

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 12, 2009

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THIS WEEK:

- Search & Seizure
- Crawford; Res Gestae
- Out-of-Time Appeal
- Appeals; Exhibits
- Indictments; Double Jeopardy
- Double Jeopardy
- Jury Charges
- Due Process; Security Measures
- Judicial Comment; Merger
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Search & Seizure

Johnson v. State, S08G1975

The Court granted certiorari in this case to determine if the entry into the defendant's hotel room was justified. The evidence showed that officers were called to a hotel after hotel guests complained of illegal drug sales from the defendant's room. The manager of the hotel decided to evict the defendant and asked for assistance from the officers. The manager, acting in accordance with hotel protocol, sent the hotel clerk to evict the defendant. The clerk asked the officers to accompany her to the room. From outside, they could detect the smell of marijuana. The clerk unlocked the room but was afraid to go inside. She asked the officers to go in first. The officers saw marijuana in plain view on a table between the beds. An officer checked under the bed for anyone hiding and discovered a bag of marijuana. As one of the officers was walking to the bathroom to open the door to determine if anyone was hiding

there, he saw a camouflage jacket hanging outside the bathroom door. The jacket had a large bulge in a pocket on the upper sleeve area, and the officer worried that it might be a weapon. Before opening the bathroom door, he felt the bulge. Because it felt like a baggie filled with marijuana, similar to the type they had already found, he took the baggie out of the pocket.

The Court of Appeals, in *Johnson v. State*, 292 Ga. App. 752 (2008), held that the marijuana on the table was admissible because it was in plain view, but the other drugs, located under the bed and in the jacket, must be suppressed. The Supreme Court held that all the drugs were admissible, affirming and reversing in part.

The Court held that a hotel guest has a reasonable expectation of privacy in his room. However, a justifiable eviction terminates a hotel occupant's reasonable expectation of privacy in the room. Disruptive, unauthorized conduct in a hotel room invites intervention from management and termination of the rental agreement. On the other hand, if a hotel manager's termination of a guest's rental agreement was wrongful, the guest would not have lost his expectation of privacy in the room. Here, the hotel manager had the authority to terminate the defendant's rental agreement without prior notice. Before the officers went to his room, the hotel manager had exercised this authority and justifiably terminated his occupancy of the room on the ground he was selling drugs from the room and creating a disturbance at the hotel. Thus, he no longer had a reasonable expectation of privacy in the room. The officers had to determine if anyone was in the room before the hotel clerk could lock the door with the "inhibit key" and effectuate the eviction. The officers thus properly entered the room and searched in places where someone could

be hiding. Accordingly, the officers properly seized the marijuana on the table, which was in plain view, as well as the marijuana located under the bed. The Court held that the marijuana in the coat was “more problematic.” But, because the officers were justifiably concerned about a weapon, the search was upheld under the “plain feel” doctrine.

Lawrence v. State, A09A0744

Appellant was indicted for VGCSA. He argued that the trial court erred in denying his motion to suppress. The evidence showed that two officers were called to an apartment on an anonymous domestic disturbance complaint. Lying in the hall in front of the apartment door, the officers observed a partially smoked joint. The officers heard talking and knocked on the door. The talking stopped. After five minutes of knocking, a woman opened the door a couple of inches. The officers smelled the odor of burning marijuana coming from the apartment and a cloud of smoke emanated through the cracked door. The testimony was disputed as to whether the officers were invited in and whether they received permission to look through the apartment for other individuals. The officers, upon entering the apartment, saw drugs in plain view, handcuffed the appellant and the woman who answered the door and maintained the status quo until a warrant was obtained.

The Court held that under the totality of the circumstances, the officers’ entry into the residence was supported by probable cause to search the residence. However, probable cause can provide no justification for a warrantless intrusion of a person’s home absent a showing of exigent circumstances. Whether exigent circumstances existed is a question of fact, and must be reviewed from the standpoint of a hypothetical reasonable officer and must measure those actions from the foresight of an officer acting in a quickly developing situation and not from the hindsight of which judges have benefit. Based on the facts, the Court held that the evidence authorized the warrantless entry into the residence.

Crawford; Res Gestae

Glover v. State, S09A0508

Appellant was convicted of malice murder and aggravated assault. He contended that

the trial erred by admitting two 911 calls in violation of his right of confrontation. The Court held that only testimonial statements cause the declarant to be a “witness” within the meaning of the Confrontation Clause. Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Here, the calls were made while the incident was still ongoing, the perpetrator was at large, and the operator’s questions were to assist the police in meeting an ongoing emergency. Thus, the statements were nontestimonial and the Confrontation Clause was not implicated. Once a determination is made that a statement is nontestimonial in nature, normal rules regarding the admission of hearsay apply. Because the calls were placed within a short time after the shooting, and the callers had no opportunity to deliberate about their statements or be influenced by others, the evidence was admissible under the *res gestae* exception to the hearsay rule.

Out-of-Time Appeal

Mock v. State, A09A1591

Appellant was convicted following a jury trial of burglary and other offenses in 2007. He did not file a motion for new trial or a notice of appeal. In 2009, he moved for an out-of-time appeal, claiming ineffective assistance of counsel in not appealing his conviction. The trial court denied his motion without holding a hearing.

The Court reversed. A defendant’s allegation that he was deprived of the right to direct appeal due to trial counsel’s ineffective assistance requires that a trial court conduct a hearing to determine whether the failure to pursue a timely direct appeal was attributable to the defendant or his then legal representative. It is an abuse of discretion for a trial court to fail to make such a factual inquiry. Here, the trial court determined that appellant was not entitled to an out-of-time appeal without the proper inquiry into whether his attorney or he bore the ultimate responsibility for the failure to file a timely appeal. The correct procedure under these circumstances is for the trial court, after an evidentiary hearing, to rule on the motion for out-of-time appeal. If the motion is granted, then the grant of an

out-of-time appeal constitutes permission to pursue appropriate post-conviction remedies, including a motion for new trial.

Stockton v. State, A09A0376

Appellant pled guilty to armed robbery, aggravated assault, and theft by taking. He filed a timely motion to withdraw his guilty plea and was appointed counsel. His counsel, however, apparently abandoned the motion in favor of an application for sentence review, which was denied pursuant to OCGA § 17-10-6.1 (b) (1). Two years later, the trial court noticed that the motion to withdraw was not ruled upon or dismissed so it denied the motion. The trial court then denied appellant’s motion for an out-of-time appeal from that denial even though the motion, which was filed *pro se*, apparently argued that the actions of his appointed counsel had frustrated his right to appeal.

The Court reversed. It held that an out-of-time appeal is the remedy for a frustrated right of appeal, where the defendant was denied his right of appeal through counsel’s negligence or ignorance, or if the defendant was not adequately informed of his appeal rights. A defendant has a right to appeal directly the denial of his timely motion to withdraw a guilty plea. A defendant is also entitled to the assistance of counsel for such a direct appeal. When a defendant’s right to directly appeal the denial of his motion to withdraw a guilty plea has been frustrated, he is entitled to an out-of-time appeal from the order on his motion. The disposition of a motion for out-of-time appeal hinges on a determination of who bore the ultimate responsibility for the failure to file a timely appeal.

Appeals; Exhibits

Hughes v. State, A09A1394

Appellant was convicted of child molestation. Four videotapes were to be included in the record on appeal: Two tapes of the interviews of the victim; an unredacted tape of the interview of appellant; and a redacted tape of the appellant’s interview shown to the jury. These tapes were not sent by the clerk of superior court to the Court of Appeals. It was subsequently determined that the tapes were irretrievably lost. However, appellant’s counsel had copies of the three unredacted tapes that

were received during pre-trial discovery. Appellant produced the tapes to the trial court and a redacted tape of the interview of the appellant was recreated. The tapes were sent to the Court of Appeals which then affirmed appellant's convictions.

Appellant appealed from the order that certified the accuracy of the videotapes transmitted to the Court of Appeals. First, he claimed that his counsel should not have been forced to turn over the tapes to the trial court, as such was an act of self-incrimination. The Court found this claim ironic because appellant needed these tapes to be included in the appellate record so that the Court could review the enumerations of error that he raised in his appeal from his conviction. Requiring appellant's counsel to turn over these tapes to the trial court was not an act of incrimination against appellant but rather was an effort to allow appellant to complete the record in his own appeal so as to permit the Court to review his enumeration of errors. He also argued that the sound quality of the copy of one of the child-victim interviews was inadequate to allow the Court to review it. However, the Court held the trial court certified that the copy was a true, fair, and accurate reproduction of what the jury heard and the Court further noted that it was in fact able to hear it.

Indictments; Double Jeopardy

Phillips v. State, A09A0257

Appellant pled guilty to one count of sexual battery (OCGA § 16-6-22.1) and two counts of terroristic threats and acts (OCGA § 16-11-37). He argued that (1) his indictment violated the double jeopardy clauses of the U.S. and Georgia Constitutions; and (2) his indictment was untimely. The record showed that in October 2003, he was indicted on one count of child molestation, one count of cruelty to children, third degree, and two counts of terroristic threats and acts. The indictment alleged that he had committed child molestation by sucking on the breasts of a minor under 16 years of age; allowed another minor to witness the felony; and threatened to murder both of the minor victims. He subsequently pled guilty to enticing a child for indecent purposes as a lesser-included offense to child molestation. In December, 2004, the remaining three counts of the indictment were nolle

pressed at the State's request. Thereafter, he filed a motion to withdraw his guilty plea and vacate the judgment of conviction, claiming that enticing a child for indecent purposes is not a lesser-included offense to child molestation, no adequate factual showing in support of the enticement charge was made before the trial court, and he had not received sufficient notice of aggravating evidence used during sentencing. In April, 2007, appellant was re-indicted on the same charges set forth in the 2003 indictment. In November 30, 2007, the trial court granted appellant's motion to withdraw, and on the same day his prior conviction was vacated, he pled guilty to one count of sexual battery and two counts of terroristic threats and acts.

The Court held that the second indictment did not violate the double jeopardy clauses in the U.S. and Georgia Constitutions. The prohibition against double jeopardy in both the U.S. and Georgia Constitutions, among other things, protects against a second prosecution for the same offense after acquittal or conviction. Because the Georgia Code expands the proscription of double jeopardy beyond that provided for in the United States and Georgia Constitutions, the Court determined it must look to our code to resolve the issues of double jeopardy. OCGA § 16-1-8 (a) provides that "[a] prosecution is barred if the accused was formerly prosecuted for the same crime based upon the same material facts, if such former prosecution: (1) resulted in either a conviction or acquittal. . . ." First, the Court held, this rule has no application to the counts in the first indictment as to which an order of nolle prosequi was entered because appellant was never convicted or acquitted of those crimes. Second, under OCGA § 16-1-8 (a), the State is not precluded from re-indicting appellant for child molestation. OCGA § 16-1-8 (d) provides an exception to the rule in subsection (a), stating, in relevant part, that "[a] prosecution is not barred within the meaning of this Code section if: . . . (2) Subsequent proceedings resulted in the invalidation, setting aside, reversal, or vacation of the conviction, unless the accused was thereby adjudged not guilty or unless there was a finding that the evidence did not authorize the verdict." Here, nothing in the record indicated that the trial court adjudged appellant not guilty of the offense of child molestation. Instead, the trial court simply concluded, that the offense of enticing

a child for indecent purposes was not a lesser-included offense to child molestation.

Appellant also argued that his re-indictment violated the double jeopardy prohibitions because the second indictment was returned before his prior conviction was vacated. The Court held that under the principle of "continuing jeopardy," where, as here, a defendant succeeds in setting aside his conviction, the defendant's initial jeopardy never terminates, and no double jeopardy bar arises to prevent further prosecution. The second indictment, which was apparently filed to address the eventuality that appellant's motion to withdraw his guilty plea would be granted, was returned while his jeopardy was ongoing, and, as such, it did not violate federal or state double jeopardy prohibitions.

Finally, appellant argued that the second indictment was untimely under OCGA § 17-3-3. This statute provides that if an indictment is found within the initial statute of limitations in OCGA § 17-3-1 and 17-3-2 "and is quashed or a nolle prosequi entered, the limitation shall be extended six months from the time the first indictment is quashed or the nolle prosequi entered." Thus, it is intended to function solely as a savings provision, and has no application to a prosecution in which the nolle prosequi is entered over six months before the original statute of limitations expires. Therefore, the State did not need to take advantage of the statute of limitations extension provided by OCGA § 17-3-3 because the second indictment was filed within the initial limitations period.

Double Jeopardy

State v. Jeffries, A09A0969

The State appealed from an order dismissing an indictment charging the defendant with aggravated assault and aggravated battery arising out of a bar fight between the defendant and the alleged victim. The trial court granted the defendant's motion in *autrefois* convict because the defendant pled guilty to disorderly conduct in the county recorder's court allegedly based on the same conduct. The Court held that the trial court erred in finding that the State was barred from prosecuting the defendant under the substantive aspect of double jeopardy, OCGA § 16-1-7 (a), because the disorderly conduct is allegedly an included offense of both aggravated battery and aggravated as-

sault. The Court found that the test to be used is the “required evidence” test. The trial court was required to determine if the conviction for disorderly conduct, a violation of a local ordinance, constituted an included offense of either the aggravated battery or aggravated assault charges. However, the Court noted, “[o]ur courts cannot take judicial notice of local ordinances; rather, “they must be alleged and proved by production of the original or of a properly certified copy.” Thus, “as the State correctly pointed out, because [the defendant] did not set forth the elements of the disorderly conduct ordinance below, failing completely to plead and to prove the ordinance by any proper method, she failed to carry her burden of proving her special plea in autrefois convict at the trial court level.”

The Court found that the trial court also appeared to find a violation of the procedural aspect of double jeopardy under OCGA § 16-1-7 (b). However, because the defendant failed to carry her burden of proving in the hearing that the charges at issue could have been brought within the jurisdiction of a single court and that the proper prosecuting attorney had actual knowledge of the recorder’s court proceedings, the trial court also was not authorized to grant the plea in bar pursuant to OCGA § 16-7-1 (b).

Jury Charges

Butler v. State, A09A1104

Appellant was convicted of furnishing alcohol to a minor. He argued that the trial court erred in failing to give his requested charge on circumstantial evidence under OCGA § 24-4-6. The Court agreed and reversed his conviction. The evidence showed that a 28-year-old agent and a 19-year-old investigator with the Department of Revenue’s Alcohol and Tobacco Division entered appellant’s restaurant. The investigator ordered two beers from the appellant who, without asking for identification or proof of age, served him the beers. The trial court charged the jury on the definition of circumstantial evidence but refused to charge on the language of OCGA § 24-4-6, finding that it was not applicable to the case. The Court noted that the Supreme Court of Georgia has established a bright-line rule requiring a trial court to charge the jury on OCGA § 24-4-6 when the State introduces both direct and circumstantial evidence to

support a conviction and the defendant has requested the charge. Here, the State relied on circumstantial evidence to show that appellant *knowingly* furnished an alcoholic beverage to a person under 21 years of age because the State had no direct evidence of appellant’s knowledge of the investigator’s age. Instead, the State relied on appellant’s failure to ask the investigator for identification or proof of age, from which the jury was allowed to draw an inference of knowledge.

Due Process; Security Measures

Mathis v. State, A09A0215; A09A0308; A09A0358

The three appellants were jointly tried and convicted of armed robbery and other charges relating to the robbery of a local bank. They contended that the number of police officers present in the courtroom and before and after trial each day violated their due process rights by denying them a fair trial. The record showed that the trial occurred shortly after Brian Nichols escaped from the Fulton County Courthouse. The Sheriff testified that because there were three defendants, they basically tripled their security. As such, they had individuals in plainclothes but still wore badges. They had people in uniform, some with guns, some not with guns. While in court, appellants wore “street clothes” with stun belts underneath their clothing which were not visible. There was no evidence that they were handcuffed or shackled while in the courtroom. After court was in recess each day, the appellants changed into their orange jail uniforms and were shackled, with restraints on their ankles and their wrists. They were then led out of the courthouse one at a time and into patrol cars that transported them to the jail. The Court held that while a defendant is entitled to a trial free of partiality which the presence of excessive security measures may create, the use of extraordinary security measures to prevent dangerous or disruptive behavior which threatens the conduct of a fair and safe trial is within the discretion of the trial court. Under the circumstances of this case, particularly given the security concerns regarding the three defendants on trial, the Court held that the trial court did not abuse its discretion in denying appellants’ constitutional challenge.

Judicial Comment; Merger

Howard v. State, A09A0780

Appellant was convicted of armed robbery and aggravated assault. He contended that the trial court improperly commented on his absence from the second day of trial, and that the trial court erred in sentencing him because the aggravated assault conviction should have merged with his armed robbery conviction. The record showed that when appellant failed to appear for the second day of trial, the trial court informed the jury that, “the defendant has not returned this morning. And because his absence is unexplained and I have no basis upon which to believe there was an emergency or anything like that, we will proceed without his being present. Which is the legal thing to do in our state.” The Court held that this was not a violation of OCGA § 17-8-57, because the statement did not express an opinion about whether the evidence had proven a material issue in the case, whether a witness was credible, or whether the defendant was guilty. Instead, the Court held, the statements were appropriate under the circumstances as they were intended to explain appellant’s absence from the second day of trial.

Appellant also argued and the State conceded that the two offenses merged. The Court stated that while it is possible to first commit aggravated assault by frightening the victim with a weapon and immediately thereafter to commit armed robbery by proceeding to use the weapon to rob the victim, here the only evidence was that appellant used the gun to rob the victim. Thus, the aggravated assault conviction was “used up” in proving the armed robbery and merger was required.

Business Records Evidence

Ross v. State, A09A1107

Appellant was convicted of two counts of theft by deception, in connection with funds she withdrew from two accounts at the United Community Bank (“UCB”). She argued that the trial court abused its discretion in admitting certain checks over her hearsay objection. The evidence showed that appellant set up two accounts at UCB and then deposited six checks from other banks (“payor banks”) into the accounts. She then basically immediately with-

drew the money deposited and subsequently, the checks from the payor banks were returned for insufficient funds. The State only called representatives of UCB to testify. Appellant contended that because UCB did not “produce” the six checks at issue because the checks were drawn on accounts at other banks, the State’s failure to call representatives of the payor banks that created the checks resulted in a lack of the foundation required to admit the State’s Exhibits under the business records exception to the hearsay rules. The Court disagreed. To introduce a writing under the business records exception to the hearsay rule, a witness must lay a foundation indicating that he or she is aware of the method of keeping the documents. It is not required that the witness made the records or kept them under his or her supervision or control. Instead, the witness must be able to testify that the record was made (1) in the regular course of business, and (2) at the time of the event or within a reasonable time of the event. The witness’s lack of personal knowledge regarding how the records were created does not render them inadmissible, but merely affects the weight given to the evidence. A factual document may be admitted under the business records exception when an officer or employee of a business that *received, relied upon, and retained* the document in the regular course of its business testifies to that effect, despite the lack of testimony from a witness associated with the business that originally *created* the document. Therefore, because UCB’s branch manager testified that the bank received, relied upon, and retained the checks in the regular course of its business, the trial court did not abuse its discretion in admitting the exhibits under the business records exception to the hearsay rules.