Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 27, 2012

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THIS WEEK:

Guilty Plea; Sentencing

Scott v. State, A12A1028 (4/19/2012)

Appellant appealed from the denial of his motion to withdraw his guilty plea to armed robbery. In his motion, appellant contended that the sentence entered following his guilty plea did not conform to the terms of the plea agreement because the court failed to give him credit for the time he served in jail while his case was awaiting trial. It was undisputed that, at the time appellant was charged with the armed robbery, he was in Baldwin County jail on charges from unrelated crimes, and he was still incarcerated for those crimes when he entered his guilty plea to the Lauren County armed robbery charge. In its order denying appellant's motion to withdraw his guilty plea, the trial court ruled that appellant had knowingly and voluntarily entered his plea. The trial court also ruled that, before appellant entered his guilty plea, he had been specifically informed that he would not receive credit toward his sentence for the period of time that he had served in the Baldwin County jail, even though the instant charge was pending during part of that time.

The Court noted that because appellant did not challenge these rulings, he implicitly conceded that he knowingly and voluntarily entered his guilty plea after being informed that he would not receive credit for the time he had already served for the Baldwin County crimes. Consequently, to the extent that the trial court denied appellant's motion on these bases, the order was affirmed. Appellant contended, however, that the trial court erred in refusing to credit the time he was confined in Baldwin County while the instant case was pending to the sentence he received on his guilty plea, pursuant to OCGA § 17-10-11 (a). The Court stated that this argument lacked merit because appellant would have been confined in Baldwin County on the unrelated charges during the time period at issue regardless whether he had been charged with the Lauren County crimes. Thus, OCGA § 17-10-11 (a) does not apply to that period, and appellant was not entitled to the statutory credit to his sentence. Accordingly, to the extent that the trial court denied appellant's motion on that basis, there was no error.

Search & Seizure; Unlawful Arrest

Ewumi v. State, A12A0617 (4/18/2012)

Appellant was convicted of felony obstruction, simple battery, and possession of less than one ounce of marijuana. Appellant argued that the trial court erred by denying his motion to suppress, and denying his motion for new trial based on insufficient evidence as to each count. The record showed that shortly after midnight an officer was dispatched to an

apartment complex in what was described as a high-crime area after shots were fired and a bullet entered a residence. Approximately 20 minutes later, the officer encountered 17-year-old appellant outside the relevant building while searching for shell casings on the ground. Appellant was returning to his unit in the building after attending an event at school, and he was walking with a friend when he saw the officer. The officer observed that appellant's head and hands were obscured by a hooded sweatshirt. The officer approached appellant and said that he wanted to ask some questions, but appellant did not stop and mumbled an inaudible response before walking away. Thereafter, the officer attempted to close the gap between himself and appellant, and appellant began to run toward the building. He then ran upstairs to the second floor and tripped as he reached the top. The officer pursued appellant and, immediately after he fell, climbed atop him and initiated an "armbar" technique to apply handcuffs. Appellant struggled against the officer to escape, kicking his legs about and throwing his elbows back and forth. Meanwhile, the officer restrained one of his arms and gave verbal commands, but appellant continued to struggle. The officer called for backup, applied a taser directly to appellant's body, and eventually restrained and arrested him. Marijuana was subsequently found on appellant at the police station.

The Court agreed with the trial court that the initial encounter between appellant and the officer — i.e. , when the officer first approached appellant and indicated that he wished to speak with him — was a first-tier encounter. And the fact that appellant exercised his right to walk away from a first-tier encounter and avoid the officer did not give rise to reasonable, articulable suspicion to instigate a second-tier encounter, which the officer did by quickening his approach toward appellant and indicating that compliance with the request might be compelled. The Court noted that these facts presented a situation that different from those in which the Court has held that flight from a first-tier encounter warranted a stop after the citizen voluntarily spoke with an officer, gave suspicious answers to questions, and then fled.

When the officer was asked why he continued to pursue appellant, he testified that he became suspicious when appellant appeared and began walking toward the building where gunshots were reported; thus, the officer wanted to identify appellant. And when pressed to describe what exactly was suspicious about appellant, the officer testified that it was after midnight in a high-crime area; appellant wore a hoodie that covered his head and obscured his hands in pockets; he walked in a slumped position; and he stepped away from the officer upon the initial approach.

When considering the totality of the circumstances, the Court found that these facts did not amount to an objective, articulable suspicion of criminal activity to warrant a second-tier detention. It is well established that mere presence in an area of suspected crime is not enough to support a reasonable, particularized suspicion that the person is committing a crime. Moreover, an officer's feeling that a person is acting in a suspicious way does not amount to a particularized and objective basis for suspecting him of criminal activity. The Court stated that none of appellant's described activities — walking away from the officer, ignoring the officer, being present in a high-crime area (and returning home from a school function), walking in a slumped position, and wearing a hooded sweatshirt in early March — are a crime in and of themselves, "nor are they enough to make an objective determination that [appellant] was about to be engaged in criminal activity." Additionally, the mere refusal to identity oneself to an officer is not a crime. Furthermore, the Court stated, even assuming that the officer obtained reasonable, articulable suspicion to conduct a second-tier stop after appellant began to run away, after appellant ran toward his building and fell on the stairway, it was undisputed that the officer immediately attempted an arrest solely on the basis of obstruction, which required probable cause.

Appellant acted within his rights by avoiding a first-tier encounter, and thus, the officer lacked probable cause to justify an arrest for obstruction. Indeed, because appellant had the right to leave the first-tier encounter, his exercise of that right, even if accomplished by running, cannot constitute obstruction. As to battery, the struggle between appellant and the officer began when the officer attempted the unjustified arrest for obstruction. Thus, the officer lacked probable cause to arrest appellant for battery because the struggle ensued only after the officer attempted to arrest appellant for obstruction, and because that arrest was unlawful, appellant was justified in resisting the attempted arrest with all force that was reasonably necessary to do so. Accordingly, because appellant was unlawfully arrested for battery and for felony obstruction, the evidence discovered as a result of appellant's unlawful arrest should have been suppressed at trial, and therefore, his last conviction, for possession of marijuana, was also reversed.

Justification; Reckless Driving

Jones v. State, A12A0450 (4/19/2012)

Appellant was found guilty of reckless conduct, reckless driving, and speeding. He was sentenced to 12 months in confinement, with a total of 20 days to serve and the balance on probation. He contended that the trial court committed reversible error in failing to give, sua sponte, a jury charge on justification. The Court found that there was no evidence to support such a charge and affirmed.

The evidence showed that around noon, an experienced officer on duty in a marked police car, observed a appellant's vehicle traveling on Interstate 285, just past the exit for Interstate 75, in the far right of three lanes of travel. The vehicle was approaching the point where the far right lane ends by merging into the middle lane and the road narrows to two lanes. The officer testified that, by his visual estimate, the vehicle was traveling at 100 mph; and that, when measured by the officer's laser speed-detection device, the vehicle's speed was 103 mph. The speed limit on 285 at that location is 55 mph. The officer made a traffic stop and pulled the vehicle over. He then determined that the driver was appellant, and that appellant's 14-year-old son was a passenger in the right front seat of the car. Appellant admitted to the officer that he knew that the speed limit was 55, but he said he did not know how fast he had been traveling. The officer placed appellant under arrest for speeding and reckless driving.

Appellant relied upon *Tarvestad v. State*, 261 Ga. 605, 606 (1991), which set forth the principle that "[t]he 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." Where there is no evidence to support a justification defense, however, the rule stated in *Tarvestad* is not applicable: "[a] charge on the defendant's sole defense is mandatory only if there is some evidence to support the charge." Moreover, whether the evidence

presented is sufficient to authorize the giving of a charge is a question of law.

The Court found that there was no evidence supporting a charge on justification. Contrary to appellant's assertions, at no time did appellant testify that he accelerated to 103 mph "because he had no safer option." In his testimony, appellant admitted that he was going 90 mph, the same speed as the tractor-trailers that he testified were "all bunched up together" in the lane to his left; and that he "floored it" in order to merge left before his lane of travel ended by merging into the center lane. Appellant testified that "I figured I'd be able to merge." He explained that the tractor-trailers were bumper to bumper and were not allowing him to merge to the left. He testified, I wanted to get over . . . . Nobody was letting me in, and I saw a gap. . . . and I floored it, because I know I have to speed up to merge. . . . And so I sped up, . . . and I shot up to that gap. And right then I saw [the police] car. . . . I was moving over into the second lane. And I had to go that fast in order to get into the traffic." At no time did he testify that it was unsafe to pull over; only that he did not want to. When asked why he did not just wait to merge, he testified that "the traffic was going ninety miles an hour . . . . the only place I could merge was by speeding up." When asked if it would not have been safe for him to just slow down and wait, he testified that he knew the road and knew that the lane merged; and that "[t]he lane was going away. The alternative would be to just pull over on the side of the road and wait the traffic, I'm telling you, was horizon-to-horizon of tractor-trailers." Appellant denied that his son or anyone else was ever in any danger. The Court concluded that appellant knew that his lane would soon end, refused to slow down or pull over; instead, he insisted on going 90 miles an hour in a "little" car next to a line of tractor-trailers. His reasons for refusing to slow down or pull over did not raise the defense of justification, and the trial court did not err in failing to give a jury charge on justification sua sponte.

Venue

Taylor v. State, A12A0419 (4/19/2012)

Appellant was convicted of VGCSA. He argued that the State failed to prove venue. The Court disagreed and affirmed.

An office testified that at the time of the crime in question, she worked for the Statesboro Police Department as part of a special drug investigation unit targeting drug sales in Statesboro. During direct examination, the following exchange occurred: "Q: All right. Now this particular operation where you go in and target and that sort of thing is that here in Bulloch County? A: Yes." She further testified that as part of the operation, those on her team enlisted confidential informants to purchase drugs in a specified area of Statesboro. One such CI also testified that as part of this same operation, he sold crack cocaine to appellant.

The Court noted that it has held that public officials are believed to have performed their duties properly, and not to have exceeded their jurisdiction unless clearly proven otherwise. Thus, construed in favor of the verdict, the jury, as a rational trier of fact, was entitled to infer that the events the CI described were part of the Bulloch County drug operation about which the officer testified, and that the sale of crack cocaine to appellant took place in Bulloch County as part of that operation. Viewing the evidence as whole, the Court found that it constituted proof beyond a reasonable doubt that the evidence was sufficient to show venue in Bulloch County.

Child Hearsay Statute; Evidence of Guilty Conscience

Anderson v. State, A12A0306 (4/19/2012)

Based on acts committed against J. A., his adopted daughter, appellant was found guilty of three counts of aggravated child molestation. Pursuant to OCGA § 17-10-6.1, he was sentenced on each aggravated child molestation count to life in prison, with 25 years to serve on each count, consecutively, and the balance on probation. After hearings, appellant's amended motion for new trial was denied and he thusly appealed challenging the sufficiency of the evidence and enumerating other errors. The Court affirmed.

Appellant contended that the evidence was insufficient to support his convictions for aggravated child molestation. The Court disagreed. The Court found that the testimony of J. A., standing alone, was sufficient to support the verdict; and the jury was entitled to consider the victim's out-of-court statements, such as those made in an October 2008 police interview, as substantive evidence under the Child Hearsay Statute, OCGA § 24-3-16.7 Accordingly, the Court concluded that any rational trier of fact could have found appellant guilty beyond a reasonable doubt of the three counts of aggravated child molestation with which he was charged. Also, appellant contended that the trial court erred in allowing J. A.'s schoolmates, D. P. and E. E., to testify as to J. A.'s outcry statements to them. Appellant argued that the circumstances of the statements made by J. A. to these two outcry witnesses lacked "sufficient indicia of reliability" as required by the Child Hearsay Statute, OCGA § 24-3-16. However, appellant did not preserve these alleged errors for appellate review. At the pretrial hearing, the trial court addressed appellant's motion in limine only as to the October 2008 interview; and appellant made no effort to address the reliability of the testimony of these two outcry witnesses, even though the State noted that they would be called as witnesses at trial. Appellant neither sought nor obtained any pre-trial ruling as to the admissibility of testimony of these witnesses; nor did appellant object at trial to the testimony of either D. P. or E. E., on this or any other ground. Appellant asserted that these alleged errors were preserved for appellate review, but the Court found that he provided no citation to the record; and the record did not show that these alleged errors were preserved.

Lastly, appellant contended that the trial court erred in admitting into evidence certain items found during the execution of a search warrant at his apartment. The record showed that, on the afternoon of the day after appellant's wife told him that J. A. had revealed the abuse, he was found in a drunken stupor on the floor of a small closet; his handgun was found within arm's reach; and the handgun was fully loaded. Additionally, a note along with Falcons tickets were found addressed to a friend. The Court held that whether the note and Falcons tickets, in conjunction with the foregoing, were evidence of a contemplated suicide attempt and indicative of consciousness of guilt, or whether these items had an innocent explanation, was a question for the jury.

Search & Seizure; Excessive Window Tinting

Christy v. State, A11A2152 (4/18/2012)

Following a traffic stop that was based on his driving a vehicle with excessive window tinting, appellant was charged with one count

of DUI less safe, DUI per se, fleeing a police officer, possession of an open alcoholic beverage container, excessive window tinting, and speeding. Appellant filed a motion to suppress the evidence garnered as a result of the traffic stop and a motion to dismiss the accusation, arguing that the excessive-window-tinting statute was unconstitutional. The trial court agreed that the excessive-window-tinting statute was unconstitutional and dismissed that part of the accusation, but nevertheless denied appellant's motion to suppress, finding that it was not unreasonable for the arresting officer to have relied on the statute in determining whether to conduct a traffic stop of appellant's vehicle. The court further found that the traffic stop did not amount to an arrest without probable cause.

Appellant contended that because the trial court ruled that OCGA § 40-8-73.1 (b) is unconstitutional, the court erred in nevertheless finding that the police officer's belief that appellant's vehicle violated the excessive tinting statute justified the second-tier traffic stop. The Court found that the officer stopped appellant's vehicle for the traffic offense of driving a vehicle with excessive window tinting and the fact that this statute was later found to be unconstitutional does not render the stop invalid. The officer observed that appellant's vehicle had darkly tinted windows and reasonably believed this to be in violation of OCGA § 40-8-73.1. Accordingly, he had a reasonable articulable suspicion to justify the traffic stop.

Appellant also contended that the trial court erred in denying his motion to suppress because the traffic stop amounted to an arrest without probable cause. Specifically, appellant argued that when the officer drew his weapon, ordered him to show his hands outside the window of his vehicle, and handcuffed him, a full-blown arrest lacking probable cause occurred. The Court disagreed. Instead of stopping his vehicle when the officer activated his own vehicle's blue lights, appellant sped up and did not stop until he had pulled into the driveway of his residence. Faced with a suspect who appeared to be fleeing from him in a vehicle into which he could not see, the officer drew his weapon, ordered appellant to show his hands, and then briefly handcuffed him. In addition, the officer informed appellant at the time that he was detaining him until the officer could "figure out what [was] going on." Given these circumstances, the initial encounter between the officer and appellant was a second-tier traffic stop "rather than a full-scale arrest, as the forcible nature of the stop arose from the officer's primary concern at that point for his safety, and as the nature of the detention did not unambiguously convey a prolonged custodial arrest."

Habitual Violator; Effective Assistance of Counsel

Murray v. State, A12A0270 (4/18/2012)

Appellant was convicted for two counts DUI, two counts of driving without a valid license after being declared a habitual violator (Counts 1 and 8), and other traffic offenses. The evidence showed that on April 22, 2007, appellant was pulled over after an officer observed him driving approximately 70-80 miles per hour in a 45-mile-per-hour zone. A check of appellant's driver's license revealed that he was declared a habitual violator in 2004 and had a probationary driver's license. After the officer noticed appellant's large pupils and smelled alcohol emanating from him, appellant was arrested for driving under the influence of alcohol. A subsequent blood test indicated that appellant's blood alcohol level was 0.138 grams. Approximately two weeks later, on May 6, 2007, appellant drove his vehicle off the highway and into a ditch. When police reported to the scene, appellant, who was naked below the waist, had bloodshot, watery eyes and slurred speech, was argumentative and agitated, and smelled of alcohol. Appellant was arrested for DUI, but refused to submit to a blood test. The arresting officer ran appellant's license and learned that appellant was a habitual violator; appellant did not tell the officer that he had a provisional license.

Appellant argued that the trial court erred by denying his motion for directed verdict as to Count 1. At trial, the arresting officer testified that appellant had a probationary driver's license on the day of his April 22, 2007 arrest, and the State tendered a copy of appellant's application for a probationary driver's license, which was approved on October 12, 2006, and expired on August 20, 2009.

The Court stated that a probationary driver's license is a valid driver's license for purposes of OCGA § 40-5-58 (c) (1). Thus, appellant was not driving without a valid driver's license. The Court held that because there was no conflict in the evidence, and the charge of being a habitual violator operating a vehicle without a "valid driver's license" demanded a verdict of acquittal as a matter of law, the trial judge erred by denying appellant's motion for a directed verdict as to that count.

Appellant also contended that trial counsel was ineffective by failing to move for a directed verdict as to Count 8, which alleged that he operated a motor vehicle as a habitual violator without a valid driver's license on May 2, 2007. As the Court previously concluded as to Count 1, the State also failed to prove the charge alleged in Count 8. Because the trial court would have been required to grant a motion for directed verdict as to Count 8, appellant's trial counsel was ineffective by failing to make such a motion. The Court found that the trial court erred by denying appellant's motion for new trial on this basis, and his conviction as to Count 8 must be reversed as well.