manslaughter and possession of a knife during the commission of a crime. He argued that the trial court erred in failing to give his request to charge regarding his claim of immunity under OCGA § 16-3-24.2. The Court held that there was no error in refusing to give this charge. The issue of immunity under this code section is a question of law for the trial court to decide, not the jury. Therefore, any instruction on this issue had the potential to mislead the jury, and the trial court did not err by refusing to give the appellant's request to charge.

Appellant also argued that the trial court erred under the rule of lenity by not sentencing him to misdemeanor involuntary manslaughter. The Rule of Lenity applies when 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. Here, however, the two subsections of code section OCGA § 16-5-3 did not define the same offense. Felony involuntary manslaughter is committed when one causes the death of another human being without any intention to do so by the commission of an unlawful act other than a felony. Misdemeanor involuntary manslaughter is committed when one causes the death of another human being without any intention to do so, by the commission of a lawful act in an unlawful manner likely to cause death or great bodily harm. Thus, the two crimes do not address the same criminal conduct, and no ambiguity is created by different punishments being set forth for the same crime.

Ineffective Assistance of Counsel; Jury Charges

Nejad v. State, A08A1685

Appellant was convicted of rape, aggravated sodomy, aggravated assault with a deadly weapon (two counts), and aggravated battery (two counts). He contended that the trial court erred in instructing the jury and that he received ineffective assistance of counsel. The trial court charged the jury that "a pellet gun in the shape of an automatic weapon is per se a deadly weapon." The Court held that while a firearm is a deadly weapon per se, the "deadliness" issue in regard to an air rifle is for the jury. Therefore, since the instruction removed this issue from the jury's consideration, the instruction was in error.

Appellant also contended that his counsel rendered ineffective assistance by refusing to allow him to exercise his constitutional right to testify at trial. During the motion for new

trial, appellant's trial counsel unequivocally stated on several occasions that he told appellant that he was not testifying and that he ordered appellant to inform the court that he was not going to testify. The Court held that the right to testify is personal to a defendant and cannot be waived either by the trial court or by defense counsel. Thus, trial counsel rendered ineffective assistance because a criminal defendant cannot be compelled to remain silent by defense counsel. Moreover, the deficient performance prejudiced appellant's trial because the jury heard the testimony of the victims and appellant's stipulation that the physical evidence contained his DNA but did not hear from appellant that the sexual acts involved were consensual.

Judge Smith filed a concurring opinion in which he stated as follows: "trial counsel in such situations testify primarily to the factual details of their conduct and decisions, and admit errors only with reluctance and with due regard for their professionalism and pride in their work. The developing trend of emphatically and even eagerly testifying to one's own incompetence or misconduct is dangerous to the administration of justice, particularly if it is allowed to continue without any consequences for the testifying trial counsel."

Search & Seizure

Hess v. State, A08A2380; A08A2381

Appellant was convicted of possession of methamphetamine and had his probation revoked for possession of methamphetamine. He contended that search was illegal because it was not based upon reasonable suspicion. The evidence showed that the search was conducted under appellant's valid Fourth Amendment waiver from a prior sentence. Law enforcement received an anonymous tip that appellant was supplying his current girlfriend with methamphetamine. His probation officer also relayed to law enforcement that he had failed to appear for recent drug screens. Thereafter, officers appeared at his mother's house, informed her of the state of affairs, and obtained her consent to enter her house to search his room where methamphetamine was discovered.

The Court held that a tip from an informant of unknown reliability is generally insufficient to create a reasonable suspicion of criminal activity. However, under the totality of the circumstances presented here, there existed a sufficiently reasonable or good-faith suspicion for the search so that it was based on individualized suspicion of specific criminal activity and thus was not arbitrary, capricious, or harassing.

Celestin v. State, A08A2365

Appellant was convicted of trafficking in cocaine. He argued that the trial court erred in denying his motion to suppress. The evidence showed that an investigator was told that appellant was in possession of a large amount of crack in a particular motel room. When the investigator walked past the door, he "smelled burning marijuana." He asked a maintenance man to knock on the door. Appellant opened the door, smoking a "blunt." The investigator then arrested appellant and entered the motel room to "clear" it. While doing so, he observed scales and baking soda on a counter. A warrant was subsequently obtained and the search resulted in the discovery of a trafficking amount of powder cocaine. The Court held that observation of appellant smoking marijuana created exigent circumstances justifying the warrantless entry into the motel room to prevent the destruction of evidence. The Court also held that because the officer testified that he wanted to ensure that no one was hiding in the bathroom, a limited protective sweep was authorized to secure the room while a search warrant was obtained. In so holding, the Court distinguished State v. Charles, 264 Ga. App. 874 (2003) because in that case the officers "had detected only the smell of marijuana smoke, as opposed to the odor of burning marijuana" and more importantly, the officers in Charles did not indicate that they were concerned for their safety in conducting the protective sweep.

Sentencing

Reese v. State, A09A0344

Appellant was convicted of DUI and making a false statement under OCGA § 16-10-20. He argued that the trial court erred by increasing his sentence after he had begun serving it and by refusing to give him credit for time served. The record showed that on March 3, 2008, the trial court sentenced appellant to six years probation with not less than 240 days and not more than 300 days to serve in a probation detention center. At a second sentencing hearing on March 17, the trial court ordered that appellant spend 90 days in jail, to be suspended upon his transfer to the detention center. Appellant began serving his sentence when he met with the probation officer on March 3. Therefore, the trial court did not have authority to increase his sentence" at a subsequent hearing. A trial court is authorized only to modify a sentence by revoking a defendant's probation if the court concludes the defendant had violated his probation by refusing to abide by the conditions of it. The Court consequently vacate appellant's sentence and remanded for resentencing. The Court also held that "[t]he amount of credit [for time served] is to be computed by the convict's pre-sentence custodian, and the duty to award the credit for time served prior to trial is upon the Department of Corrections." The trial court should not involve itself in the matter on remand. To the extent that appellant was dissatisfied with the credit received, his relief can be had only by means of a mandamus or injunction action against the Commissioner of the Department of Corrections.

Voir Dire

Rouse v. State, A08A2241

The appellant contended that the trial court erred in failing to strike a juror for cause. The record showed that the juror stated that he would have some doubt as to the appellant if he did not testify. The prosecutor attempted to rehabilitate the juror, but the Court held that the trial court erred. It found that the juror in this case was never asked if he could follow the judge's instructions; rather, he was asked by the prosecutor whether he understood that appellant had the right not to testify and that the State had the burden of proving the case. Although the juror indicated his understanding and also responded affirmatively that with those principles in mind he could listen to the case "fairly," the juror also stated twice more following this exchange that if appellant did not testify it would cause him to doubt the appellant's innocence. The Court thus felt "constrained to conclude that the trial court abused its discretion in failing to strike [the] Juror … for cause. The case was thus remanded for a new trial.

Motion for New Trial; Newly Discovered Evidence

Rivera v. State, A09A0555

Appellant was convicted of trafficking in methamphetamine and possession of cocaine. The evidence showed that officers were surveilling a mobile home when appellant came out with a gray bucket and got into a van. The officers approached the van and while talking to appellant, noticed methamphetamine in the bucket. Appellant was subsequently arrested. Appellant contended at trial that someone else put the drugs in his "tool bucket." Following trial, appellant learned that on the same day he was arrested, the police were conducting surveillance on another person at the mobile home park who was allegedly trafficking in methamphetamine and that this person was also subsequently arrested for trafficking in methamphetamine. He moved for a new trial on newly discovered evidence.

The Court held that the party seeking a new trial on the ground of newly discovered evidence must satisfy the trial court that: (1) the evidence has come to his knowledge since the trial; (2) it was not owing to the want of due diligence that he did not acquire it sooner; (3) it is so material that it would probably produce a different verdict; (4) it is not cumulative only; (5) the affidavit of the witness himself should be procured or its absence accounted for; and (6) a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness. The Court held that appellant failed to carry his burden. Appellant testified at the motion for new trial that he knew of this other person's drug trafficking and presence at the mobile home prior to his trial but was either afraid or unable to mention this information to his trial counsel. Thus, the Court held, the proffer that appellant made shows that the testimony and discovery information were merely newly available, rather than newly discovered, evidence. Moreover, Appellant could not show that the evidence would have produced a different verdict. The fact that this other person was present at the mobile home at some point during the day of appellant's arrest and that this other person was also arrested that day for trafficking in methamphetamine did not rebut or mitigate appellant's guilt for the same crime.

Closing Arguments

Taylor v. State, A08A2073

Appellant was convicted of two counts of aggravated assault. The record showed that at the beginning of his argument, the prosecutor stated: "This is the stage of the trial known as the closing argument. Rather than argue, what I'd like to do is, as it was written in Chapter One, Verse 18 of Isaiah —." Defense counsel interrupted with an objection, and the trial court stated: "The phrase that you were quoting was 'Come and let us reason together'? " When the prosecutor replied, "yes," the trial court overruled the objection. Appellant argued that the state and trial court improperly injected religious beliefs or doctrine into the jury's deliberation. However, the Court held that the biblical reference did not invite jurors to base their verdict on extraneous matters and nothing in the quoted passage urged jurors to reach a verdict on religious grounds. Instead, the Court held, the prosecutor merely used the passage to encourage jurors to "reason" with him during his closing argument. Thus, "[a]lthough biblical references generally should be avoided, we find no basis for reversal in this case."

Jury Charges

Potts v. State, A08A2046

Appellant was convicted of homicide by vehicle, serious injury by vehicle, hit and run, and reckless driving. The evidence showed that appellant, while intoxicated, ran a red light during a heavy rainstorm which causes a law enforcement officer, responding to a call, to swerve to avoid the defendant. The officer hydroplaned, crashed and later died from his injuries. Appellant contended that the trial court erred in refusing to admit evidence that the officer was not wearing a seat belt as a defense to the charge of serious injury by vehicle. To prove that appellant was guilty of serious injury by vehicle under OCGA § 40-6-394, the State had to show that appellant "without malice, [caused] bodily harm to another by depriving him of a member of his body, by rendering a member of his body useless, by seriously disfiguring his body or a member thereof, or by causing organic brain damage which renders the body or any member thereof useless through the violation of Code Section 40-6-390 [reckless driving] or 40-6-391 [driving under the influence." The Court held that this statute imposes no duty on the victim to prevent or mitigate injuries caused by a reckless or intoxicated driver and the Court "decline[d] to do so here." Accordingly, the trial court did not abuse its discretion in refusing to admit evidence as to whether the officer, who was responding to the scene of an ongoing crime, was wearing his seat belt.