Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 3, 2009

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THIS WEEK:

Voir Dire; Right to a Public Trial

Presley v. State, S08G1152

Appellant was convicted of trafficking in cocaine. He contended that the trial court violated his constitutional right to a public trial. Prior to the jury being brought to the courtroom to begin voir dire, the trial court asked that the members of the public leave the courtroom because the room was too small to accommodate the 42 potential jurors and the spectators. The trial court did not want the potential jurors to be intermingled with the spectators. Defense counsel objected and asked the court if some accommodations could be made, but offered no specific alternative solutions to clearing the courtroom during voir dire. A criminal defendant has the constitutional right to a public trial and this right extends to jury voir dire and selection. To exclude the public from a trial, there must be an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. The Court found that the trial court certainly had an overriding interest in ensuring that potential jurors heard no inherently prejudicial remarks from observers during voir dire and the trial court's order was not overbroad because the exclusion of observers was only for the duration of jury voir dire. The Court also held that as to alternatives, where, as here, the factual record permitted the closure and the closure was not facially overbroad, the party opposed to closing the proceeding must alert the trial court to any alternative procedures that allegedly would equally preserve the interest. Since appellant did not direct the court's attention to alternatives, there was no abuse of discretion in the court's failure to sua sponte advance its own alternatives.

Indictment; Vagueness

Raber v. State, S08A1705

OCGA § 16-13-41(h) provides that "[i]t shall be unlawful for any practitioner to issue any prescription document signed in blank." The State alleged that Appellant violated OCGA § 16-13-41 (h) when he pre-signed one of his prescription pads, containing thirty-three separate forms in blank, and provided them to his nurse practitioner. The pad was found at the home of the nurse in a safe. Appellant argued that because OCGA § 16-13-41 (h) does not define what a physician must do to "issue" a prescription document, the statute was constitutionally vague because he did not have fair notice that providing a pre-signed blank prescription pad to a member of his medical staff in the course of her em-

ployment would subject him to prosecution for a felony offense. The Court disagreed. It noted that OCGA § 16-13-41 (h) addresses issuance of a prescription "document" rather than issuance of the prescription itself. It also noted that the concluding sentence of OCGA § 16-13-41 (h) provides that "[t]he possession of a prescription document signed in blank by a person other than the person whose signature appears thereon shall be prima-facie evidence of a conspiracy between the possessor and the signer to violate" the Georgia Controlled Substances Act. Thus, the subsection, which broadly includes possession of the document by any "person other than the person whose signature appears thereon," is completely inconsistent with exclusion of a person who is a staff member, regardless of whether she is intended to be the ultimate user herself or is instead expected to complete the document in the future at the direction of the licensed physician who employs her. Therefore, the statute provides definite warning to persons of ordinary intelligence that the conduct alleged here is proscribed.

Jury Charges; Circumstantial Evidence

Davis v. State, S08A1677

Appellant was convicted of malice murder, aggravated assault, and armed robbery. He contended that the trial court erred in not instructing the jury on the principle set forth in OCGA § 24-4-6: "To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused." Appellant's requests for jury instructions did not comply with USCR 10.3, as they were not "numbered consecutively on separate sheets of paper . . . ." But, the request directed the court's attention to the specific page and paragraph of the Suggested Pattern Jury Instructions containing the desired instruction, which contained the legal principle set forth in the statute. The Court found that while the trial court might have been authorized to reject appellant's requests to charge the jury for failure to comply with USCR 10.3, the trial court did not do so. Instead, the trial court mistakenly believed that the request was covered by another charge governing direct and circumstantial evidence. It was not. Consequently, the principle set forth in the statute was not given as an instruction. Therefore, since the evidence against appellant was largely circumstantial and not overwhelming, his convictions were reversed.

Search & Seizure

Preston v. State, A08A2063

Appellant was convicted of possession cocaine with intent to distribute. He argued that the trial court erred in denying his motion to suppress. The evidence showed that appellant and his girlfriend shared a residence. The girlfriend went to the police and accused appellant of domestic violence and told them he had drugs, guns and money at the residence. She signed a consent to search form and the officers left for her home, but without her. En route, the officers learned that appellant had an outstanding arrest warrant on him. When appellant answered the door, he was arrested and handcuffed and placed on the sofa. The officers then conducted a search of the residence but did not inform him of the consent by his girlfriend.

In this case of first impression, the Court reversed appellant's conviction. Drawing guidance from *Georgia v. Randolph*, 547 U. S. 103, 109 (2006), the Court first found that appellant's failure to object to the search was not fatal to his claim since he was not told of the reason for the search and could have reasonably believed that the search was incident to his arrest. The Court then turned to reasonable belief in an expectation of privacy and found "no widely shared social expectations that support third parties entering a residence without first explaining to the occupant who has opened the door that an absent co-occupant has given them permission to do so." The Court therefore found that here, it unreasonable under the Fourth Amendment for the officers to search appellant's residence without first informing him that they were conducting the search based upon his co-tenant's consent and not incident to his arrest for the unrelated offense. In so concluding, the Court stated, "we do not impose upon law enforcement officers an affirmative obligation to seek out potential objectors or to solicit the consent of occupants on hand. Rather, we simply find that if an occupant is at the door, as was the defendant in *Randolph*, then the officers must inform that occupant that they are conducting a search pursuant to a co-occupant's consent for the search to be reasonable under the Fourth Amendment."

Jury Charges; Lesser Included Offenses

Johnson v. State, A08A1593

Appellant, a sheriff's deputy, was convicted of purchasing marijuana. The evidence showed that she arranged for a friend of hers to sell her a small amount of marijuana and that she purchased it while in uniform and in her marked patrol car. She argued that the trial court erred by refusing to give her request to charge on possession of marijuana, less than an ounce. The Court agreed. It noted that it had previously held that possession of a controlled substance is a lesser included offense of the sale of the same controlled substance and no logical distinction exists between the purchase of a controlled substance and the sale of a controlled substance for purposes of charging possession as a lesser included offense. Moreover, appellant testified that she did not intend to purchase the marijuana and she did not pay for the marijuana before her arrest. But, it was undisputed that she took possession of it. Although the weight of the marijuana was not established at trial, the jury could conceivably have found that the small bags were less than an ounce.

Double Jeopardy; Venue

Hudson v. State, A09A0367

Appellant was charged with driving under the influence of alcohol per se, driving without taillights, failure to maintain her lane, and misdemeanor obstruction of an officer. At her bench trial, she successfully moved for directed verdict because the State failed to prove venue. The trial court denied her plea of former jeopardy and she appealed, arguing that retrial was barred by the United States Constitution and OCGA § 16-1-8. In *Burks v. United States*, 437 U. S. 1 (1978), the U. S. Supreme Court held that when a conviction is reversed due to insufficient evidence, the defendant cannot be retried without violating double jeopardy. But, the Supreme Court also distinguished between reversals based on procedural errors and reversals based upon insufficient evidence to prove guilt beyond a reasonable doubt, stating that reversal for

trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Venue is wholly neutral; it is a question of procedure, and it does not either prove or disprove the guilt of the accused. Thus, a failure to properly establish venue does not bar retrial, because evidence of venue does not go to the guilt or innocence of the accused, and hence it does not invoke double jeopardy concerns.

The Court also held that OCGA § 16-1-8 also does not bar retrial. Subsection (d)(1) of the statute provides: "A prosecution is not barred within the meaning of this Code section if the former prosecution was before a court which lacked jurisdiction over the accused or the crime. . . ." A court in which venue is not proved does not have jurisdiction over the crime.

Jury Charges; Conspiracy

Mosley v. State, A08A2403

Appellant was convicted of trafficking in cocaine. He contended that the trial court erred in charging the jury on conspiracy. The court disagreed. When the evidence supports a finding of conspiracy, it is not error for the trial court to charge the jury on the subject of conspiracy even if a conspiracy is not alleged in the indictment. Appellant's argument that a buyer and seller cannot be found guilty of conspiracy was misplaced because appellant and all of the co-defendants were arrested and charged with the same crime of trafficking in cocaine and were all alleged to have been attempting to sell the drugs.

Grand Jury; Right to Appear

Smith v. State, A08A2421

Appellant was convicted on three counts of false statements and writings. The charges allegedly occurred while he was in the performance of his duties as a police officer. He contended that the trial court erred in denying his plea in abatement and motion to dismiss the indictment pursuant to OCGA §§ 17-7-52 and 45-11-4 because he was not properly notified concerning his right to appear before the grand jury. The record showed that on January 11, 2007, appellant was served with a copy of a proposed indictment charging him with seven counts of false statements and writings. The indictment indicated on its face that it was to be presented during the January term. The term ran through April. The investigator who served the indictment on appellant did not notify him as to a date when the indictment would be presented, but told him that he should call the district attorney. Appellant had no knowledge of when the grand jury would consider the indictment. The grand jury returned the indictment on January 29, 2007.

The Court held that when an individual is entitled to the protections of OCGA §§ 17-7-52 and 45-11-4, the State must provide notice of when the proposed indictment will be presented to the grand jury. In so holding, the Court stated, "[t]he protections of OCGA §§ 17-7-52 and 45-11-4 would be undermined if the State could simply furnish the accused with a proposed indictment and hope that he or she would not know or be able to discover when the indictment would be presented. Receiving the proposed indictment confers little benefit unless the accused, after reviewing it, has the opportunity to explain his or her position to the grand jury."