Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 4, 2016

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THIS WEEK:

Return of Property; O.C.G.A. § 17-5-54

Norman v. Yeager, A15A1990 (1/13/16)

Appellants, Norman and Rite Brokers Auto Sales, LLC, appealed the trial court' order dismissing their complaint that sought the return of three 100-gallon fuel tanks and a fuel pump that were attached to, or contained in, the truck owned by Rite Brokers. Norman is one of the managing members of Rite Brokers. He was arrested and eventually pled guilty under the First Offender Act to theft by taking for stealing diesel fuel. The Sheriff refused to return the fuel equipment following the plea and appellants sued. The Sheriff answered the complaint, denying that he was required to return the equipment, but did not asset a counterclaim or file an independent forfeiture action. The trial court dismissed the complaint, finding that the equipment was used to commit the theft by taking and was therefore contraband. In so holding, the trial court reasoned that the State has the inherent authority to retain as contraband any seized personal property used as a tool in the commission of a crime. The Court reversed.

The Court stated that under O.C.G.A. § 17-5-54 (2013), following the conclusion of a criminal prosecution, personal property seized for use as evidence at trial must be returned to its rightful owner, unless the property constitutes contraband or is subject to forfeiture. In determining whether the seized property constitutes contraband, Georgia courts distinguish between contraband per se, which is inherently unlawful (e.g. cocaine), and contraband which may ordinarily be used in a beneficial and useful manner but which becomes unlawful under certain specific circumstances set forth by law. Here, the fuel equipment was not contraband per se because when used in the ordinary course of affairs, are legal to possess and are beneficial and useful to society. Accordingly, Rite Brokers, as the undisputed title owner of the fuel equipment, was entitled to the return of the equipment, unless a statute provided for its forfeiture.

The Court found that no Georgia statute specifically addresses the forfeiture of fuel equipment used in connection with a theft offense. And while Georgia more generally criminalizes possession of tools "commonly used in the commission of burglary, theft, or other crime with the intent to make use thereof in the commission of a crime," O.C.G.A. § 16-7-20(a), the statute does not declare those tools to be contraband or subject to forfeiture. Furthermore, the Court noted, while RICO may have provided statutory authority for the forfeiture of the fuel equipment, the State did not bring a RICO forfeiture action against the fuel equipment and had not alleged, or sought to establish, that Norman engaged in a pattern of racketeering activity rather than the single

felony theft to which he pled guilty under the First Offender Act. Consequently, the Sheriff could not rely upon RICO as a basis for retaining the fuel equipment under the circumstances of this case. Accordingly, the Court concluded, given the absence of specific statutory authority justifying retention of the fuel equipment, the trial court erred in dismissing the appellants' complaint and in failing to order the Sheriff to return the equipment.

Conflicts of Interest; Double Jeopardy

Beasley v. State, A15A1713 (1/27/16)

In *Beasley v. State*, 328 Ga. App. 96 ("Beasley I"), the Court reversed appellant's conviction for trafficking in cocaine. Specifically, the Court found that there was a conflict of interest on the part of the trial court and remanded for an evidentiary hearing to determine when defense counsel first learned of the conflict to decide if the recusal motion was timely and preserved for appellate review. However, on remand, the State consented to the new trial and the trial court ordered the new trial without reaching the disqualification issue.

Appellant first argued that the trial court erred by ordering a new trial without holding an evidentiary hearing as directed in Beasley I. But, the Court found, the trial court merely sought to maximize judicial economy by moving forward with a new trial with the State's concession. Although the Court's decision and direction must be respected and carried into full effect in good faith by the trial court, the record did not demand reversal on this ground.

Next, appellant argued that a new trial was not the correct remedy for a conflict of interest on the part of the trial judge, citing Pope v. State, 256 Ga. 195 (1986), overruled on other grounds by *Nash v. State*, 271 Ga. 281 (1999). But, the Court found, Pope does not stand for the proposition that a criminal defendant cannot be retried after his conviction is reversed based on a procedural error.

Finally, appellant argued that his new trial was barred on double jeopardy grounds. Again the Court disagreed. Appellant's complained of conflict of interest on the part of the trial judge did not implicate his guilt or innocence or the sufficiency of the evidence introduced by the State at trial. Thus, if the State adduced sufficient evidence of his guilt to authorize his conviction in his first trial, double jeopardy concerns would not bar his retrial in the event of a procedural error. And here, the Court found, the evidence introduced in his first trial was sufficient to support his conviction. According, the Double Jeopardy Clause did not bar his retrial.

Jury Instructions; Mistake of Fact

Franklin v. State, A15A2180 (2/2/16)

Appellant was convicted of rape, aggravated sodomy, aggravated assault, aggravated battery, false imprisonment, and the false report of a crime. The evidence, briefly stated, showed that appellant was estranged from his wife. Appellant lured her to a rental home that was a subject of a dispute between them. Appellant then viciously attacked her. At some point after appellant had severely beaten the victim and bound her to the bed, she decided to stop resisting in an effort to calm appellant and persuade him to untie her. She first asked him to untie one of her arms that had become numb and swollen, and then she requested that he untie her legs under the guise that intercourse would "be easier." Over the course of the day, appellant began to suggest that the two of them should again be together as a couple, to which the victim—who was panicking because she had lost a lot of blood from a gash in her head—agreed. She then requested that appellant administer medical aid and agreed to go along with a home-invasion story that appellant concocted in order to receive treatment for her injuries.

Appellant argued that the trial court erred in failing to sua sponte give an instruction on mistake of fact. The Court disagreed. The Court noted that it is true that the trial court must charge the jury on the defendant's sole defense, even without a written request, if there is some evidence to support the charge. And with respect to "mistake of fact," which is an affirmative defense, a person shall not be found guilty of a crime if the act or omission to act constituting the crime was induced by a misapprehension of fact which, if true, would have justified the act or omission. Additionally, because mistake of fact is an affirmative defense, even if it was not appellant's sole defense, if the defense was raised by the evidence, the trial court would have been required to present the affirmative defense to the jury as part of the case in its charge, even absent a request. The affirmative defense, however, would not have to be specifically charged if the case as a whole had been fairly presented to the jury. Moreover, in cases in which a jury finds a defendant guilty of forcible rape after proper instruction, the element of force negates any possible mistake as to consent, such that the court does not err by failing to charge on mistake of fact.

Here, the Court found, the defense of mistake of fact was not reasonably (or even remotely) raised by the evidence when the victim's physical resistance ended and her demeanor changed after being brutally beaten with a baseball bat, threatened at gunpoint, dragged bleeding through a house, ruthlessly bound to a bed, beaten with the bat again after resisting, and lacerated with a box cutter while her clothes were forcibly removed, all while appellant kept a handgun nearby and repeatedly verbally berated the victim. Indeed, a lack of resistance that is induced by fear is not legally cognizable consent but instead constitutes force. And here, because the jury was otherwise properly instructed, and found appellant guilty of forcible rape and forcible aggravated sodomy, the element of force negated any possible mistake of fact as to consent.

Double Jeopardy; Sentencing

Nolley v. State, A15A1686 (2/2/16)

Appellant was convicted of criminal attempt to commit armed robbery (count 1); aggravated assault (count 2); seventeen violations of the Street Gang Terrorism and Prevention Act (the Street Gang Act) (counts 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19); possession of a firearm during the commission of the felony offense of criminal attempt to commit armed robbery (count 20); possession of a firearm during the commission of the felony offense of aggravated assault (count 21); and misdemeanor obstruction of a police officer (count 22). By merger with other counts, the trial court subsequently vacated the convictions on counts 2, 4, 6, 10, and 21. The facts, briefly stated, showed that appellant was a high-ranking leader and organizer of a criminal street gang known as the Gangster Disciples and that he organized and recruited others to engage in gang related activity by attempting to rob Hammond, a drug dealer, and take over Hammonds territory for the gang.

Specifically, appellant was convicted of violating O.C.G.A. § 16-15-4(a) in counts 3 and 5; violating O.C.G.A. § 16-15-4(b) in

counts 7, 8 and 9; violating O.C.G.A. § 16-15-4(d) in count 11; and violating O.C.G.A. § 16-15-4(e) in counts 12-19 (each count related to a separate individual). Appellant argued that the prohibition against double jeopardy required that all of his convictions for violations of the Street Gang Act in counts 3, 5, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, and 19 merged into the conviction on count 11 under which he was found guilty of violating O.C.G.A. § 16-15-4(d) of the Street Gang Act by being an organizer of the gang who directly engaged in criminal gang activity, to wit: "the shooting of …Hammond." The Court said that normally this argument would require application of the "required evidence" test under *Drinkard v. Walker*, 281 Ga. 211, 212 (2006). The State conceded that *Drinkard* required merger of count 3 into count 11, but, the Court found no basis to apply the *Drinkard* test to appellant's contention that all the Street Gang Act convictions merge into count 11. Subsection (m) of O.C.G.A. § 16-15-4 provides: "Any crime committed in violation of this Code section shall be considered a separate offense." Under the plain language of this provision, the Legislature determined that any crime committed in violation of O.C.G.A. § 16-15-4 is a separate offense which does not merge with another separate offense under the code section or with any predicate offense listed in the code section. The Legislature has the power to authorize multiple criminal convictions or punishments arising out of the same act or transaction. Because the Legislature has the power to define crimes and fix punishments, the protection against double jeopardy is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. Accordingly, the Court held, the *Drinkard* test did not apply to appellant's multiple convictions for violations of distinct criminal offenses set forth in O.C.G.A. § 16-15-4(a), (b), (d), and (e).

Nevertheless, the Court found that the trial court should have vacated appellant's convictions and sentences on counts 8, 9 and 11. First, the Court noted that the trial court properly concluded that the conviction on count 2, which charged appellant with aggravated assault by shooting Hammond during the attempted armed robbery, was vacated by operation of law because it merged into the attempted armed robbery conviction (count 1). After merging and vacating the aggravated assault conviction, the trial court also vacated the convictions on counts 4, 6, and 10, which charged violations of the Street Gang Act predicated on commission of the vacated aggravated assault. The trial court also vacated the conviction on count 21, which charged appellant with possession of a handgun during commission of the vacated aggravated assault. But, count 8 (charging appellant committed aggravated assault with the intent to increase his status in the gang) and count 11 (charging that appellant was a gang organizer who directly engaged in criminal gang activity by shooting Hammond) also charged violations of the Street Gang Act predicated on commission of the vacated aggravated assault. Accordingly, the Court vacated appellant's convictions and sentences on counts 8 and 11, and remanded the case to the trial court for resentencing,

Count 7 charged that appellant, a gang member, violated O.C.G.A. § 16-15-4(b) by committing the offense of attempted armed robbery with the intent to *increase* his status in the gang, and count 9 charged that appellant, a gang member, violated subsection (b) by committing the offense of attempted armed robbery to *maintain* his status in the gang. The Court concluded that the portion of subsection (b) making it unlawful for any person to commit an offense enumerated in O.C.G.A. § 16-15-3(1) with the intent to "maintain or increase his or her status or position in a criminal street gang" expresses the Legislature's intention to create a single crime, committed by a person already a member or associated with the gang, which is proved by showing the person committed the enumerated offense with the intent to maintain or increase status or position in the gang. When a defendant is convicted for multiple violations of a single statutory provision, the required evidence test enunciated in *Drinkard* does not apply. Rather, to determine whether multiple convictions and punishments are permissible in this context, a court must determine the "unit of prosecution," or the precise act or conduct that is being criminalized under the statute. And here, the Court found no statutory basis to conclude that the Legislature intended that proof of intent to "maintain" status or position in the gang would constitute a separate "unit of prosecution" from proof of intent to "increase" status or position in the gang. Therefore, the State's indictment charging violation of one offense in two counts (counts 7 and 9) was multiplicitous, and resulted in appellant being punished twice for a single offense in violation of double jeopardy protections.

DUI; Implied Consent

State v. Oyeniyi, A15A1724 (2/4/16)

The State appealed from an order granting Oyeniyi's motion to suppress the results of a State-administered chemical test of his breath obtained at the time of his arrest for DUI because it was coercive. The trial court found that the implied consent rights for adults over the age of 21 was "inaccurate, misleading, and overstate[s] the penalty for refusing to submit to the State's test" because it informed Oyeniyi that his driver's license "'would be suspended for a minimum of one year' if he refused, when it was only true that [it] might[.]" The trial court further concluded that the current wording of the implied consent notice "deprived [Oyeniyi] of the ability to make an informed decision as to whether he should refuse or consent" to the State-administered test.

Here, the Court noted, the police officer testified that he read verbatim to Oyeniyi the implied consent notice for suspects 21 years of age or over pursuant to O.C.G.A. § 40-5-67.1(b)(2), and a copy of the officer's implied consent card identical to the one he read to Oyeniyi was admitted in evidence. The notice provides that a suspect's Georgia driver's license will be suspended if he refuses to submit to testing. Furthermore, O.C.G.A. § 40-5-67.1(d) provides, in pertinent part, that when a person under arrest for driving under the influence refuses to submit to a chemical test at the request of the law enforcement officer and the officer submits a report to the Department of Driver Services stating that he or she has reasonable grounds to believe the arrested person had been driving under the influence and that the person refused to submit to the State-administered test, "the department *shall* suspend the person's driver's license, permit, or nonresident operating privilege for a period of one year . . . , subject to review as provided for in this chapter." (emphasis supplied). Thus, the Court found, the statute provides for a one-year suspension for a refusal. The fact that this suspension may

be subject to administrative or judicial review does not mean that the implied consent notice is misleading or overstates the consequence for such refusal. The legislative intent behind the refusal provision of the implied consent notice is to inform drivers of the potentially most serious consequence of refusal of testing, and the one-year suspension is one such consequence. "We can find no authority for the proposition that, in addition to the notice of the one year suspension, a suspect must also be advised of all conceivable outcomes or possible factors that may affect that one-year suspension, a suspect must also be advised of all conceivable outcomes or possible factors that may affect that one-year suspension." According, the Court found that the trial court erred in granting the motion to suppress.

DUI; Rule 403

Jones v. State, A13A1940 (2/3/16)

The Supreme Court in *Jones v. State*, 297 Ga. 156 (2015) reversed the Court of Appeals on its determination that Rule 404 (b) evidence of a prior DUI was irrelevant and inadmissible in a DUI case. The Court of Appeals in this case addressed the issue on remand from the Supreme Court of whether the trial court erred in its evaluation of the admissibility of the prior conviction evidence under O.C.G.A. § 24-4-403.

Citing Eleventh Circuit case law, the Court noted that under Rule 403, the determination of whether the probative value of extrinsic acts outweighs its prejudicial effect lies within the sound discretion of the trial court. Also, application of Rule 403 is an extraordinary remedy which should be used sparingly since it permits the trial court to exclude concededly probative evidence. Here, the Court noted the trial court found that (1) the circumstances surrounding the prior conviction were similar to the circumstances involving the charged offenses and, likewise, involved a charge for DUI (less safe); and (2) the charged offenses allegedly occurred five to six years after the extrinsic offense, when Jones would have had "[k]nowledge of the fact that he was less safe because he was [less safe] before." Moreover, the record demonstrated the State's need to introduce the prior conviction evidence because, as the Supreme Court explained, "[a] genuine issue regarding whether Jones was voluntarily driving while under the influence of alcohol was raised by [his] defense," and the prior conviction evidence "had a tendency to make the existence of his general intent to drive under the influence more probable and would authorize a jury to logically infer that Jones was voluntarily driving while under the influence." Accordingly, the Court found that it could not say that the trial court abused its discretion in allowing in the evidence under Rule 403.

Indigency; Right to Free Transcript

Robertson v. State, A15A135 (2/8/16)

Appellant was convicted of family-violence simple battery. She was represented at trial by a public defender. After trial, she filed a notice of appeal together with an affidavit of poverty asserting she was "unable to pay the fees and costs normally required." She subsequently moved to obtain a free transcript due to her indigency. The trial court, however, held a hearing on the motion because testimony at trial suggested appellant may not be indigent. When appellant failed to make any attempt to prove her indigent status, the court denied the motion.

Appellant contended that the trial court erred in not providing a free transcript. The Court noted that O.C.G.A. § 9-15-2(a)(2) provides as follows: "The judgment of the court on all issues of fact concerning the ability of a party to pay costs or give bond shall be final." Accordingly, the Court found, the trial court's decision regarding appellant's ability to pay for a trial transcript must be affirmed.

Nevertheless, appellant argued, O.C.G.A. § 17-12-24(a), which is part of the Georgia Indigent Defense Act of 2003 (the "IDA"), provides that the decision whether an arrested person is indigent for the purpose of obtaining representation by an attorney under the IDA rests with the public defender's office. And here, the public defender determined that she was indigent and therefore, the trial court was required to accept this determination and provide her with a free transcript. The Court disagreed. The Court noted that although the IDA requires the Georgia Public Defender Standards Council to pay the costs of defense for an indigent defendant, it has previously held that the cost of a trial transcript is not a cost of providing a defense under IDA and is to be borne, therefore, by the county. Thus, although the IDA provides that the public defender offices established by the IDA are required to determine whether a defendant is indigent for the purpose of providing a defense, that determination does not control a county's obligation to provide an appellate transcript. And because the IDA does not pertain to a determination of indigence for the purpose of providing a transcript free of charge to indigent defendants, it follows that the trial court retains discretion to determine whether a defendant is indigent for the purpose of holding a county responsible for the cost of a transcript. Thus, the Court found, because the court was concerned that appellant's indigent status was suspect, the court held an evidentiary hearing, as it was authorized to do, on whether appellant was entitled to a trial transcript at county expense and that decision is not subject to review. According, the Court affirmed.

DUI; Rule 417 Evidence

State v. Tittle, A15A1808 (2/5/16)

Tittle was charge with DUI (less safe) and failure to maintain lane. The evidence showed that Tittle refused to submit to any chemical testing after being read the implied consent warnings. The State sought to admit an 8-year-old DUI conviction under O.C.G.A. § 24-4-417. The trial court, relying on *Frost v. State*, 328 Ga.App. 337 (2014), denied the motion, finding that the State was limited to using it only in rebuttal of the defense's case. The State appealed.

The Court noted that after the parties had briefed the case, the Supreme Court reversed the Court of Appeals in *State v. Frost*, 297 Ga. 296 (2015). Therefore, the Court found that O.C.G.A. § 24-4-417(a)(1) permits the State to introduce evidence of Tittle's prior DUI conviction during its case in chief. Accordingly, the Court reversed the order limiting the State's use of this evidence to its rebuttal case.

Accident Reconstruction Video; Relevancy

Michael v. State, A15A1956 (2/4/16)

Appellant was convicted of five counts of homicide by vehicle in the first degree, one count of serious injury by vehicle, six counts of hit and run, one count of reckless driving, one count of failure to maintain lane, and one count of tampering with evidence. The evidence, briefly stated, showed that appellant was travelling in a gold BMW in the outside westbound lane

of a four lane highway. There was a Mercedes in inside lane travelling in the same direction. Appellant's vehicle struck the Mercedes, causing the Mercedes to hit a Volkswagen travelling in the westbound lane. The Mercedes burst into flames and five people died. Appellant then drove away from the scene.

At trial, appellant presented opinion testimony from her own accident reconstruction expert that the collision was caused by the Mercedes rather than her BMW. In support of this testimony, she sought to introduce for demonstrative purposes a computer animation video illustrating how the collision allegedly occurred in the opinion of the accident reconstruction expert. The video showed a simulation from an "overhead perspective view" of the Mercedes drifting into the other lane and striking the BMW, causing the BMW to lose control and setting off the chain of events that culminated in the serious injuries and deaths that occurred. The beginning of the video stated that the simulation was based on the Mercedes traveling 65 mph and the BMW traveling 55 mph. The Court granted the State's motion in limine to exclude the video.

The Court found that pretermitting whether the trial court erred in excluding the video, there was no error. Although appellant's accident reconstruction expert was not permitted to use the computer animation video, the expert still was able to use photographs, diagrams, and model cars to discuss and illustrate his opinion of how the collision occurred to the jury. The expert thus had ample opportunity to explain his theory of the collision through demonstrative and illustrative evidence other than the computer animation video. Under these circumstances, even if the trial court erred by excluding the computer animation video, the error did not constitute grounds for reversal of the judgment.

Appellant also contended that the trial court erred in granting the State's motion to exclude expert testimony about the precision immobilization technique ("PIT") maneuver used by police officers to strike a suspect's car. Specifically, to illustrate how the collision was initiated by the Mercedes, the defense sought to analogize to the PIT maneuver used by police officers to immobilize a suspect's vehicle in a car chase. During his testimony, the defense accident reconstruction expert described the PIT maneuver, noting that an officer normally performs the maneuver by using the front right of his patrol car to strike the left rear of a suspect's car. The expert further explained that the extent to which a suspect realizes that his car has been struck by the patrol car can vary, and that sometimes the "sensation is little, if at all."

The Court found no abuse of discretion. The defense sought to have its expert testify how a trained police officer would have carried through with the PIT maneuver to avoid a collision after making the initial contact with the suspect's vehicle. But this proffered expert testimony was unrelated to, and would not have assisted the jury in resolving, the causation question that was in controversy, namely, which of the two cars (the BMW or Mercedes) first struck the other car. The trial court thus acted within its discretion by excluding the proffered expert testimony as irrelevant.

Juveniles; Appellate Jurisdiction

In re W. L., A15A2247 (2/2/16)

Appellant committed offenses in Monroe County and was ordered in the juvenile court of that county to pay $5,508.38 in restitution. In its order, the juvenile court also transferred the case to Peach County for final adjudication because appellant was a resident of Peach County. Appellant filed a direct appeal from the order, asserting issues concerning the order to pay restitution.

The State moved to dismiss the appeal as premature and the Court agreed. The Court stated that transfer orders are not directly appealable under O.C.G.A. § 5-6-34(a)(1) because a case transferred from one trial court to another trial court is still "pending in the court below." The Court stated that this general rule that transfer orders are not "final appealable orders" may also adhere when an order transfers a case to a *different type* of trial court below, citing *Fulton County Dept. of Family & Children Svcs. v. Perkins*, 244 Ga. 237, 237-238) (1978). And here, the Court found, appellant filed a direct appeal from an order transferring the case from the Juvenile Court of Monroe County to the Juvenile Court of Peach County. This transfer order was not final because it is the continuation of the same proceeding against him. Accordingly, the Court found, appellant's direct appeal was premature as there was no final judgment and the case remained pending in the juvenile court. Therefore, the order from which appellant sought to appeal was interlocutory and not appealable without compliance with the interlocutory appeal procedure of O.C.G.A. § 5-6-34(b).