

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 20, 2009

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Merger

Moore v. State, S09A0119

Appellant was convicted of aggravated assault and murder. He contended that the two crimes should have merged as a matter of fact for sentencing. The evidence showed that appellant went into a convenience store and walked into the back where the beer was kept refrigerated. The victim, who worked at the store as a clerk, confronted appellant as the appellant was attempting to shoplift a beer by hiding it in his pants. The appellant

then pulled a gun and pointed it at the victim. The victim then went to the front of the store ostensibly to phone for the police. Appellant followed and then shot the victim by the cash register. The Court, except Justice Hunstein, agreed that no merger took place. The majority held that based on the evidence, the trier of fact had the authority to conclude that an aggravated assault was completed on one side of the convenience store before the shooting and murder occurred on the opposite side of the convenience store.

Ineffective Assistance of Counsel

Cleveland v. State, S08G1371

Appellant was convicted of methamphetamine possession and related crimes. He argued that he received ineffective assistance of trial counsel because he would have accepted a plea offer but for his counsel's deficient performance. The Sixth Amendment guarantees a criminal defendant's right to competent counsel performing to the standards of the legal profession in deciding whether or not to plead guilty. At the hearing on the motion for new trial, defense counsel admitted that he failed to review the State's file as allowed under the prosecutor's "open file" policy, so he did not realize evidence gathered at appellant's home would be used at trial. Appellant testified that had he known evidence obtained from his home would be used against him at trial, he would have accepted the State's offer of a plea bargain. The Court, except Justice Hunstein, held that where, as here, the defendant demonstrates that counsel's representation in the plea process fell below an objective standard of reasonableness, the inquiry turns to whether

the defendant has demonstrated the required prejudice. The Court rejected appellant's argument that his statement that he would have accepted the plea agreement, standing alone, shows prejudice. Instead, the Court found that the record supported the trial court's finding that appellant failed to demonstrate, through his testimony at the motion for new trial hearing or otherwise, that but for his counsel's failure to avail himself of the State's open file policy, there was a reasonable probability that he would have accepted the State's pretrial plea offer.

Kidnapping

Henderson v. State, S08A1478

Appellant was convicted of two counts of felony murder, four counts of armed robbery and kidnapping, and one count of aggravated assault. He challenged the sufficiency of the evidence of his kidnapping convictions under *Garza v. State*, 284 Ga. 696 (2008). The evidence showed that appellant and his co-defendants went to a two room duplex with weapons drawn. When they arrived, they ordered one victim, who was standing outside, to go inside with them. They then robbed that victim and three others inside the duplex at gunpoint. They then ordered them into another room and told them to remove their clothes. An armed pizza delivery man then showed up. A gunfight ensued and appellant fled. Under *Garza*, the standard for determining the sufficiency of evidence of asportation provides for the assessment of four factors: (1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an inherent part of that separate offense; and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. The Court held that the movement of the victims from one room to another within the duplex was of minimal duration. However, such movement was not an inherent part of the armed robbery; in fact, it occurred after the offense of armed robbery had been completed. Moreover, it created an additional danger to the victims by enhancing the control of the gunmen over them. Accordingly, the element of asportation was established and the trial court did not err in sentencing appellant on the kidnapping convictions.

In the Interest of A. B., A08A1889

Appellant was adjudicated a delinquent for robbery, aggravated assault, and kidnapping. He challenged the sufficiency of the evidence regarding the kidnapping. The evidence showed that he and two friends waited outside the victim's house. When she arrived in her driveway and exited her car, one acted as lookout while the other two collaborated to strike the victim on the head, drag her into the neighbor's yard, and forcefully take her purse. After they fled with the purse, the victim was taken to a hospital where she received stitches in her head and other treatment for cuts and abrasions. Utilizing the *Garza* test regarding asportation, the Court held that the movement of the victim (dragging her across the yard) was brief, occurred during the robbery, was an inherent part of the robbery and aggravated assault, and did not significantly endanger the victim independently of the purse snatching and aggravated assault. The Court therefore overturned only the kidnapping adjudication.

Statements; Conspiracy

O'Neill v. State, S08G0708

Appellant was convicted of possession of methamphetamine. He challenged the sufficiency of the evidence. The evidence showed that the police, acting on information, went to a motel room and knocked on the door. One of appellant's co-defendants opened the door and let the officers inside. Another co-defendant was awake on the bed and appellant was practically unconscious on the bed. The police saw in plain view evidence of methamphetamine use in the form of two glass pipes on the bed. They arrested appellant and his co-defendants. The officers then found methamphetamine in the room. One of the co-defendants told the officers he attributed appellant's condition to the fact that appellant was having marital problems and "had been drinking or smoking the entire night."

OCGA § 24-3-52 expressly provides that "[t]he confession of one joint offender or conspirator made after the enterprise is ended shall be admissible only against himself." A conspirator's post-arrest statement to police incriminating a co-conspirator terminates the conspiracy, rendering the statement admissible only against the declarant. The evidence

established that the officers took appellant's co-defendants into custody upon spotting the glass pipes on the bed. The "drinking or smoking" statement to the officers came as the officers struggled to search and handcuff the unresponsive appellant and after the co-defendants had been taken into custody. Thus, the incriminating statement was made after the conspiracy was terminated and, pursuant to OCGA § 24-3-52, was admissible only against the declarant, not appellant. The Court then found that the remaining evidence was insufficient to convict appellant.

Evidence; Character

Alexander v. State, S09A0294

Appellant was convicted of the malice murder. He argued that the trial court erred in excluding evidence of the victim's general reputation for violence and for carrying a gun, which he claimed he learned from his girlfriend. Generally, a victim's character and reputation for violence are irrelevant and inadmissible in a murder trial. However, there is an exception and such evidence is admissible when the defendant makes a prima facie showing that the victim was the aggressor, that the victim assaulted the defendant, and that the defendant was honestly trying to defend himself. Here, the Court held, appellant arguably made a prima facie showing that the victim was the aggressor based on evidence that she walked up to him and yelled at him about whether they had a problem. However, appellant failed to make the requisite showings that the victim assaulted him or that he was honestly trying to defend himself when he shot the unarmed victim.

Allison v. State, A08A2092

Appellant was convicted of two counts of aggravated assault and one count of possession of a firearm during commission of a crime. He contended that after a State's witness, appellant's former girlfriend, testified that appellant had previously threatened to shoot her, the trial court erred in refusing to declare a mistrial or instruct the jury to disregard the witness's testimony. The evidence showed that the two male victims were living in a motel room close to the room where the appellant and the witness had lived. On the day of the crimes, appellant told the former girlfriend that "he was about to do something stupid." On cross-examination,

defense counsel asked the witness whether she believed that appellant's "saying something about him doing something stupid related to your breakup." She responded, "Yeah, I thought he was going to shoot me." On redirect, the prosecutor asked the witness whether appellant appeared normal or upset. She answered, "He didn't want —he didn't want us to end. He thinks that we can work it out, you know. He always blamed the drugs. Which it probably was the drugs, why we couldn't make anything happen. And then he just said he was going to do something stupid. I personally thought he was going to shoot me, because at one time he did give me a bullet for a present and he told me if I ever left him that bullet would be in my head." The Court held that defense counsel elicited testimony that the witness had interpreted appellant's statement that he was going to do something stupid as evidencing an intent to shoot her rather than to rob or assault others. That opened the door to the witness explaining on redirect examination that she thought he was going to shoot her because he had threatened to do so before. Therefore, the trial court did not abuse its discretion in not granting a mistrial or giving curative instructions.

Evidence; Hearsay

Character v. State, S08A2056

Appellant was convicted of murder, aggravated assault and other related offenses. He contended that the trial court erred by admitting hearsay evidence concerning prior difficulties with the victim. At trial, one victim, Tharpe, was allowed to testify as to the prior difficulty the murder victim, Lovejoy, had with the appellant. The Court stated that Lovejoy's out-of-court statements were non-hearsay and admissible as "original evidence" if the requirements of OCGA § 24-3-2 were satisfied. The Court interpreted that Code section to mean that, when, in a legal investigation, the conduct and motives of the actor are matters concerning which the truth must be found, then information, conversations, letters and replies, and similar evidence known to the actor are admissible to explain the actor's conduct. A victim's statements about prior difficulties cannot serve to illustrate the defendant's conduct and motives unless (1) those statements are true; or (2) they are false, but the defendant knew that the victim was telling people they were having difficulties. In

so holding, the Court overruled *Perry v. State*, 255 Ga. 490 (1986) to the extent it holds that a victim's conversations with a witness are admissible to explain the defendant's conduct under § 24-3-2 even if they are unknown to the defendant. Moreover, to the extent *Perry* holds that the victim's conduct was a matter concerning which the truth had to be found and that the victim's statements were admissible to explain that conduct, it too is overruled. The trial court therefore erred in admitting this testimony under that code section because appellant did not know of those statements.

However, the Court found that the statements were admissible under the necessity exception to the hearsay rule. The record shows that Tharpe and Lovejoy were life-long friends who placed great confidence in each other and that Lovejoy confided in Tharpe in times of trouble. Lovejoy's out-of-court statements to Tharpe constituted some of the most probative evidence regarding the difficulty between Tharpe and the defendants.

Prosecutorial Misconduct

Brooks v. State, S08A1647

Appellant was convicted of malice murder, aggravated assault and possession of a firearm during the commission of a felony. He contended the State engaged in prosecutorial misconduct in failing to provide him with sufficient information to locate a potential defense witness. The Court stated that a charge of prosecutorial misconduct is a serious one and is not to be lightly made; having raised it, appellant has the duty to prove it by the record and by legal authority. Here, the record showed the State placed the witness on its witness list, provided appellant with what information it had concerning his location, and then communicated with appellant before trial that it would not call the witness. The Court held that the State, acting in its role as the prosecution, has no obligation to locate defense witnesses and here, made a good faith effort to comply with its discovery obligations when it listed the witness as a possible prosecution witness. In any event, the Court found, there was no evidence of prosecutorial misconduct.

Similar Transactions

Payne v. State, S08G1267

Appellant was convicted of multiple counts

of child molestation. The Court granted cert. to determine if the trial court erred in admitting a similar transaction concerning his conviction for the rape of an adult woman in Alabama. To be admissible for the purposes of establishing motive, intent, course of conduct or bent of mind, the State must show (a) sufficient evidence that the similar transaction occurred and (b) sufficient connection or similarity between the similar transaction and the crime alleged so proof of the former tends to prove the latter. When considering the admissibility of similar transaction evidence, the proper focus is on the similarities, not the differences, between the separate crime and the crime in question. This rule is most liberally extended in cases involving sexual offenses because such evidence tends to establish that a defendant has such bent of mind as to initiate or continue a sexual encounter without a person's consent. Here, both victims were females with whom appellant had a personal relationship, as opposed to randomly chosen strangers. Both crimes were committed in the home where appellant was residing or had recently resided, and where he likely felt more comfortable than in public or a less familiar place. Both victims described similar sexual acts, including oral sodomy. Finally, both victims were physically restrained and threatened with physical violence.

Appellant argued that evidence of a prior sexual act committed on an adult is inadmissible at the later trial of an indictment charging a sexual act committed on a child unless the facts are so similar as to be "obvious and numerous." The Court stated that "[n]o Georgia case holds that the difference in age of the victims is alone determinative of similarity. Our precedent consistently holds that it is the totality of the similar facts surrounding the crimes which are properly considered in a similar transaction analysis." Thus, the Court found, "[t]his is not the type of child molestation which depends upon mental manipulation, trickery or cajoling to adduce the child's consent. This was a series of violent acts in which the child victim was restrained, threatened, and physically forced to commit sexual acts. To hold that these cases are too dissimilar to constitute similar transaction evidence based solely on the difference in the victims' ages would ignore our precedent."

Evidence; Sufficiency

Mahone v. State, A08A2017

Appellant was convicted of sale of cocaine and of possession of cocaine with intent to distribute within 1000 feet of a public housing project. Appellant contended that the State failed to prove that the latter offense. The Court agreed. A narcotics investigator for the county sheriff's department testified that the cocaine buy took place less than 1,000 feet from a government housing development. He did not testify that the government housing development was the property of a municipal housing authority. Nor did he testify that the housing development was occupied by low and moderate-income families. Therefore, the Court held that the evidence was insufficient to show that, in violation of OCGA § 16-13-32.5, appellant possessed cocaine within 1,000 feet of a housing project.

Jury Charges; Lesser Included Offenses

Dixon v. State, A08A2126

Appellant was convicted of two counts of armed robbery. He argued that the trial court erred in failing to charge the jury as to the lesser included offense of theft by taking. The victim claimed that appellant took his truck and wallet at gunpoint. The appellant testified that he was walking along, saw a truck with the keys in it and decided to take it. A few minutes later, he thought better of it and parked the truck in an apartment complex. But, right after he parked it, the police showed up and arrested him. The Court stated that where a case contains some evidence, no matter how slight, that shows that the defendant committed a lesser offense, the trial court should charge the jury on that offense. The Court held that while appellant's account appeared to be incredible, the jury was at first deadlocked before reaching a verdict. The failure to give the requested charge, which in reality formed the basis of appellant's sole defense, effectively removed this issue from the jury's determination. It therefore reversed his convictions.

Competency to Stand Trial

Phelps v. State, A08A2259

Appellant was convicted of aggravated assault, terroristic threats, and burglary. He

argued that the trial court erred in failing to determine whether he was mentally competent to stand trial. Before the trial court, appellant insisted he was competent although defense counsel argued otherwise. Appellant refused to cooperate with an evaluation and the trial court proceeded to try him on the indictment. The Court held that a criminal defendant's due process right to a fair trial encompasses the right not to be tried or convicted while incompetent to stand trial. In order to protect this right, Georgia law provides that "[w]henver a plea is filed that a defendant in a criminal case is mentally incompetent to stand trial, it shall be the duty of the court to cause the issue of the defendant's mental competency to stand trial to be tried first by a special jury." OCGA § 17-7-130 (b). Here, prior to trial, appellant's counsel moved for a continuance but never technically filed a written plea that appellant was mentally incompetent to stand trial. Although counsel's technical failure to file a plea of mental incompetence may waive a defendant's statutory right to a special jury under OCGA § 17-7-130 (b), the constitutional guarantees require the trial court to inquire into competency, even where state procedures for raising competency are not followed, if evidence of incompetence comes to the court's attention. Defense counsel expressed to the court more than once and in no uncertain terms that he had serious doubts about appellant's competency, specifically noting that appellant was paranoid and felt that his counsel was working against his interest. Defense counsel also informed the trial court that, based upon his personal observations and interactions with appellant, he feared that appellant was either delusional or did not understand the proceedings against him. These concerns were supported by reports from an evaluation of appellant two years earlier in which a psychologist expressed doubt that appellant had a rational understanding of the criminal proceedings that he faced at that time for a similar but separate crime. Moreover, appellant's father testified during trial that appellant had previously been diagnosed with a mental illness and, indeed, appellant's own trial testimony seemed to reflect some level of paranoia. Given this evidence, it was incumbent on the trial court to conduct a hearing to determine appellant's competency to stand trial. The conviction was reversed and the case remanded for a hearing to determine if appellant was competent at the time of trial.

Evidence; Sufficiency

Fluker v. State, A08A1834

Appellant was convicted of trafficking in ecstasy. He argued that the evidence was insufficient to support his conviction. The Court agreed. The evidence showed that appellant was traveling in a vehicle with a woman, her two children, and another adult male. The traveled from New Orleans and stopped at a gas station in Atlanta. Although the testimony was contradictory, no one saw appellant leave the car. Law enforcement suspected that the station was being used as a place for narcotics transactions. An officer, who had been observing the station for a few days, observed suspicious behavior of appellant's traveling companions which was consistent with similar behavior he had witnessed over the last couple of days. A uniformed officer stopped the vehicle and after obtaining consent to search, found the ecstasy. The testimony at trial only showed that the drugs were found on the passenger side of the vehicle. The Court held that the circumstantial evidence produced by the State failed to establish a connection between appellant and the ecstasy other than the fact that he was a passenger in the car. The arresting officer testified that nothing linked appellant to the drugs other than the fact that he was in the car. As appellant was merely a passenger, no presumption of ownership arose. Because mere spatial proximity to the hidden drugs was insufficient to establish beyond a reasonable doubt that appellant had constructive possession of the ecstasy, and the circumstantial evidence was insufficient to exclude every other reasonable hypothesis save that of guilt, the conviction was reversed.

DUI; Demurrer

State v. King, A08A2025

Appellee was charged with DUI (less safe) and DUI (per se). During trial, the trial court granted his general demurrer to the per se count. The accusation alleged that appellee "was in actual physical control of a moving vehicle on Piedmont Road with an alcohol concentration of 0.08 grams or more within three hours after being in actual physical control ended [sic], in violation of OCGA § 40-6-391. . . . " OCGA § 40-6-391 (a) (5) provides that "a person shall not drive or be in actual physical control of any moving vehicle while

. . . the person's alcohol concentration is 0.08 grams or more at any time within three hours after such driving or being in actual physical control from alcohol consumed before such driving or being in actual physical control ended. " The trial court concluded that the accusation was fatally defective because the State failed to include essential words from the relevant statute. The Court disagreed and reversed. It held that a charging instrument "should contain a complete description of the offense charged, and that there can be no conviction unless every essential element thereof is both alleged in the indictment and proved by the evidence." However, where an accusation charges the defendant with having committed certain acts "in violation of" a specified penal statute, the accusation incorporates the terms of the referenced Code section. Since an accused cannot admit an allegation that her acts were "in violation of" a specified Code section and yet not be guilty of the offense set out in that Code section, such an accusation is not fatally defective. Thus, an accusation will survive a general demurrer if it charges an accused with having committed certain acts in violation of a specific criminal statute, notwithstanding the omission of an essential element of the crime. Here, the accusation did not specifically allege that appellee's alcohol concentration resulted from alcohol consumed before his driving ended. But, the accusation was not defective because it alleged that the appellee violated OCGA § 40-6-391 and it was titled "Driving Under the Influence of Alcohol (Per Se)." Therefore, there could be no confusion over the crime the appellee was charged with. Under these circumstances, the trial court erred in sustaining appellant's general demurrer regarding the DUI per se charge.

Cruel and Unusual Punishment

Bragg v. State, A08A2145

Appellant was indicted for rape, statutory rape, and child molestation. The indictment specifically charged him with child molestation by engaging in sexual intercourse with the victim. After a jury trial, he was acquitted of the first two charges and convicted of child molestation. He was sentenced to twenty years, ten in confinement and the remainder on probation. Citing *Humphrey v. Wilson*, 282 Ga. 520 (2007), appellant contended that his

sentenced violated the Eighth Amendment. The evidence showed that at the time of the offense, appellant was 15 and his victim was 12. Appellant argued that his conduct fell within the legislative intent of the 2006 amendment to OCGA § 16-6-4 because he was less than eighteen years old, he and the victim were less than four years apart in age and both he and the victim were "children" as defined by the legislature. The Court, however, found that the 2006 amendment did not apply to appellant because the victim was only 12 years old at the time of the sexual act. The amendment therefore did not raise an inference of gross disproportionality with respect to his sentence.

The Court, nevertheless, stated that this did not preclude an evaluation of a sentence to determine whether it is cruel and unusual. Under general rules, the Court was required to examine "the harm caused or threatened to the victim or society, and the culpability of the offender" and to take into account "the absolute magnitude of the crime" before examining the sentence imposed. Here, the Court found, this was not one of those rare cases that raises a threshold inference of gross disproportionality. As for the harm caused or threatened to society, the Legislature declared that sexual offenders who prey on children are "sexual predators who present an extreme threat to the public safety." Appellant's crime was not a passive felony. Competent evidence showed that he had engaged in sexual intercourse with a 12-year-old girl without her consent. Georgia law against child molestation punishes acts that are far less severe. Under these circumstances, and given the fact that the potential punishment for child molestation ranges from five to twenty years, appellant's sentence of ten years confinement followed by probation did not raise a threshold inference of gross disproportionality. Moreover, because appellant failed to make this threshold showing, the Court was not required to compare his sentence to sentences imposed for similar crimes within the jurisdiction.

DUI; Accusation

Page v. State, A09A0196

Appellant was convicted of DUI. She argued that she did not freely and voluntarily consent to the state-administered blood test because the officer provided her with false and misleading information concerning the

consequences of her failure to take the test, which confused her and impaired her ability to make an informed decision under the implied consent law, and amounted to an "unlawful inducement." The Court stated that even when an officer properly gives the implied consent notice, if the officer gives additional, deceptively misleading information that impairs a defendant's ability to make an informed decision about whether to submit to testing, the defendant's test results or evidence of his refusal to submit to testing must be suppressed. The suppression of evidence, however, is an extreme sanction and one not favored in the law. Here, the officer properly advised appellant of her rights pursuant to OCGA § 40-5-67.1 (g) (2) (B); that in response to her repeated questioning, the officer informed her that she was being arrested for DUI-less safe; and that the officer made no extraneous statements of the law beyond the implied consent notice. Thus, the trial court did not err in denying appellant's motion to suppress.

Appellant also argued that even though she allowed blood to be taken from her arm at the hospital, her consent was invalid. The Court disagreed. Appellant refused when asked at the scene of the traffic stop whether she would take a blood test. But, the evidence showed that she later rescinded her refusal and consented to the test. The officer even permitted her to call an attorney before her blood was drawn, although he was not required to do so. The officer's actions, including reading appellant the implied consent warnings multiple times, were reasonable and the procedure he utilized was fair.

Appellant further argued that the trial court erred in denying her oral motion to quash Count 2 of the accusation, contending that it did not contain all of the essential elements of OCGA § 40-6-391 (a) (6). This Court stated as follows: "DRIVING UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE-PER SE (BENZOYLECGONINE) . . . by being in actual physical control of a moving vehicle when benzoylecgonine, a controlled substance, was present in her blood, in violation of OCGA § 40-6-391 (a) (6) and 16-13-21." Appellant argued that the accusation was fatally flawed because it incorrectly states that benzoylecgonine is a controlled substance, rather than a metabolite of a controlled substance. The Court stated that although the accusation could have been more artfully

drawn, it is not legally insufficient. Here, the accusation informed appellant of the charge against her by reciting the appropriate Code section, OCGA § 40-6-391 (a) (6), which criminalizes driving with metabolites of a controlled substance present in the person's blood. Benzoylcegonine is a metabolite of a controlled substance — cocaine. Appellant could not have admitted to all that was charged in Count 2 and still be innocent of having committed any offense. Nor could she have been surprised or misled to her prejudice by the evidence at trial because she was aware of the substance she ingested. Thus, the accusation was sufficient.

Rule of Lenity

Manning v. State, A08A2057

Appellant was convicted of aggravated battery, two counts of aggravated assault, one count of kidnapping and an unindicted count of false imprisonment. He argued that the trial court erred in sentencing him on his conviction of kidnapping rather than the unindicted false imprisonment conviction because the jury's verdict convicting him of the kidnapping offense and the lesser included offense of false imprisonment was ambiguous. Specifically, he argued that a guilty verdict on the lesser included offense operated as an acquittal of the greater offense which, under the rule of lenity, required that he be sentenced on his false imprisonment conviction. The Court held that, unlike *Camphor v. State*, 272 Ga. 408, 414 (6) (2000), where the jury failed to reach a unanimous verdict on the indicted greater offense but found the defendant guilty on the unindicted lesser offense, here, appellant was convicted of the greater indicted offense of kidnapping and the lesser unindicted offense of false imprisonment. A conviction on both offenses, absent the intervention of the trial court, foreclosed any ambiguity as to the jury's intent to convict appellant beyond a reasonable doubt of kidnapping. Thus, the trial court properly entered judgment on the jury's verdict finding appellant guilty of each count of the indictment, including that of kidnapping. The lesser included offense was then properly merged into the greater offense for sentencing.