Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 1, 2016

THIS WEEK:

Due Process; Sexual Offender Classifications

Gregory v. Sexual Offender Registration Review Bd., S15A1718 (3/21/16)

Appellant appealed from a superior court decision affirming a Sexual Offender Registration Review Board ("Board") determination classifying him as a sexually dangerous predator. He contended that that he was denied due process because he was denied the opportunity to challenge the classification in an evidentiary hearing before either the Board or the superior court. The Court agreed and reversed.

Appellant was convicted in 2012 of obscene internet contact with a child. For the purposes of the Georgia sexual offender registration laws, obscene Internet contact with a child is a "dangerous sexual offense," see O.C.G.A. § 42-1-12(a)(10)(B)(xvii), and any person convicted of a "dangerous sexual offense" is a "sexual offender." See O.C.G.A. § 42-1-12(a)(20)(A). Appellant is, therefore, a sexual offender subject to the sexual offender registration laws. As such, his conviction, alone, subjects him to certain registration requirements and residency and employment restrictions.

Additional requirements and restrictions may attach, however, upon a finding that a sexual offender presents a significant risk of committing additional dangerous sexual offenses. The sexual offender registration laws require the Board to assess "the likelihood that a sexual offender will engage in another crime against a victim who is a minor or a dangerous sexual offense," and to classify sexual offenders according to that assessment. There are three classifications. A "Level I risk assessment classification" signifies that "the sexual offender is a low sex offense risk and low recidivism risk for future sexual offenses." O.C.G.A. § 42-1-12(a)(12). A "Level II risk assessment classification" means that "the sexual offender is an intermediate sex offense risk and intermediate recidivism risk for future sexual offenses," and it is the default classification for sexual offenders. O.C.G.A. § 42-1-12(a)(13). A "sexually dangerous predator" classification indicates that the sexual offender is "at risk of perpetrating any future dangerous sexual offense." O.C.G.A. § 42-1-12(a)(21)(B). In assessing and classifying a sexual offender, the Board may rely upon a variety of information provided by prosecuting attorneys, the GBI, the State Board of Pardons and Paroles, the Department of Corrections, the Department of Community Supervision, and the sexual offender himself. Such information may include psychological evaluations, sexual history polygraph information, treatment history, personal, social, educational, and work history, criminal history, and court records. Although

the sexual offender is entitled to submit any information relevant to his classification, there is no provision for an administrative evidentiary hearing in connection with the Board's initial assessment and classification of a sexual offender. Upon making a classification determination, the Board must notify a sexual offender of his classification in writing.

Sexual offenders classified as Level II risk assessments or sexually dangerous predators may seek administrative reevaluation, and in connection with that reevaluation, sexual offenders again have an opportunity to provide information relevant to their classification. Sexual offenders classified as Level II risk assessments or sexually dangerous predators also may seek judicial review of their classifications, and yet again, they are afforded an opportunity to submit documentary evidence in connection with judicial review. Moreover, there is a provision for the reviewing court to hold an evidentiary hearing, but that provision is permissive, not mandatory.

The Court noted that a sexually dangerous predator is subject to requirements and restrictions in addition to those requirements and restrictions that apply to sexual offenders generally. Most notably, O.C.G.A. § 42-1-14(e) requires a sexually dangerous predator to submit for the rest of his life to electronic monitoring and tracking of his person and to pay the costs associated with that monitoring and tracking. Also, sexually dangerous predators must register with their sheriffs more frequently than other sexual offenders, and many sexually dangerous predators are subject to additional employment restrictions. Finally, although there are procedures by which a sexual offender may seek to be released from the registration requirements and residency and employment restrictions, the standard for release is more onerous for Level II risk assessments and sexually dangerous predators.

Appellant contended that his classification as a sexually dangerous predator — without affording him any opportunity in person at an evidentiary hearing to present favorable evidence and confront unfavorable evidence concerning the likelihood that he will commit additional dangerous sexual offenses — amounted to a deprivation of his liberty without due process of law. The Court first held that considering the electronic monitoring and tracking requirement, the additional registration requirement, the additional employment restrictions, and the opprobrium and reputational harm associated with classification as a sexually dangerous predator, such a classification implicates a liberty interest. It then turned to the question of what process is due, and more specifically, whether the classification requires an evidentiary hearing.

The Court stated that to decide what process is due, it must apply the familiar three-factor test that the United States Supreme Court identified in *Mathews v. Eldridge*, 424 U.S. 319, 332 (III) (A) (1976), weighing (1) the private interest affected; (2) the possibility of erroneous deprivation using the established procedure and the probable value of additional procedural safeguards; and (3) the government's interest in the procedure or the burden of providing greater procedural protections. And considering the three *Mathews* factors, the Court concluded that due process demands an evidentiary hearing. However, the Court added, there is no reason why an evidentiary hearing would be required in both administrative and judicial proceedings. Unlike a substantive due process claim, a constitutional violation of procedural due process is not complete unless and until the State fails to provide due process. When the State does provide a hearing at some point in the course of administrative or judicial proceedings, the failure to hold a hearing at an earlier point in the proceedings generally becomes moot or is considered cured. Affording an evidentiary hearing to appellant in which he might present evidence favorable to his cause and confront the evidence against him would satisfy the requirement of due process, regardless of whether the hearing is held before the Board or the superior court.

But, here, the Court noted, the evidentiary hearing requested by appellant and required by due process has never been held. Accordingly, the Court reversed the judgment of the superior court and remanded for an evidentiary hearing at which appellant will have a meaningful opportunity to present favorable evidence and to confront the evidence against him, unless there is a finding of good cause not to permit such confrontation. Furthermore, the Court noted, it will be sufficient in this case for the trial court itself to hold that hearing pursuant to the statutory authorization in O.C.G.A. § 42-1-14(c). For other cases, the Board may elect to establish procedures by which persons classified as sexually dangerous predators are afforded a meaningful opportunity in an administrative hearing to present favorable evidence and confront the evidence against them, if the Board determines that an administrative hearing would be more efficient and cost-effective than a judicial hearing.

In so holding, the Court further stated "We express no opinion about whether the Board, if it elects to establish procedures for an administrative hearing, would be required to afford a right of compulsory process to the sexual offender, whether the offender would have a right to counsel, and what rules of evidence would apply in such an administrative proceeding."

Ultimate Issue; Ineffective Assistance of Counsel

Pyatt v. State, S15A1734 (3/25/16)

Appellant was convicted of felony murder and two aggravated assaults. The evidence, briefly stated, showed that after an argument in the parking lot of a nightclub, appellant fired a handgun in the direction of the car the victim was driving away. The victim continued to drive away, but the victim eventually turned his car around and came back. The victim drove his car twice past the nightclub and appellant and two others fired weapons into the car. The victim was shot and died later.

Appellant contended that his trial counsel rendered ineffective assistance by failing to object on "ultimate issue" grounds when a detective testified that, in his opinion, the shot fired by appellant as the victim drove away from the nightclub for the first time was an aggravated assault. Specifically, the detective testified that "In my opinion and in what I consider the law[,] that is aggravated assault. That's why he was charged with three counts of aggravated assault." And then later, stated, "I never considered it a warning shot. That was an assault."

In a 4-3 decision, the Court found no Sixth Amendment violation. First, the Court stated, it assumed, without deciding, that the testimony at issue properly was objectionable on "ultimate issue" grounds and that the failure to raise such an objection was unreasonable. Even so, the Court noted, appellant was still required to show that the failure to object was prejudicial.

And here, for a number of reasons, the Court found no prejudice. First, the concern about opinions on the ultimate issue is that they invade the province of the jury, but that concern was mitigated here by the detective's explicit concession on cross-examination that "I don't determine the guilt part," which refers to the responsibility of the jury to decide the ultimate issue. Second, the cross-examination called into question the basis for the detective's opinion, thereby reducing the likelihood that the jury would blindly accept that opinion. Third, and most important, the cross-examination elicited substantially the same opinion — that the detective believed that the first shot amounted to aggravated assault — as the direct examination to which appellant argued his lawyer should have objected. Appellant notably, however, did not contend that his lawyer cross-examined the detective in an unreasonable way. In these circumstances, appellant was not prejudiced by testimony on direct examination to the extent that his own counsel reasonably brought out the same testimony on cross-examination.

Finally, the Court noted the absence of any indication in the record that the prosecuting attorney made use of any improper testimony by the detective. To the contrary, the transcript showed quite clearly that the detective shared his opinion about the ultimate issue for the first time without any prompting from the prosecuting attorney; his opinion was not responsive to the question that the prosecuting attorney had posed. And although the closing arguments were not transcribed, appellant did not allege that the closing of the prosecuting attorney included a reference to the opinion of the detective. Furthermore, the trial court's jury instructions charged the jury that determining guilt, assessing the credibility of the evidence, resolving conflicts in the evidence, and weighing the evidence are tasks solely for the jury. The jury was therefore thoroughly and definitively instructed that they were not bound by the opinion testimony of any witness but were by law the sole and exclusive judges of the credibility of the witnesses, and it was solely within their province to determine the outcome of the case. Likewise, to the extent that the opinion shared by the detective implied anything about the law of aggravated assault, the trial court charged the jury that it was the responsibility of the court to determine the law that applied, instructed that the jury was to take the law as charged by the court, and gave the jury an accurate charge on the elements of aggravated assault. Accordingly, the Court concluded, "[o]n the peculiar facts of this case," appellant failed to show a reasonable probability that, if only his lawyer had objected to the opinion offered by the detective on direct examination about the first shot amounting to an aggravated assault, the outcome of the case would have been different.

Misdemeanor Probation; Tolling

Anderson v. Sentinel Offender Services, LLC, S15Q1816 (3/25/16)

A federal district court certified two questions to the Supreme Court: 1) Is tolling authorized for privately supervised misdemeanor probated sentences under Georgia common law? 2) If so, has the common law rule that allows tolling of misdemeanor probated sentences been abrogated by the State-wide Probation Act?

As to the first question, the Court stated that under common law, the actual fulfillment of the terms of a misdemeanor sentence — the "service" of that sentence — dictates the completion of that sentence. Thus, the Court found, under common law, a misdemeanor sentence — even one to be served on probation — is not extinguished by the mere passage of time, and any unserved term of that sentence may be enforced beyond the expiration of that original sentence. This principle, in effect, tolls the expiration of the sentence and concomitantly extends the jurisdiction of the sentencing court. Therefore, the Court concluded, tolling existed at common law and it answered the first certified question in the affirmative.

As to the second question, the Court stated that the common law rule is still of force and effect in this State, except where it has been changed by express statutory enactment or by necessary implication. The Court noted that probation is a creature of statute and was first enacted in 1913. In 1956, the legislature passed the "State-wide Probation Act." It was amended in 1958 to add a tolling provision. However, the Court found, the legislature did not abrogate the common law principle of tolling with the 1958 amendment; instead, the General Assembly codified the common law principle. Though this provision remains good law, and was once applicable to both felony and misdemeanor probation, it is currently codified in the portion of the State-wide Probation Act that is inapplicable to the private probation scheme for misdemeanors. Thus, the Court stated, the question, then, is whether common law tolling remains in force with respect to misdemeanor probation.

The Court noted that common law tolling has never been expressly abrogated and, though the now-codified tolling provision has been made inapplicable to misdemeanor probation by way of O.C.G.A. § 42-8-30, that fact does not conclude the matter. This is so because O.C.G.A. § 42-8-30 renders the entirety of the State-wide Probation Act inapplicable to misdemeanor probation, not just its tolling provision and, thus, does not necessarily imply an abrogation of the common law rule. Further, though the General Assembly is presumed to act with the full knowledge of existing law, it is also true that a statute must be viewed so as to make all its parts harmonize and to give a sensible and intelligent effect to each part because it is not presumed that the legislature intended that any part would be without meaning. And here, the Court found, any construction of the misdemeanor probation scheme that abrogates common law tolling would render misdemeanor probation unenforceable in some situations, as it would allow defendants to avoid their sentences by simply avoiding apprehension until the expiration of their original sentence. Therefore, the Court stated, it could not say that the General Assembly meant to enact an ineffective misdemeanor probation scheme without any mention of abrogating the well-established common-law and common-sense principle of tolling. Accordingly, the Court concluded that common law tolling of misdemeanor probation sentences was not abrogated by the State-wide Probation Act, and it answered the second certified question in the negative.

Search & Seizure

Whatley v. State, A15A1911 (2/22/16)

Appellant was convicted of two counts each of armed robbery, aggravated assault, and possession of a firearm during the commission of a crime, and one count each of financial transaction card theft, kidnapping, and burglary. He contended that the trial court erred in denying his motion to suppress

evidence found in two residences because the search warrants were improperly based on information from an informant of unknown reliability. The Court disagreed.

The Court found that although the investigating detective's affidavits contained insufficient information to establish the informant's reliability, another officer's oral testimony to the issuing judge showed that the informant had proven to be trustworthy by giving helpful information on multiple recent occasions. Moreover, the affidavits showed that the informant's tip was reliable in this case. The informant gave a range of details about the first robbery that would not have been widely known, including describing the mask, gun, and jacket used by one of the perpetrators and the large quantity of lottery tickets that were taken. Further, the informant claimed that he had seen these items inside appellant's codefendant's residence, and the informant provided an address. Thus, the Court concluded, this detailed information, much of it independently corroborated, was sufficient to establish the informant's reliability and consequently, to supply probable cause for the warrants.

Speedy Trial; Ineffective Assistance of Counsel

Priest v. State, A15A2032 (2/22/16)

Appellant was convicted of child molestation and two counts of enticing a child for indecent purposes. He contended that his trial counsel was ineffective for failing to file a motion to dismiss the indictment based upon a violation of his right to a constitutional speedy trial.

The Court noted that in order to establish prejudice by his counsel's failure to file a motion to dismiss on speedy trial grounds, appellant must show that such a motion would have been granted had it been filed. In reviewing the motion under the *Barker v. Wingo* factors, the Court noted that the State conceded that the 59 month delay was presumptively prejudicial; that the reason for the delay was apparently due to the negligence of the State and weighed only slightly against the State; and the defendant's assertion of the right was weighed heavily against the appellant.

As to the final factor of prejudice, appellant contended that he had two witnesses, Shipman and "Dana" who allegedly disappeared during the delay. One of the victims allegedly told Shipman that she had brought false accusations against appellant. As to "Dana," it was unclear as to this person's last name, but this person allegedly also had information that the same victim stated that the allegations against appellant were false. The trial court found no prejudice resulting from the loss of Shipman, finding in part, that his testimony would not survive a hearing under *Smith v. State*, 259 Ga. 135 (1989). The trial court did not address the loss of "Dana."

The Court, however, found that *Smith* was inapplicable to this case. *Smith* addressed the admissibility of an alleged victim's alleged past false accusations of sexual misconduct against persons *other than* the defendant. Thus, the rule in *Smith* does not apply to any testimony by Shipman that the victim had admitted to falsely accusing appellant, because *Smith* addressed past false accusations against third parties, not accusations against the defendant currently before the court. The Court also noted that the trial court's order did not show any consideration of the possibility that Shipman also might have testified that the victim had admitted to falsely accusing appellant, nor did it show the trial court considered the prejudice, if any, related to any testimony by Dana. Accordingly, the Court remanded the case back to the trial court to properly consider the question of prejudice.

DUI; Williams

Kendrick v. State, A15A2111 (2/23/16)

Appellant was charged with DUI. She contended that the trial court erred in denying her motion to suppress breathalyzer evidence showing she had a blood alcohol content of .15 because she did not freely and voluntarily consent to the breath test under *Williams v. State*, 296 Ga. 817 (2015). The evidence showed that after being read the implied consent rights, appellant replied "yes" and made no other comments, did not ask any questions about the implied consent notice or chemical breath test, and did not request an attorney. Appellant was subsequently transported to jail and approximately twenty minutes later provided a breath sample for testing.

The Court stated that the question before it was whether the State met its burden of proving that appellant actually consented freely and voluntarily under the totality of the circumstances. In this regard, consent to search will normally be held voluntary if the totality of the circumstances fails to show that the officers used fear, intimidation, threat of physical punishment, or lengthy detention to obtain the consent. Nor may consent be coerced, by explicit or implicit means, by implied threat or covert force. Other factors to be considered are prolonged questioning; the accused's age, level of education, intelligence and advisement of constitutional rights; and the psychological impact of these factors on the accused. Moreover, while knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent. Instead, the court should consider whether a reasonable person would feel free to decline the officers' request to search or otherwise terminate the encounter. Mere acquiescence to the authority asserted by a police officer cannot substitute for free consent.

Here, the Court found, the evidence did not show that the officers used fear, intimidation, threat of physical punishment, or lengthy detention to obtain the consent. Nor did appellant argue that youth, lack of education, or low intelligence somehow negated the voluntariness of her consent. Rather, the crux of her argument was that she felt coerced into giving consent because she was not informed of her constitutional right against unreasonable searches and seizures and because the language of the implied consent notice, when read to her while she was arrested and in handcuffs, made her feel as though she did not have a choice but to acquiesce. But, the Court stated, "[t]he Supreme Court of the United States and other courts have rejected invitations to create a duty to inform suspects of their constitutional right against unreasonable searches and seizures, and we will not depart from their well-worn path." Moreover, the Court stated, it was unpersuaded by appellant's argument that her affirmative response to the implied consent notice was merely an acquiescence to authority.

Nevertheless, appellant argued, consent under the implied consent statute does not per se equal consent for Fourth Amendment purposes. The Court agreed. However, the Court stated, "we do not read *Williams*' rejection of a per se rule of consent under the implied consent statute as authorizing us to replace it with its opposite - that is, a

per se rule that the State must always show more than consent under the implied consent statute. Rather, we take the Supreme Court at its word when it instructed trial courts to review the totality of the circumstances in determining consent." And, the Court stated, an affirmative response to the question posed by the implied consent language may be sufficient for a trial court to find actual consent, absent reason to believe the response was involuntary.

Here, the Court found, appellant gave an affirmative answer to the question posed by the implied consent language, which is necessarily part of the circumstances to be considered by the trial court. She did not attempt to change that answer during the time that elapsed before testing. She did not appear so impaired that she was unable to understand what she was being asked, she did not express any objection to the test, and the officer did not force her to take the test. During the hearing on her motion to suppress, although appellant testified that she thought the breath test was mandatory, she also said that her decision to submit to testing was motivated, at least in part, by a desire to keep her license, recognition of the actual choice she had. Therefore, the Court concluded, on this record, and considering all of the facts before it, and affording appropriate deference to the trial court that heard the testimony first-hand, the Court affirmed.

Sentencing; O.C.G.A. § 17-10-7(b.1)

Becker v. State, A15A (2/24/16)

Appellant was convicted of possession of methamphetamine in violation of O.C.G.A. § 16-13-30(a) and the trial court sentenced him as a recidivist to fifteen years, with the first seven years to be served in confinement and the remaining years to be served on probation. He contended that the trial court erroneously believed that it had no discretion in sentencing him to the maximum period of time prescribed for the punishment of possession of methamphetamine. The State and the Court agreed.

The trial court sentenced appellant as a recidivist under O.C.G.A. § 17-10-7(a) and (c). In 2012, the legislature amended § 17-10-7 to add subsection (b.1) which provided that "Subsections (a) and (c) of this Code section shall not apply to a second or any subsequent conviction for any violation of Code subsection (a) … of Section 16-13-30." This provision became effective on July 1, 2012 and applied to offenses occurring on or after that date. Since appellant's crime occurred in August of 2012, the newly-enacted subsection (b.1) applied. Therefore, the trial court erred in sentencing appellant as a recidivist and in believing that it was required to impose upon him the maximum sentence for possession of methamphetamine. Accordingly, the Court vacated his sentence and remanded for resentencing.

Recidivist Sentencing

Johnson v. State, A15A1665 (2/24/16)

Appellant was convicted of possession of a firearm by a convicted felon, possession of cocaine, and misdemeanor possession of marijuana. In its case-in-chief, the prosecutor tendered into evidence a 1991 felony theft by taking conviction to support the possession of a firearm conviction. Then, during sentencing, the State tendered a 1995 felony weapons conviction and a 2003 possession of cocaine conviction. Pursuant to O.C.G.A. § 17-10-7(c), the Court sentenced appellant to serve five years as to the possession-of-a-firearm charge (count one); three years to serve on the possession of cocaine charge, concurrent with count one; and twelve months to serve on the possession of marijuana charge, also concurrent with count one.

Appellant contended that the trial court erred in sentencing him as a recidivist under O.C.G.A. § 17-10-7(c) when one of the three prior felony convictions used in aggravation was for simple possession of cocaine. The Court agreed. As to his conviction for possession of a firearm by a convicted felon, the trial court properly sentenced appellant under O.C.G.A. § 17-10-7(c) when the State presented certified copies of three prior felony convictions, making his possession-of-a-firearm conviction a fourth felony. However, as to his conviction for possession of cocaine under O.C.G.A. § 16-13-30(a), following the explicit and plain terms of O.C.G.A. § 17-10-7(b.1), appellant could not be sentenced as a recidivist under O.C.G.A. § 17-10-7(c) because one of the three prior felony convictions used in aggravation was also a conviction under O.C.G.A. § 16-13-30(a). Nevertheless, the Court noted, nothing would have precluded the trial court from using one of the other two prior felony convictions to sentence appellant under O.C.G.A. § 17-10-7(a) for his conviction for possession of cocaine under O.C.G.A. § 16-13-30(a). The trial court indicated on the record that it believed it was mandatory to sentence appellant without the possibility of parole; however, the court also hedged by further providing that, "[t]o the extent the [c]ourt might have any discretion to probate any portion of the sentence, the [c]ourt chooses to exercise that discretion by not probating any portion of the sentence." Nevertheless, the Court stated, because the court was operating under an incorrect assumption, and because the final disposition reflected only that appellant was sentenced under O.C.G.A. § 17-10-7(c), it must vacate the trial court's sentence and remand for the court for resentencing.

Search & Seizure; Third Party Consent

Sevilla-Carcamo v. State, A15A2351 (2/23/16)

Appellant was indicted for trafficking in cocaine. She contended that the trial court erred in denying her motion to suppress. The evidence showed that based on a tip from the DEA, law enforcement believed that appellant's vehicle contained contraband. After the vehicle made an illegal lane change, an officer stopped the vehicle. Appellant was then arrested for driving without a license. After her arrest, the officers asked appellant for consent to search the vehicle, which she declined to give. Then, in accordance with department policy, the officers allowed appellant to contact someone to recover the vehicle rather than have it impounded. Appellant called her pastor and, 20 to 25 minutes later, he arrived on the scene. Both prior to and concurrent with the pastor's arrival, a K-9 unit conducted two open-air searches of appellant's vehicle, but the dog did not alert to the presence of any contraband. Nevertheless, before the pastor could leave with the vehicle, the officers informed him that they suspected the presence of illegal contraband and that he "would be responsible for whatever was in the car if he took possession of the vehicle." The pastor then asked to speak with appellant, who was sitting handcuffed in the back of a patrol car. The conversation that ensued between the pastor and appellant was mostly in Spanish, which none of the officers could speak or

understand; but at its conclusion, the pastor informed the officers that appellant gave him permission to take possession of the vehicle and that she told him that "there may be drugs in the vehicle." The pastor then requested that the officers search the vehicle. But before doing so, one of the officers once again confirmed with appellant that she wished for the pastor to take possession of the vehicle, to which she responded in the affirmative. Having received the pastor's permission to search the vehicle, the officers then proceeded with the search and located in the center console a large white purse containing a kilogram of cocaine.

Appellant argued that her pastor's consent to a search of the vehicle was invalid because she had previously refused to permit a search. The Court disagreed. Here, the Court found, appellant agreed to entrust her vehicle to her pastor for safekeeping, thus creating a bailment. And in doing so, she assumed the risk that the pastor would allow someone else to look inside. Thus, the pastor at that point possessed authority to consent to a search of the vehicle because there is no evidence that appellant in any way limited her pastor's use of the vehicle or ability to consent. And despite the fact that appellant had previously refused consent to a search of the vehicle, the Court declined her invitation to extend the U. S. Supreme Court's narrow holding in *Randolph*, given the well-established differential treatment of residences and automobiles under the Fourth Amendment.

Other Acts Evidence; Prejudice

State v. Dowdell, A15A2308 (2/23/16)

Dowdell was charged with forcible rape of an adult woman in 2012. Pursuant to O.C.G.A. § 24-4-413, the State sought to admit other acts evidence to show that Dowdell is a sexual deviant. First, in 2002, the State alleged that 18-year-old Dowdell had intercourse with a 13-year-old middle school student on two separate occasions. Dowdell was indicted for child molestation, but he entered an *Alford* plea to the offense of sexual battery. Second, in 2003, Dowdell allegedly molested the 13-year-old sister of one of his friends by touching the girl's vaginal area with his hand and later, during a sleep-over party, by touching her breasts and buttocks with a knife. The State indicted Dowdell for child molestation; however, he ultimately entered a guilty plea to misdemeanor simple battery. The trial court ruled that while the conduct was relevant to show that Dowdell was a sexual deviant, the prejudice of admitting the evidence outweighed its probative value. The State appealed.

First, the State argued that under O.C.G.A. § 24-4-413, the court failed to recognize that the proffered other acts evidence "shall be admissible" because it was relevant to show that Dowdell was a sexual deviant with a lustful disposition and that he was predisposed to commit acts of sexual assault. But, the Court found, even if the court had expressly determined that the evidence met all the requirements for admission pursuant to § 24-4-413, the court still had the discretion to exclude it pursuant to O.C.G.A. § 24-4-403. Second, the State argued, the trial court's application of O.C.G.A. § 24-4-403 to the facts of this case constituted an abuse of discretion because the court applied "the wrong legal standard." Specifically, it contended, the exclusion of the evidence is an extraordinary remedy to be used sparingly. The Court disagreed. The Court found that the trial court believed that the State was attempting to compensate for a weak case by "piling on" bad character evidence of scant probative value in an effort to undermine the presumption of innocence. Moreover, the trial court was clearly concerned that the admission of the other acts would transform what should be a straightforward case into "a trial involving three separate incidents," distracting the jury from the issues central to the crime charged. Therefore, the Court found that the State failed to carry its burden of demonstrating that the court was unaware that excluding evidence under O.C.G.A. § 24-4-403 was an extraordinary remedy that should be applied sparingly or that it misapplied the law to the facts of this case.

Next, the State argued that the trial court erred by stating in its order that it "must" exclude other acts evidence if it finds that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. The State argued that because O.C.G.A. § 24-4-403 provides that a court "may" exclude such evidence, the court failed to recognize that, even if the prerequisites of O.C.G.A. § 24-4-403 are present, then it is permissible, but not mandated, that the evidence may be excluded. But, the Court found, read in context, the trial court, by using the word "must" in its order, was simply recognizing that, although its discretion to exclude evidence under O.C.G.A. § 24-4-403 was narrowly circumscribed, its broad discretion to admit other acts evidence was not absolute.

Finally, the State argued that in conducting its analysis under O.C.G.A. § 24-4-403, the court failed to consider the "prosecutorial need" for the evidence. Again, the Court disagreed. The Court stated that there is no doubt that probative value is, in part, a function of the prosecution's need for the evidence in making its case. But it is also true that the probative value of the extrinsic offense correlates positively with its likeness to the offense charged. Likewise, the more time separating the charged and prior offense, the less probative value can be assigned the extrinsic evidence. And here, the Court found, the trial court simply disagreed that the other acts evidence was especially probative of those matters, given the lack of similarity between those acts and the charged offense, the decade separating the other acts from the charged offense, and the defendant's immaturity at the time the other acts were committed. On the other hand, the court believed that, under the circumstances, admitting extrinsic evidence of acts of alleged child molestation would lure the jury into finding Dowdell guilty based on proof that was not specific to the crime charged, thereby infecting the proceedings with unfair prejudice and undermining the presumption of innocence. Given that the record supported the court's findings, the Court found no clear abuse of discretion.