Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 8, 2015

THIS WEEK:

Miranda; Hope of Benefit

Lucas v. State, A14A1949 (3/23/15)

Appellant was indicted for malice murder, felony murder and other crimes, but only convicted of criminal attempt to commit armed robbery and criminal attempt to purchase marijuana. He contended that the trial court erred in denying his motion to suppress his statements. Specifically, he contended that he invoked his rights under *Miranda* to remain silent when he stated to the investigating detective "If you want to say that, then say that. *I don't want to hear no more. If you want to take me to jail, take me to jail.*" (Emphasis supplied). However, the Court noted, appellant continued speaking to the detectives, denying his role even as one detective left the room, saying, "See you in court." In response, the remaining detective confronted appellant with the photographic lineup used to identify him. Appellant dismissed it, asking "why didn't you put [his two codefendants] in there if I'm with them . . . People look like me." Appellant continued, "I'm not even trying to hear that. . . . I don't want to hear no more. It was not me. . . . You can bring Thrasher to take me to jail. If it's gonna be like that. Please do. . . . I'm telling you here."

The detective then left, and Officer Thrasher entered the room. Appellant agreed that he had known Thrasher a "long time." Thrasher told appellant that he was hanging out with the wrong people. When appellant agreed, Thrasher told him that the detectives were "trying to help" and "trying to get the truth." Thrasher then stated, "I don't believe that you killed anybody. . . . I believe that you were there because you hang out with the wrong people. . . . Once you go down to jail it's too late. . . . The story's over." And it was then that appellant confessed. Thus, the Court found, based on the record, appellant did not clearly and unequivocally invoke his right to remain silent.

Appellant also argued that his confession was induced by the hope of benefit. Specifically he contended that the officers promised him if he didn't confess, he would get 60 years, but if he confessed, he would only get 5 to do 2 years. The evidence showed that when appellant admitted, "I may know something about it," the detectives told him he needed to save himself, "it's 60 years you're going to be doing in jail . . . By the time you get out, you'll be 81 . . . Save yourself. . . . If you have information that you're withholding, you need to say it." The detectives continued, "There's killers in this and there's victims of circumstance. . . . I would rather hear from you as a person that we are already looking at and we've got proof. . . . I was there. I didn't kill nobody. These [guys] went off on their own. . . . I took off and ran. . . . When a jury hears that, when a judge hears that, hell, when we hear that . . . What would be better, going to jail for murder or party to crime [on] armed robbery? Five years, do two [or] sixty years, no chance out?"

The Court held that the officers' comments regarding punishment amounted to an explanation of the seriousness of appellant's situation and admonitions to tell the truth. But, even if the trial court improperly admitted appellant's statement to officers admitting he acted as a lookout, the statement was cumulative of a witness's testimony that appellant told him he had acted as the lookout. Thus, because the evidence was overwhelming, any error in the statement's introduction at trial was harmless.

Conspiracy; Sentencing

Dorsey v. State, A14A1893 (3/24/15)

Appellant was convicted of voluntary manslaughter, conspiracy to commit aggravated assault, conspiracy to commit criminal damage to property and other crimes. Citing *Braverman v. United States*, 317 U. S. 49 (63 S.Ct. 99, 87 L.Ed. 23) (1942), appellant contended that the trial court erred in sentencing him separately on the two conspiracy counts because the evidence only showed a single conspiracy. Under *Braverman*, whether the object of a single agreement is to commit one or many crimes, it is in either case the agreement that constitutes the conspiracy, and if there is only one agreement there can be only one conspiracy. The State argued that the evidence showed that there were two separate agreements, not just one, and thus *Braverman* was inapplicable.

The Court stated that an improper conviction on multiple counts of a conspiracy indictment is harmless error where the defendant's sentence is within legal limits for conviction of a single conspiracy. Here, the trial court imposed a total sentence of ten years for the two conspiracy offenses, sentencing appellant to serve five years for conspiracy to commit aggravated assault with a deadly weapon and another five years for conspiracy to commit criminal damage to property in the first degree. O.C.G.A. § 16-4-8 provides as follows: "A person convicted of the offense of criminal conspiracy to commit a felony shall be punished by imprisonment for not less than one year nor more than one half the maximum period of time for which he could have been sentenced if he had been convicted of the crime conspired to have been committed." Under former O.C.G.A. § 16-5-21(b), the maximum period of time for which appellant could have been sentenced if he had been convicted of the aggravated assault that was the underlying subject of one of the conspiracy counts is 20 years. Thus, the maximum sentence for conspiracy to commit aggravated assault is one-half of that 20 years, or ten years. Because the total sentence imposed for both conspiracy offenses was ten years, the sentence was within the legal limits for a person convicted of a single conspiracy to commit aggravated assault, and therefore, any error in sentencing appellant for both conspiracy charges was harmless.

Recusal; Juvenile Court Petitions

In the Interest of H. J. C. Jr., A14A2237 (3/24/15)

The State filed a petition alleging that the child had committed the delinquent act of violating his probation for previous delinquencies including burglary and criminal damage to property. The petition cited both O.C.G.A. § 15-11-2(19), which includes a violation of probation by a child previously adjudicated as delinquent in its definition of a "delinquent act," and O.C.G.A. § 15-11-608(b), which provides that a prosecutor informed of a violation of probation "may file a motion in the [juvenile] court for revocation of probation." At a hearing, the State noted that it was orally amending its petition to proceed under O.C.G.A. § 15-11-2(19)(B) only, and not under O.C.G.A. § 15-11-608. The juvenile court then continued the hearing in order to obtain argument on the interplay between these two new Juvenile Code sections.

The next day, however, the State filed a motion to recuse the juvenile court judge with a supporting affidavit alleging that although the child had not objected to the State's proposed amendment, the juvenile court judge had "sua sponte voiced her concerns" as to the interplay between the two Code sections, such that "the entire matter of controversy was raised by the [j]udge," whose "impartiality and bias would reasonably be questioned if [she] were to hear argument on the Court's own motion and decide [her] own motion." The juvenile court judge denied the motion to recuse as insufficient under Uniform Juvenile Court Rule 27.2.3.

At the outset of the continued hearing, the juvenile court stated the issue before it was whether the State should move to revoke probation under O.C.G.A. § 15-11-608(b) rather than to petition the court to adjudicate a delinquency as defined by O.C.G.A. § 15-11-2(19)(B) to include a violation of probation imposed on a child previously found delinquent. The trial court granted the child's motion to dismiss the State's petition on the ground that O.C.G.A. § 15-11-608 created "a new procedure for addressing violations of probation," including the mechanism of bringing such a violation to the juvenile court's attention by means of motion rather than petition, such that "petitions [based on an alleged probation violation] filed pursuant to O.C.G.A. § 15-11-2(19)(B) are not valid." The State appealed and the Court reversed.

The Court noted that O.C.G.A. § 15-11-2(19)(B) defines "delinquent acts" as including "[t]he act of disobeying the terms of supervision contained in a court order which has been directed to a child who has been adjudicated to have committed a delinquent act[.]" As in this case, then, the statute provides a mechanism by which a child who violates probation ordered in a previous adjudication of delinquency may become the subject of a new delinquency petition. As part of the same statutory scheme, O.C.G.A. § 15-11-608(b) provides that a delinquent child's violation of probation "may be reported to the prosecuting attorney who may file a motion in the court for revocation of probation[,]" and that such a motion "shall contain specific factual allegations constituting each violation of a condition of probation."

The Court noted that it is required to read each of these statutes according to the natural and most obvious import of the language, without resorting to subtle and forced constructions, for the purpose of either limiting or extending their operation. Having done so, the Court stated that

O.C.G.A. § 15-11-2(19)(B) plainly includes a delinquent child's violation of probation in the category of actions that may give rise to a new delinquency petition, and O.C.G.A. § 15-11-608(b) plainly provides that a prosecutor who becomes aware of such a child's violation of probation "may file a motion . . . for revocation of probation." There being no ambiguity in either of these provisions, the first of which authorizes the State to file a petition concerning a violation of probation and the second of which authorizes

the State to move for revocation of probation as a consequence of such a violation, no court is authorized to ignore either a petition brought under the first or a motion brought under the second. Thus, the Court concluded, in the absence of any other basis for dismissal, the juvenile court erred when it dismissed the State's petition without prejudice.

The State also contended that the trial court erred in denying its motion to recuse. However, the Court found, even assuming the facts pled in the State's affidavit to be true, the record showed that the juvenile court judge did not err in denying the motion to recuse. It is as much the duty of a judge not to grant the motion to recuse when the motion is legally insufficient as it is to recuse when the motion is meritorious. Here, the Court noted, the juvenile court merely sought further legal argument on the question of the interplay between O.C.G.A. § 15-11-2(19)(B) and 15-11-608(b), both of which were cited in the State's petition and had recently been adopted into law. Even if the State was caught unawares by the court's questions concerning these statutes or was inconvenienced by its eventual ruling that the petition was defective, such circumstances do not warrant recusal, which is not required simply because a judge may have to issue a ruling that might offend an individual or group that could possibly take adverse action against him. On the contrary, there is a presumption that a trial judge, acting as a public official, faithfully and lawfully performs the duties devolving upon him. Because the State's affidavit did not include facts sufficient to overcome this presumption, the juvenile court judge did not err in denying the motion to recuse as legally inadequate.

Custodial Statements; Miranda

Chavez-Ortega v. State, A14A2188 (3/24/15)

Appellant was accused of DUI, reckless driving and racing. The trial court denied his motion to suppress his incriminating statements and the Court granted him an interlocutory appeal. The evidence, briefly stated, showed that officers observed two vehicles allegedly racing. The officers activated their sirens and emergency lights to initiate a traffic stop, but only one car stopped. The second car continued down the road. Appellant was later seen walking back to the traffic stop location. When an officer approached appellant, he noticed that appellant smelled of alcohol and had watery, bloodshot eyes. An officer briefly spoke to appellant and asked him where he was coming from. When appellant stated that he was walking from a friend's house, but could not provide details as to where the friend lived, the officer detained him in handcuffs and placed him in the back of a patrol car while the other two officers were finishing the investigation of the driver who stopped. Subsequently, appellant was questioned in the back of the police car. He admitted to drinking, but stated that he was not the driver of the other car. He also told the officers that he did not wish to speak with them. At some point thereafter, the officers read appellant his *Miranda* warnings and again appellant stated he did not wish to speak with the officers. However, the questioning continued and appellant made other incriminating statements.

Appellant argued that the trial court erroneously determined that he was not "in custody" when he made statements to officers prior to receiving the *Miranda* warnings and that the trial court erred in denying his motion to suppress those statements. The Court agreed. *Miranda* warnings are required when a person is interviewed by an investigating officer while in custody. When determining whether a suspect was in custody for *Miranda* purposes, the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Whether a suspect is in custody does not depend upon the subjective views harbored by either the interrogating officers or the person being questioned. Instead, the only relevant inquiry is how a reasonable person in the suspect's position would have understood the situation.

Here, the Court found, an officer approached appellant as soon as he saw him walking down the road and, after questioning appellant about where he was coming from, placed him in handcuffs and put him in the back of the police cruiser. At the suppression hearing, officers even admitted that appellant was "detained" and "basically taken into custody," and was not free to leave when he was in the police cruiser. Although an officer informed appellant that he was "not arrested yet[,]" the Court stated, "[W]e fail to see how a reasonable person in [Appellant]'s position would not have considered himself to be under arrest, given that he was handcuffed, placed in the back of a patrol car and informed that officers were searching for his vehicle."

Moreover, the Court stated, officers conducting an ordinary traffic stop or arriving at the scene of suspected criminal activity may conduct a general on-the-scene investigation, including making inquiries solely to determine whether there currently is any danger to them or other persons. These inquiries may even require them to temporarily detain someone attempting to leave before the preliminary investigation is completed, and such inquiries and detention do not trigger the requirements of *Miranda*, unless the questioning is aimed at obtaining information to establish a suspect's guilt. Here, however, the officers' inquiries went beyond a general on-the-scene investigation. The questions posed by officers - where he had been, if he had been drinking, and if he had been driving the other speeding car - were clearly aimed at obtaining information to establish his guilt. Accordingly, the trial court erred in finding that any statements appellant made to officers were made in noncustodial circumstances. Such statements were inadmissible and must be excluded at trial.

Appellant also argued that the statements he made *after* being read his *Miranda* rights should also have been excluded. The Court again agreed. An arrested person has the constitutional right to remain silent, but he must clearly assert his desire to remain silent to exercise that right. Police must honor an arrested person's right to remain silent if the person clearly and unambiguously states that he wants to end questioning.

Here, the Court found, appellant clearly informed the officers that he did not wish to speak to them prior to being read his *Miranda* rights, and he stated that he did not want to talk to the officers immediately after being informed of his *Miranda* rights. Furthermore, it was clear that the statements made by appellant after being read his *Miranda* rights resulted from direct interrogation by the officer, and were not the spontaneous and unsolicited statements of a person who was anxious to explain. Thus, the Court noted, directly after reading the *Miranda* warning, and after appellant had twice informed the office that he did not wish to speak to him, an

officer began to ask appellant questions. But, the Court found, after appellant made these unequivocal assertions of his right to remain silent, all questioning of him should have ceased. Yet, instead of honoring appellant's right to remain silent, the officer continued to question him. Accordingly, any responses by appellant after he stated his wished to remain silent should have been suppressed at trial.

Sentencing; Merger

Sullivan v. State, A14A2045 (3/26/15)

Appellant was convicted of one count of aggravated assault, one count of criminal damage to property in the first degree, and one count of criminal damage to property in the second degree. He contended that the trial court erred in failing to merge the two counts of criminal damage to property. The Court disagreed.

Georgia law generally prohibits multiple convictions if one crime is included in the other or if one crime differs from the other only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission. To determine if one crime is included in and therefore merges with another under O.C.G.A. § 16-1-6(1), courts must apply the required evidence test set forth in *Drinkard v. Walker*, 281 Ga. 211 (2006). Under that test, a court must examine whether each offense requires proof of a fact which the other does not. Thus, a single act may constitute an offense which violates more than one statute, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Here, appellant's conviction for criminal damage to property in the first degree, as indicted, requires proof that he "[k]nowingly and without authority interfere[d] with any property in a manner so as to endanger human life." O.C.G.A. § 16-7-22(a)(1). And his conviction for criminal damage to property in the second degree, as indicted, requires proof that he "[i]ntentionally damage[d] any property of another person without [the victim's] consent and the damage thereto exceeds $500.00." O.C.G.A. § 16-7-23(a)(1). Thus, each requires proof of a fact which the other does not because criminal damage to property in the first degree requires evidence that the defendant acted in a manner that endangered human life, whereas criminal damage to property in the second degree requires evidence that the damage to property exceeds $500, neither of which is required in the other. Thus, the two did not merge under *Drinkard*.

Moreover, the Court found, to the extent appellant was asserting that his convictions should have been merged under O.C.G.A. § 16-1-6(2) as a lesser included offense, the Court rejected his contentions for similar reasons. O.C.G.A. § 16-1-6(2) provides that a crime is included in another if it differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission. Here, although the criminal damage to property charges are defined by degrees, they prohibit different risks of injury; knowing interference with property in a manner that endangers human life and damage that results in a certain level of damage to the property. Accordingly, the trial court did not err in declining to merge the two convictions.

Search & Seizure; Search Warrants

Wiggins v. State, A14A1545 (3/23/15)

Appellant was charged with numerous counts of VGCSA after a search warrant executed at his home revealed marijuana, LSD, MDMA, methamphetamine and other scheduled drugs. The trial court denied appellant's motion to suppress and the Court granted an interlocutory review.

The record showed that the agent sought to establish probable cause for the search warrant by averring that (1) an anonymous tipster reported that appellant was selling 50 pounds of marijuana out of his home per week, that his home contained a "mushroom grow," that the informant had seen these drugs, and that there were surveillance cameras outside of appellant's house; (2) during a traffic stop, appellant was found in possession of 19.7 grams of marijuana (including the packaging), which was "inside a plastic bag labeled 17 (commonly marked for weight by drug dealers)," and a revolver, which was located in his glove box; and (3) the female passenger in appellant's truck reported that she had smoked marijuana at appellant's house on "multiple occasions."

First, the Court looked at the information given by the informant. The Court noted that the agent did not identify any actions that she took to determine the reliability of the anonymous informant, who she admittedly knew nothing about. And because she took no such actions, her affidavit provided no information whatsoever regarding the informant, much less any indicia of his reliability. Thus, the Court found, given the complete lack of information regarding the anonymous informant, his motives, or the basis for his knowledge, his allegations, standing alone, were insufficient to establish probable cause for the search of appellant's home.

Next, the Court stated, there was essentially no investigation to determine the anonymous informant's reliability or to corroborate his claims. Although the State contended that the informant's claim that there were cameras outside of appellant's residence was corroborated when officers confirmed the existence of those cameras, the Court found this to be meaningless because the cameras were on the exterior of appellant's residence and visible to the general public. Nevertheless, the State contended, the anonymous tip was corroborated by appellant's possession of marijuana contained inside a bag with a marking commonly used by drug dealers. The Court agreed that this evidence reasonably supported an inference that appellant is a marijuana user, but, the Court stated, "it strains credulity to suggest that his possession of less than one ounce of marijuana in a single bag with this marking is sufficient to demonstrate his possible involvement in a high volume drug-distribution operation."

As to the revolver, the Court found that appellant's possession of a relatively small amount of marijuana and a legally owned firearm during a traffic stop, with no other indicia of drug distribution, was insufficient corroboration for the anonymous informant's claim that, at some unknown time, appellant was trafficking in a substantial amount of marijuana every week out of his home. And as to the statements made by appellant's female passenger, her admission that she used drugs at appellant's house on unspecified occasions

did not create a fair probability that evidence of drug trafficking would be found there at the time the warrant was issued.

Accordingly, the Court held, the anonymous informant's wholly uncorroborated allegations that appellant was selling drugs at some undisclosed time, even combined with evidence that appellant legally possessed a firearm during a traffic stop and that he and his friend had previously used marijuana, did not provide a substantial basis for determining that probable cause existed to search appellant's residence at the time when the warrant was issued. The fact that appellant appeared to have actually been engaged in drug trafficking was ultimately of no consequence for purposes of the Court's analysis. Consequently, the trial court erred in denying the motion to suppress.