Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 6, 2016

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THIS WEEK:

Street Gang Activity; Indictments

State v. Brown, S16A0122 (4/26/16)

The State indicted Brown and others on charges of murder, armed robbery, robbery by force, car-jacking, and numerous violations of the Street Gang Terrorism and Prevention Act, and Georgia RICO Act. During pre-trial proceedings, the State filed a motion seeking a ruling on the admissibility of a 13-count federal indictment charging unrelated defendants with crimes and racketeering activities in association with a particular gang operating in Virginia. The State contended that information in the federal indictment was "required" to prove certain essential elements of the alleged violations of Georgia's street gang act, specifically, the existence of a "criminal street gang" and the commission of "criminal gang activity," as those terms are defined in the statute. In the alternative, the State contended that the indictment was admissible under O.C.G.A. § 24-4-404(b) to prove motive. The trial court denied the State's motion and the State appealed.

The Court found that the federal indictment was inadmissible. An indictment is simply a formal written accusation of a crime, and the assertions therein are nothing more than hearsay statements by the prosecutor bringing the charges. The fact that this case involved alleged violations of the Georgia street gang act did not alter this result. While the statute expressly provides that evidence of crimes committed "by any member or associate of a criminal street gang shall be admissible . . . for the purpose of proving the existence of the criminal street gang and criminal gang activity" O.C.G.A. § 16-15-9, this provision, does no more than clarify the nature of the evidence that will be deemed relevant in establishing specific elements of the crimes proscribed by the statute and does not purport to supersede or dispense with the generally applicable rules of evidence, including the prohibition on hearsay. Thus, the Court held, the fact that this case involved the prosecution of alleged gang-related crimes did not obviate the State's responsibility to prove its case in accordance with the rules of evidence applicable in all other prosecutions.

DUI; Fourth Amendment Consent

State v. Depol, A15A1947 (3/15/16)

The State appealed after the trial court granted Depol's motion to suppress his breath test. The record showed that Depol initially filed a motion to suppress, arguing that the unreasonable length of his detention vitiated his consent to the breath test. At the hearing, three officers testified and a video of the encounter with Depol was admitted into evidence. The trial court denied Depol's motion based upon its conclusion that probable cause existed for his arrest, the length of his detention was not unreasonable, and the implied consent notice was timely and properly read.

Six months later, Depol filed a supplemental motion to suppress based upon the Supreme Court's intervening decision in *Williams v. State,* 296 Ga. 817 (2015). In a second hearing before the trial court, it heard only argument of counsel before ruling from the bench that it would grant the motion. The judge stated, "All the reasons that I put in my order as to his demeanor are the same reasons that lend me to believe that he could not have formed a voluntary choice. He was, as you watch the video, and it's quite a lengthy video, it's very clear he's extremely impaired."

The State contended that the trial court erred by concluding that it failed to meet its burden of proving that Depol voluntarily consented to the breath test. The Court agreed. The issue is not whether the defendant voluntarily decided to waive his Fourth Amendment rights, but rather whether he voluntarily consented to a breath test. The determination is based on a totality of the circumstances.

Here, the Court reviewed the video and discussed at length the events that transpired during the encounter between Depol and the officers. Based upon its de novo review of the video and the other undisputed evidence before the trial court, the Court concluded that Depol voluntarily consented to a test of his breath. Although he was under the influence of alcohol, the video clearly demonstrated that he was also capable of understanding what was said to him, able to freely and voluntarily consent, and actually did so. Accordingly, the Court reversed the trial court's grant of Depol's motion to suppress.

Indictments; Harming a Police Dog

Bynes v. State, A15A1974 (3/15/16)

Appellant was convicted of two counts of armed robbery and harming a police dog (O.C.G.A. § 16-11-107). Although not raised by appellant on appeal, the Court found that the five-year sentence for harming a police dog exceeded the statutory guidelines for the crime with which he was charged. Thus, the Court noted, appellant was indicted under O.C.G.A. § 16-11-107, without reference to a subsection, for "the offense of harming a police dog" in that appellant, "on or about the 21st day of May, 2013, did knowingly and intentionally cause *serious physical injury*" to the police dog in question. (Emphasis supplied.) See O.C.G.A. § 16-11-107(c), (d) (distinguishing between second- and third-degree harm to a police dog by whether the dog received "serious" or "debilitating" physical injuries). Appellant was not charged, in other words, with causing debilitating physical injury to the dog.

The trial court, however, charged the jury that the crime of harming a police dog consisted of "knowingly and intentionally caus[ing] *serious or debilitating* physical injury to a police dog, knowing said dog to be a police dog." (Emphasis supplied.) The jury found appellant guilty of two counts of armed robbery and one count of "harming a police dog" without making any reference to the degree of injury suffered by the dog. Appellant was convicted on these three counts and sentenced to two concurrent life terms as to the armed robberies and five years, also concurrent, for harming a police dog. Moreover, there was no evidence that the jury considered or determined whether appellant had knowingly caused "debilitating" injury to the dog under O.C.G.A. § 16-11-107(d), which is a felony and carries a maximum sentence of five years. And, appellant was indicted for causing "serious" injury to the dog, which is defined as a misdemeanor under O.C.G.A. § 16-11-107(c). Therefore, the Court held, because appellant was sentenced for a crime not charged in the indictment, and not considered by the jury, it vacated that portion of appellant's sentence imposed for causing debilitating injury to a police dog under O.C.G.A. § 16-11-107(d) and remanded to the trial court for resentencing for causing serious physical injury to a police dog under O.C.G.A. § 16-11-107 (c).

Recidivist Sentencing; O.C.G.A. § 17-10-7(b.1)

Mathis v. State, A15A2292 (3/16/16)

Appellant was convicted of two counts of a controlled substance in violation of O.C.G.A. § 16-13-30(a). Appellant had the following priors: 1987 conviction under of O.C.G.A. § 16-13-30(j)(1); 1994 conviction under O.C.G.A. § 16-13-30(j)(1); and 1994 conviction for attempt to escape. The judge sentenced him as a recidivist under O.C.G.A. § 17-10-7(c) to three years on each of the possession counts with the sentences to run consecutively. Appellant thereafter filed a pro se motion to modify his sentence, arguing that his sentence was illegal under O.C.G.A. § 17-10-7(b.1). This subsection provides, "Subsections (a) and (c) of this Code section shall not apply to a second or any subsequent conviction for any violation of subsection (a), paragraph (1) of subsection (i), or subsection (j) of Code Section 16-13-30."

The trial court denied the motion, finding that O.C.G.A. § 17-10-7(b.1) bars recidivist sentencing for simple possession and marijuana-related offenses only where a defendant is convicted two or more times of violating *the exact same subsection* of O.C.G.A. § 16-13-30. In other words, the trial court read the sentencing statute as meaning that recidivist sentencing could not apply to a second or subsequent conviction for violating O.C.G.A. § 16-13-30(a); or to a second or subsequent conviction for violating O.C.G.A. § 16-13-30(i)(1); or to a second or subsequent conviction for violating O.C.G.A. § 16-13-30(j). Thus, the court concluded that because appellant had never been convicted previously of violating O.C.G.A. § 16-13-30(a), O.C.G.A. § 17-10-7(b.1) permitted the court to use his prior convictions under O.C.G.A. § 16-13-30(j) to sentence him as a recidivist for his first two violations of that code section.

The Court, however, found that the trial court misinterpreted O.C.G.A. § 17-10-7(b.1) because it failed to give effect to that part of the statute which provides that recidivist sentencing "shall not apply to a second or *any* subsequent conviction for any violation of" subsections (a), (i)(1), or (j) of O.C.G.A. § 16-13-30. (Emphasis supplied.) And when read in its entirety, O.C.G.A. § 17-10-7(b.1) means that a defendant who has been convicted previously of violating *either* subsection (a) *or* subsection (i)(1) *or* subsection (j) of O.C.G.A. § 16-13-30, may not be sentenced as a recidivist for a second or any subsequent conviction for violating any of those code sections — even if the defendant had never been convicted previously of violating the exact subsection for which he is being sentenced. Accordingly, recidivist sentencing is not allowed where a defendant has previous convictions for violating subsection (i)(1) (simple possession of a counterfeit substance) or subsection (j) (marijuana-related offenses) and is thereafter convicted of simple possession of a controlled substance (subsection (a)). Therefore, the Court found, the trial court erred in

sentencing appellant as a recidivist, and the Court reversed the trial court's order denying his motion to vacate or modify his sentence and remanded for resentencing.

Child Molestation; Sufficiency of the Evidence

Prophitt v. State, A15A2400 (3/16/16)

Appellant was convicted of a single count of child molestation. The evidence, briefly stated, showed that appellant lived with his wife and daughter. He told C.D., a child visiting his 10 year old daughter, that she had to take a very long shower before going to bed. The shower had no curtain and appellant instructed her to face the door while showering to minimize the amount of water spilling on the floor. While C.D. was showering, appellant's wife caught him masturbating while watching C.D. through a small peephole in the floor of the bathroom. At the time, appellant was sitting in the crawlspace of his house, looking up through the peephole.

O.C.G.A. § 16-6-4(a)(1), provides that "[a] person commits the offense of child molestation when [he] [d]oes any immoral or indecent act to or *in the presence of or with any child* under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or [himself]." (Emphasis supplied) Appellant contended that the evidence was insufficient to support his conviction because the State failed to establish that he was "in the presence of" the victim. The Court reluctantly agreed.

The Court noted that in *Vines v. State*, 269 Ga. 438 (1998), the Georgia Supreme Court made clear that for child molestation to occur, the accused and the victim must be "together" at the time of the alleged crime. And, for an accused and victim to be together, they must be in the same location — i.e., they must be in close enough physical proximity that each would at least have the opportunity to observe the other — regardless of whether the child actually does observe the defendant's conduct. Here, the Court found, the evidence showed that although there may have been a distance of only seven to eight feet from the shower to the area under the house where appellant had situated himself, the relatively short distance did not place appellant in immediate physical proximity to C.D. Instead, there was a significant physical barrier between the two, in the form of the bathroom floor. Thus, to be in C.D.'s immediate physical presence, it would have been necessary for appellant to crawl out from underneath the house, enter through the back door, walk down the hallway, and open the bathroom door. Additionally, appellant made no effort to expose himself to C.D. or to make the child aware of his presence. To the contrary, appellant went to some lengths to secrete himself away from both the victim and the members of his household in a concerted effort to remain undetected. And given the size and location of the hole, it would have been physically impossible for C.D. to see appellant while she was showering. Finally, the evidence showed that C.D. was not aware either that appellant was observing her or that he was engaging in an indecent act while doing so. Under these circumstances, the Court found, it could not say that appellant engaged in an immoral or indecent act while in the presence of C.D. Accordingly, his conviction was reversed.