

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 13, 2015

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THIS WEEK:

- **Jury Charges; Plain Error**
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- **Search & Seizure; Vehicle Impoundment**
- **Jury Charges; Justification**
- **Similar Transactions; Opening Statements**
- **Records Restriction; O.C.G.A. § 35-3-37**
- **Sexual Registry; Petitions for Release**

Jury Charges; Plain Error

McCullough v. State, A14A1634 (2/17/15)

Based on evidence that he had multiple videos of child pornography on his laptop computer, a jury found appellant guilty of five counts of sexual exploitation of children. The record showed that he made audio-recorded Mirandized statements to a GBI agent at his home during the execution of a search warrant and then, he made more Mirandized statements, which were video-recorded, at the Sheriff's Office after his arrest. At trial, he produced witnesses to support his sole defense that he did not know that the child pornography was on his laptop and that his roommate had equal access to his laptop and thus had the opportunity to place the child pornography on it without his knowledge. Appellant did not, however, testify in his own behalf.

Appellant contended that the trial court committed plain error in three charges to the jury. In order to show plain error, there must be an error, defect, or deviation from a legal rule that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by

the appellant; the legal error must be clear or obvious, rather than subject to reasonable dispute; the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings; and if the above three prongs are satisfied, the appellate court has the discretion to remedy the error, discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Appellant first contended that the trial court committed plain error by charging the jury on the law of deliberate ignorance. The Court agreed that the trial court should not have given such a charge; there was no evidence that appellant was aware of a high probability of the existence of child pornography on his laptop and purposefully contrived to avoid learning of this fact to have a defense in the event of criminal prosecution. Rather, the conflicting evidence pointed either to appellant having actual knowledge of the child pornography on his laptop or no knowledge at all. However, the Court found, even if the jury charge on deliberate ignorance was erroneous and the error was obvious, the error did not rise to the level of plain error because appellant failed to demonstrate that it affected the outcome of the trial court proceedings.

Second, appellant argued that the trial court committed plain error by giving an erroneous charge on the law of equal access. The record showed that in its charge, the trial court, in part, stated as follows: "If you determine from the evidence that persons other than the defendant had equal opportunity to possess or place the articles of

child pornography on the computer at issue *without the defendant's knowledge*, then you should acquit the defendant. However, if you are convinced beyond a reasonable doubt that the defendant knowingly possessed the child pornography, or shared possession or control with another person and helped or procured the other person in possessing and having control of the contraband, you would be authorized to convict." Appellant contended that the italicized language could have misled and confused the jury into mistakenly believing that it could not acquit him if he had knowledge that other persons had even the opportunity to place child pornography on his laptop. However, the Court found, when all the charges are read together, it was clear that for the jury to convict him, appellant had to knowingly possess the child pornography found on his laptop, either alone or jointly with others. The combined charges further made clear that the presumption of possession of the child pornography arising from appellant's ownership of the laptop could be rebutted by evidence that others had equal access to the laptop. Furthermore, to the extent that the italicized language regarding knowledge could have potentially led to any confusion, that confusion was removed by the subsequent sentence of the charge making clear that to be convicted, appellant had to have knowingly possessed the child pornography, or have shared possession or control of the child pornography with another person and helped or procured the other person in possessing and having control of that pornography. Thus, there was no plain error as to this charge.

Finally, appellant contended that the trial court committed plain error in its charge to the jury regarding the use of his audio-recorded statement made to the GBI special agent for impeachment purposes. As part of the trial court's charge, the court instructed "...If you fail to find any one of the conditions that I've just described, you must disregard the statement entirely and give it no consideration in reaching your verdict, *except for the purposes of impeachment.*"

Appellant contended that, because he did not testify at trial, the inclusion of the italicized language was plain error because it allowed the jury to consider his audio-recorded statement even if the jury found that his statement was obtained in violation of his *Miranda* rights.

The Court found that appellant was correct that the trial court erred; but, there was still no plain error. The trial court's charges on *Miranda* and the voluntariness of a defendant's custodial statements were expressly limited to appellant's audio-recorded statement made during the execution of the search warrant at his residence and did "not apply to the video statement" made by appellant at the Sheriff's Office. Moreover, appellant expressly waived any jury instruction on whether he had asserted or waived his right to counsel during his interrogation at the Sheriff's Office or on whether his statements during that interrogation were voluntary. Hence, the jury had before it and was authorized to consider appellant's video-recorded, incriminating statements made at the Sheriff's Office, irrespective of whether it found that his prior audio-recorded statement made during the execution of the search warrant was obtained in violation of *Miranda*. Under these circumstances, appellant failed to demonstrate that any error in the charge relating to his audio-recorded statement had any effect on the outcome at trial, and thus failed to establish plain error.

Search & Seizure

State v. Allen, A14A1837 (2/23/15)

Allen was charged with VGCSA. The State appealed after the trial court granted Allen's motion to suppress. The evidence showed that Allen was a passenger in Couch's vehicle. As the vehicle was pulling into a parking lot, an officer noticed it and ran the tag. The tag showed that the owner of the vehicle was wanted on a parole violation. The officer turned his car around and using his PA system, ordered Allen and Couch to stop. However, they continued to walk and went into a restaurant. The officer pulled in and followed them. He saw Allen sitting in a booth and asked where Couch had gone. She replied that he probably went to the restroom. After checking the restroom, it appeared that Couch ducked out the back door of the restaurant. The officer then went back to Allen and ordered her to step outside. After doing so, she consented to a search of her purse and methamphetamine was found inside.

The Court found that when the officer told Allen to come outside, no reasonable person in Allen's position would have felt free

to end the encounter, and, in fact, the second officer to arrive on the scene explicitly testified at the hearing that Allen was not free to leave. Accordingly, the officers' stop of Allen was a second-tier, investigative detention that required the officers to have a particularized and objective basis for suspecting that Allen was or was about to be involved in criminal activity. The State argued that the officer had such reasonable and articulable suspicion because Couch was wanted for a parole violation. However, the Court found, by the time the officer learned that the truck's male owner, Couch, was wanted, the truck was already stopped and Couch and Allen were walking toward the restaurant. At that point, although the officer certainly possessed a reasonable, articulable suspicion to detain Couch, he had no basis whatsoever for believing that Allen was either committing, or was about to commit, a crime. In fact, the Court noted, the officer admitted that when he first approached Allen, he had no suspicion that she had committed, or was about to commit, a crime. And while the officer added that he believed Allen was untruthful when she told him that she was unsure as to where Couch had gone, the trial court, in granting Allen's motion to suppress, obviously found that her response did not provide an objective basis for a reasonable suspicion that she was obstructing the officer in the lawful discharge of his official duties. Thus, construed most favorably to uphold the trial court's judgment, the Court concluded that the trial court did not err in finding that the officers' detention of Allen was unreasonable. Moreover, because Allen's consent to the search of her purse was the product of an illegal detention, it was not valid. Accordingly, the trial court did not err in granting Allen's motion to suppress.

Motions to Suppress; Officer Credibility

State v. Castillo, A14A2066 (3/2/15)

Castillo was charged with driving while his license was suspended, having no proof of insurance, and committing second-degree forgery (for presenting to the officer who stopped him a social security card that did not belong to him). The evidence showed that the stop occurred on May 14, 2000. The vehicle was stopped solely because the officer believed that the drive-out tag had such a weathered

look, it had to be issued more than thirty days prior to the stop. The Court granted Castillo's motion to suppress and the State appealed.

The Court initially noted that investigative stops of vehicles are analogous to *Terry* stops and, therefore, must be justified by specific, articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct. Operation of any vehicle required to be registered in the State of Georgia without a valid numbered license plate is a misdemeanor, except that, during the 30-day period within which vehicle registration is required, the purchaser of a new or used vehicle may operate the vehicle with a temporary plate issued by the dealer. At the time of the traffic stop in this case, Georgia law did not require the temporary plate to show its expiration date. Such a requirement was added by O.C.G.A. § 40-2-8(b)(2)(B)(i), effective July 1, 2000. Thus, prior to July 1, 2000, the stop of a vehicle to investigate compliance with state registration law may have been authorized if the vehicle bore a dealer's drive-out tag which, based upon its "weathered" look, appeared to have been on the vehicle beyond the statutory 30-day period.

The State contended that the officer had reasonable suspicion to conduct the traffic stop of Castillo's vehicle. But, the Court found, the State wholly failed to address the credibility underpinning of the trial court's decision. At the motion to suppress, the officer testified that the drive-out tag was so weathered, it was practically unreadable. However, Castillo's sister testified that the vehicle was bought only 10 days earlier, on May 4, and the defense argued that there was no way the tag could have been that weathered in such a short amount of time. After hearing the testimony, the trial court allowed the parties to supplement the evidence and after reviewing the documentation provided by the defense, the trial court stated that it would not give "credence" to the officer's testimony and granted the motion.

The Court stated that credibility of witnesses and the weight to be given their testimony is a decision-making power that lies solely with the trier of fact. The trier of fact is not obligated to believe a witness even if the testimony is uncontradicted and may accept or reject any portion of the testimony. And here, it was evident that the officer's claim of the tag's condition — which was the sole

articulated basis for the stop — was found by the trial court to lack credibility. Accordingly, because there was no clear error in the trial court's credibility determination and the State, having failed to adduce credible evidence that the officer observed a tag that appeared more than 30 days old, there was no basis to disturb the trial court's decision to grant Castillo's motion to suppress.

Search & Seizure; Vehicle Impoundment

Davis v. State, A14A1942 (2/27/15)

Appellant was charged with VGCSA, driving without proof of insurance and other charges. After the trial court denied his motion to suppress, the Court granted his petition for interlocutory review. The evidence showed that appellant was stopped after the officer ran appellant's tag and the vehicle showed that it was not insured. Appellant produced to the officer a binder from his insurance agent showing when that insurance on the vehicle took effect. But, according to the officer, the paperwork showed that the policy provided coverage for only 30 days, and the 30 days had already expired. The officer also called an after-hours number to verify appellant's insurance and was told by the operator that the policy for that particular vehicle could not be located. Appellant was impounded and a subsequent inventory of the trunk revealed marijuana, \$2,275 in small denomination bills, bags, and rolling paper.

Appellant argued that there was no lawful reason for the impoundment because although the database the officer checked indicated that appellant's vehicle was not insured, the printed materials appellant provided demonstrated proof of coverage. But, the Court found, this argument overlooked appellant's insurance agent's testimony that the binder had expired and would not show valid proof of coverage 30 days after issuance. Under these circumstances, the officer's decision to prohibit appellant from driving his car was not improper.

Appellant next argued that the impoundment of his vehicle was improper. The Court noted that impoundment was not proper under O.C.G.A. § 40-6-206(d), which provides that "[b]ecause uninsured vehicles pose a threat to the public safety and health," law enforcement officers may impound a vehicle when a person is charged with

O.C.G.A. § 40-6-10(a) or (b) "if such person admits to the law enforcement officer that there is no insurance in effect on the vehicle or if the law enforcement officer verifies that the proof of insurance provided by such person is fraudulent." But, the Court found, neither of these conditions was present, so the officer lacked authority to impound the vehicle under O.C.G.A. § 40-6-206(d).

However, the State's right to impound a vehicle is founded on a doctrine of necessity. Under this doctrine, while the police may not impound a car to search for contraband, they may impound a vehicle if they must take charge of it for some reason. And the test is whether the impoundment was reasonably necessary under the circumstances, not whether it was absolutely necessary. Furthermore, subsequent to a reasonable impoundment, the contents of an impounded vehicle are routinely inventoried to protect the property of the owner, protect the officers against claims for lost or stolen property, and protect the police from potential danger. Finally, inventories conducted by the police pursuant to standard police procedures are deemed to be reasonable under the Fourth Amendment.

Here, the Court found, appellant's vehicle was parked on the side of a major road late at night, and because there was no proof that the vehicle was insured, towing it was the only viable option for removing it from the roadway. Furthermore, there is no evidence that appellant expressed a preference for a towing company. Under these circumstances, the trial court did not err by finding that impoundment was reasonably necessary. Moreover, there was evidence that police department policy required an inventory search of all vehicles prior to towing in order to provide a list of valuables, damage to the vehicle, or other notable issues or items, and that the officer was trained in how to complete the inventory form. Thus, the trial court did not err by concluding that the officer's decision to search appellant's car was proper.

Jury Charges; Justification

Hughley v. State, A14A2133 (2/27/15)

Appellant was convicted of voluntary manslaughter as a lesser included offense of malice murder, aggravated assault with a deadly weapon, possession of a firearm during the commission of a crime, and possession of

a weapon during the commission of a crime. Citing *Prather v. State*, 259 Ga. App. 441, 442-443 (1) (2003), appellant contended that his conviction for possession of a firearm during the commission of a crime should have been vacated, as the indictment references the crime of murder and he was convicted of the lesser offense of voluntary manslaughter. The Court noted that in *Prather*, the trial court charged the jury that the elements of possessing a firearm during the commission of a crime required proof of a felony, and then noted that murder is a crime defined as a felony. Voluntary manslaughter was not mentioned in the context of the possession charge and was never defined for the jury as a felony. Under these circumstances, the *Prather* Court held that the jury was authorized to convict of possession of a firearm only during the commission of murder, and reversed the conviction on this count.

But here, the Court found, the trial court twice gave an additional instruction in connection with the two counts of possession of a firearm or weapon during the commission of a crime: “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 or any attempt to commit a felony, which is any crime against or involving the person of another.” The Court also instructed that murder and aggravated assault respectively were felonies “under the laws of this state” and “defined as previously stated.” While explicitly identifying every lesser included offense charged as an element of the possession charge might be the better practice, this instruction did implicitly identify voluntary manslaughter as both an offense against the person and a felony, and instructed the jury that possession could be based upon “any attempt to commit a felony, which is any crime against or involving the person of another.” (Emphasis supplied.) The jury therefore was informed that the possession charge here, unlike that in *Prather*, could be based upon “any crime against or involving the person of another” or “any attempt to commit a felony,” thus including voluntary manslaughter. Considering the charge as a whole, the Court found that the omission of an explicit reference to voluntary manslaughter in the charge on possession was not error.

Similar Transactions; Opening Statements

Nguyen v. State, A14A1806 (3/2/15)

Appellant was convicted of DUI (less safe). He contended that the trial court committed plain error in admitting a prior DUI as a similar transaction. The record showed that the State sought admission of a 2003 DUI to prove appellant’s “knowledge, intent, [and] absence of mistake.” Appellant, appearing pro se at trial, did not object to the admission of this evidence either before or during trial.

Citing *Jones v. State*, 326 Ga. App. 658 (2014), appellant argued the trial court committed plain error in admitting his 2003 DUI in violation of O.C.G.A. § 24-4-404 because the prior conviction evidence was neither relevant to, nor probative of, any issue at trial aside from his character. The Court disagreed. In order to show plain error, there must be an error, defect, or deviation from a legal rule that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant; the legal error must be clear or obvious, rather than subject to reasonable dispute; the error must have affected the appellant’s substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings; and if the above three prongs are satisfied, the appellate court has the discretion to remedy the error, discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Without deciding if the holding in *Jones* applied here, the Court found that the trial court did not commit plain error by failing to exclude the 2003 similar transaction evidence. *Jones* was decided on March 28, 2014, more than two months after the trial in this case. Thus, such error, if any, would not have met the second prong of the plain error analysis in that the legal error was clear and obvious.

Appellant also argued that the State committed error by referencing the 2003 similar transaction evidence in her opening statement. The Court noted that appellant failed to object to this reference at trial. However, the Court found, even if he had properly preserved his objection for appellate review, he did not provide any authority for his contention that a prosecutor may

not refer in opening statement to similar transaction evidence which has already been ruled admissible. A prosecuting attorney in an opening statement may state what she expects in good faith the evidence will show during trial of the case. Accordingly there was no error.

Records Restriction; O.C.G.A. § 35-3-37

Gibbs v. Bright, A14A2324 (3/2/15)

Appellant appealed after the trial court denied his petition for record restriction under O.C.G.A. § 35-3-37. The record showed that appellant was indicted on at least nine counts of child molestation, two counts of enticing a child for indecent purposes, and two counts of solicitation of sodomy. His first trial ended in a mistrial. Upon retrial, he was convicted of these counts, but the convictions were reversed because of ineffective assistance of counsel. The State then entered a nolle prosequi of all charges rather than try him a third time.

Appellant thereafter filed a petition in superior court seeking to restrict access to his criminal history record information for the underlying offenses. The Court held a hearing pursuant to O.C.G.A. § 35-3-37(j)(2) and afterwards, issued an order denying the petition. In its order, the trial court specifically found that “public interest clearly outweighs the harm resulting to the Petitioner with that information being publicly available.”

Appellant argued that the trial court erred by determining that subsection (j) governed his petition. He contended that because the prosecuting attorney entered a nolle prosequi before the end of the two-year period referred to in (j)(2), the (h)(2) (A) provision was triggered, thus qualifying him automatically for record restriction rather than requiring the application of the discretionary (j)(2) balancing test. The Court disagreed. Where, as here, a statute contains a general provision and a specific one, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision. Accordingly, the trial court did not err in determining that O.C.G.A. § 35-3-37(j)(2) governed appellant’s petition, as it was without question that the underlying circumstances, including the conviction,

sentencing, reversal, lack of a subsequent retrial, and timing of Gibbs's petition to restrict records, satisfied that Code provision's detailed applicability criteria.

Appellant also contended that the trial court abused its discretion in determining that the three factors set forth in O.C.G.A. § 35-3-37(j)(2) weighed against him. The Court noted that the trial court convened a hearing, allowed the parties to present evidence and argument, and invoked the correct legal standard. Because potential harm to individuals is the natural consequence of the maintenance and dissemination of criminal records, the balancing test should not be tipped in the defendant's favor solely on the basis of the potential harm that could accrue to a defendant in any given case. And here, the Court found, the arguments and evidence presented to the trial court neither required a finding of a diminished interest by the public in appellant's criminal history record information, nor mandated a conclusion that restricting such information was appropriate. Accordingly, the Court could not say that the trial court abused its discretion in finding that restriction was not appropriate under O.C.G.A. § 35-3-37(j)(2).

Sexual Registry; Petitions for Release

State v. Randle, A14A1676 (3/5/15)

The State appealed after the trial court released Randle from the sexual offender registration requirements. A divided en banc Court affirmed. The record showed that in 1993, when Randle was 21 years old, he pled guilty under *Alford* to one count of child molestation. In 2002, Randle applied for and obtained restoration of his civil and political rights (excluding certain firearm-related rights) from the State Board of Pardons and Paroles. In 2013, Randle filed a petition for release from the sex offender registration requirements pursuant to O.C.G.A. § 42-1-19(a)(4). The trial court conducted a hearing on Randle's petition. At the hearing, Randle tendered certified copies of his indictment and sentence for child molestation, the transcript of his plea hearing for that offense, and his criminal history from GCIC reflecting no other arrests or convictions. The parties stipulated that Randle had completed all sex offender treatment and assessments required

as part of his probation; that he had not committed any probation violations; that he "did well while on probation and as well in his treatment"; and that he had no additional criminal history.

The Court stated that a defendant who is required to comply with the sex offender registration requirements imposed by O.C.G.A. § 42-1-12 must do so for his entire life. However, a defendant may petition to be released from the lifetime registration requirements in accordance with O.C.G.A. § 42-1-19. Pursuant to O.C.G.A. § 42-1-19, a defendant may file such a petition if ten years have elapsed since he completed his term of imprisonment, parole, supervised release, and probation for the underlying sexual offense, and if the six criteria set forth in O.C.G.A. § 17-10-6.2(c)(1)(A) through (c)(1)(F) have been met. Pursuant to O.C.G.A. § 42-1-19(f), if these criteria are met, and, "if the court finds by a preponderance of the evidence that the individual does not pose a substantial risk of perpetrating any future dangerous sexual offense," the trial court may enter an order releasing the defendant from the registration requirements.

The State argued under O.C.G.A. §§ 17-10-6.2(c)(1)(D) and 42-1-19(a)(4) that the trial court abused its discretion in releasing Randle from the sex offender registration requirements because the evidence failed to show that "[t]he victim did not suffer any intentional physical harm during the commission of the offense," a statutory prerequisite for release. Specifically, the State argued, the uncontroverted evidence showed that Randle touched the genitals of the child victim with his hands, which created a presumption that the victim suffered "intentional physical harm," precluding Randle's release from the registration requirements. However, the Court found, the term "intentional physical harm" as used in O.C.G.A. § 17-10-6.2(c)(1)(D) contemplates conduct that goes beyond offensive and unwanted *touching* and involves the intentional infliction of *physical pain or injury* upon the victim. Thus, evidence of offensive and unwanted touching, without more, does not show "intentional physical harm."

The State also argued that the trial court did not consider all of the statutory criteria for release imposed by O.C.G.A. § 17-10-6.2(c)(1) in concluding that Randle should

be released from the sex offender registration requirements pursuant to O.C.G.A. § 42-1-19(a)(4). The Court noted that while the trial court's order stated without elaboration that Randle was eligible for release under O.C.G.A. § 42-1-19(a)(4), the court was not required to include written findings of fact and conclusions of law in its order. And absent any showing to the contrary, the Court must presume that the trial court followed the law when it granted Randle's petition. Moreover, while it is true that the burden is on the defendant petitioning for release from the sex offender registration requirements to make out a prima facie case of entitlement to release sufficient to shift the burden to the State to show the contrary, what amount of evidence will change the onus or burden of proof is a question to be decided in each case by the sound discretion of the trial court. Furthermore, the statutory criteria for release found in O.C.G.A. § 17-10-6.2(c)(1) are stated in the negative, and because it is often impossible to prove a negative, the degree of proof required to support a negative proposition and to shift the burden must vary, according to the circumstances of the case. And if the defendant petitioning for release presents evidence of circumstances from which it could reasonably be inferred that the negative is in truth the fact, the burden shifts to the State to show that the negative does not exist.

Here, after considering the parties' stipulations, the certified records tendered into court, and Randle's testimony, the trial court found that Randle had satisfied his prima facie burden of entitlement to release from the sex offender registration requirements. In light of the evidence, the Court found that the trial court did not abuse its discretion. With respect to O.C.G.A. § 17-10-6.2(c)(1)(D), there was evidence that the underlying child molestation offense consisted of Randle touching the genitals of the child victim with his hands, and the trial court was authorized to infer from this circumstance that there was no intentional infliction of physical pain or injury upon the victim, and thus that the sexual offense did not rise to the level of "intentional physical harm" so as to preclude release from the registration requirements. Accordingly, the trial court's order granting Randle's petition for release was affirmed.