Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 13, 2014

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THIS WEEK:

Sentencing; Merger

Andrews v. State, A12A1874 (6/2/14)

Appellant pled guilty to rape, aggravated assault, two counts of burglary, three counts of robbery, and theft by taking. The trial court sentenced him to twenty years to serve concurrently on the burglary, aggravated assault, and robbery charges (Counts 1, 2, 4, 5, 6 and 7); ten years to serve concurrently on the theft by taking charge (Count 8); and life in prison on the rape charge (Count 3). Thereafter, appellant moved to withdraw his plea. The trial court found that the two burglary counts (Count 1 and 2), and the three robbery counts (Counts 5, 6 and 7) should have merged, but the merger issue was waived due to appellant entering a plea. The Court of Appeals affirmed, but the Supreme Court reversed and remanded in light of its decision in *Nazario v. State*, 293 Ga. 480 (2013), which held that a conviction which merges with another conviction is void, a sentence imposed on such a conviction is illegal and entry of a guilty plea does not waive a defendant's claim that a conviction merged as a matter of law or fact.

The Court found that under *Nazario*, the decision on whether the counts merged under the required evidence test of *Drinkard v. Walker* must be based on the limited record of the plea hearing. The facts showed that appellant, carrying an 18-inch long black metal flashlight, entered the store in which the victim worked. He demanded money. The victim gave him the money from the cash register, along with money from her wallet and her check card. Appellant then told the victim to take her pants and panties off. When she did not comply, he hit her on the head with the flashlight, picked her up and slammed her to the floor and choked her. The victim then stopped fighting and appellant raped her. He then took her car keys, got into her car and left.

The State conceded that the two burglary convictions should have merged because both counts charged appellant with entering the same building without authority on the same date with intent to commit a felony—theft (Count 1) and rape (Count 2). Accordingly, the trial court erred in failing to merge Counts 1 and 2 for sentencing purposes. The Court noted that the trial court found that these offenses effectively merged because it imposed only one 20-year sentence on appellant's convictions for burglary (Counts 1 & 2), aggravated assault (Count 4) and robbery (Counts 5, 6 and 7). Nevertheless, because these convictions merged as a matter of law, appellant's sentence was illegal and the Court remanded for resentencing.

As to the aggravated assault with intent to rape (Count 4), the Court found that the aggravated assault did not merge with his rape conviction (Count 3) because the aggravated assault was complete before the rape and it

involved a separate and distinct act of force outside of the force necessary to accomplish the rape. On the three robbery charges (Counts 5, 6 and 7), the Court found that appellant's actions in taking the victim's cash (Count 5) and check card (Count 6) occurred simultaneously and therefore the trial court erred in failing to merge them for sentencing purposes. However, his conviction for robbery based on taking the victim's car keys (Count 7) did not merge because the record showed that this offense was not part of his initial actions in taking the victim's cash and check card. Notably, appellant did not take the victim's car keys until after he assaulted the victim and forcibly raped her. Similarly, the theft by taking (Count 8) charge also did not merge with his conviction for robbery based on his act of taking the victim's car keys because the two offenses were based on two distinct acts occurring at different times in different locations. Specifically, appellant took the victim's car keys from her immediate presence after he raped her. He then went outside of the store and took the victim's car. Consequently, the trial court did not err in failing to merge appellant's conviction for theft by taking.

Motions for Bond; Flagrant Abuse Standard of Review

Prigmore v. State, A14A0380 (5/29/14)

Appellant was charged with vehicular homicide, reckless driving, leaving the scene of an accident, and DUI. The Court granted appellant's application for interlocutory appeal to consider whether the trial court erred in denying his motion for pre-trial bond. The evidence showed that appellant's vehicle left the roadway, travelled up on a sidewalk and struck and killed a woman and her six-year-old daughter. Appellant's vehicle then continued back onto the roadway and pulled into a parking lot. Appellant parked his apparently then disabled vehicle in a drive-thru of a business. At the bond hearing, appellant produced witnesses to testify regarding his ties to the community. The State countered with evidence that appellant had multiple prior convictions for DUI, as well as a VGCSA (first offender) and shoplifting conviction.

The Court noted that under O.C.G.A. § 17-6-1(e), a trial court may release a defendant on bail if it finds that the defendant poses no significant risk of fleeing from the jurisdiction of the court or failing to appear in court when required; (2) poses no significant threat or danger to any person, to the community, or to any property in the community; (3) poses no significant risk of committing any felony pending trial; and (4) poses no significant risk of intimidating witnesses or otherwise obstructing the administration of justice. Also, the Court noted, its review of a trial court's determination on the issue of bond is limited to a "flagrant abuse" standard of review.

Here, the Court found, the trial court, in denying bond, expressed concern that appellant may pose a danger to himself and others. The trial court also expressed concern about appellant's prior DUIs and concluded that appellant posed "a significant risk of committing further felonies pending trial of this matter and poses a significant risk to persons in the community, including himself." Given the facts, the Court held that it could not say that the trial court flagrantly abused its discretion in denying bond.

Search & Seizure; DUI

State v. Criswell, A14A0527 (5/29/14)

Criswell was charged with DUI (less safe). The trial court granted his motion to suppress and the State appealed. The evidence showed that officers were called to a residential street because a vehicle was blocking a driveway. When the officers approached the vehicle, they encountered Jenkins, who was obviously intoxicated. Jenkins informed the officers that he was staying with a friend and indicated an adjacent residence. At that time, Criswell, in his own vehicle, came down the road and pulled into the driveway of the residence at which Jenkins had just indicated he was staying. An officer walked over to talk with Criswell. The initial encounter was consensual and took place with the officer standing 12 to 15 feet away. The officer then walked up the driveway and noticed manifestations of intoxication. The officer then ordered Criswell to the street or be locked up. The officer eventually charged Criswell with DUI.

The trial court ruled that the evidence should be suppressed because the officer was not credible. Specifically, the court found that the officer could not have noticed the physical manifestations of intoxication from 12 to 15 feet away given the time of night and the lighting conditions and therefore, the officer's entry into the driveway was an illegal second-tier encounter for which the officer lacked articulable reasonable suspicion. The State argued the trial court erred because the encounter in the driveway was a first-tier encounter. The Court agreed.

The Court found that the undisputed facts showed that the officer's initial encounter with Criswell took place from 12 to 15 feet away, when he was standing in Criswell's yard. The Court found that despite the trial court's determination as to the officer's credibility as it relates to his observations from his initial contact when he was standing 12 to 15 feet away from Criswell, the trial court erred because the entry into the driveway was not a second-tier encounter. Any visitor, including a police officer, may enter the curtilage of a house when that visitor takes the same route as would any guest, deliveryman, postal employee, or other caller. Here, the evidence showed that Criswell's driveway was open to the street, and had no gates, fences, or bushes blocking a visitor's access or visibility. Thus, when the officer walked up Criswell's driveway, he was in an area that is not within the protected curtilage of the home and is not protected by the Fourth Amendment. Accordingly, the officer's actions in this encounter fell within the realm of a first-tier police-citizen encounter and did not amount to a stop.

The State next argued that the trial court erred in determining that the officer's testimony was not credible as it related to his ability to see Criswell's bloodshot eyes and to smell alcohol on his breath and person. The Court agreed. The trial court made this credibility determination on the basis that the only time the officer could have legally made these observations was when he was standing 12 to 15 feet away—too far, given the lighting conditions, for him actually to have noted these potential indicia of drunkenness. But, given that the officer was legally on Criswell's driveway, to the extent that the officer made these observations from the driveway, where his undisputed testimony showed he and Criswell moved toward each other and met at Criswell's bumper, the trial court made a legal error in suppressing the evidence gleaned from these observations.

Finally, the State contended that the trial court erred in finding that the officer lacked a reasonable, articulable suspicion to

demand that Criswell come to the street so that the officer could determine whether he was under the influence of alcohol, and that the trial court erred in finding that the officer lacked probable cause to arrest Criswell for driving under the influence of alcohol. The Court again agreed. The facts necessary to establish probable cause for arrest are much less than those required to prove guilt beyond a reasonable doubt at trial; the test merely requires a probability—less than a certainty but more than a mere suspicion or possibility. Sufficient probable cause to conduct a DUI arrest only requires that an officer have knowledge that the suspect was actually in physical control of a moving vehicle while under the influence of alcohol to a degree which renders him incapable of driving safely. Here, the officer saw Criswell drive down the street and into his driveway. Although he did not see Criswell drive in an unsafe manner, a driver need not actually commit an unsafe act in order to be under the influence to the extent it is less safe to drive. The officer observed Criswell driving his vehicle immediately before he observed Criswell's bloodshot eyes, alcoholic odor, unsteadiness, confusion, and slurred speech. This evidence was sufficient to support his arrest for DUI. Accordingly, the trial court erred in its grant of Criswell's motion to suppress.

DUI; Drug Recognition Evidence

Edison v. State, A14A0208 (5/29/14)

Appellant was convicted of DUI. She contended that the trial court erred in denying her motion to suppress evidence concerning a drug recognition examination because the officer offered her a "hope of benefit" in violation of former O.C.G.A. § 24-3-50, by telling her that she would not be taken to jail if she submitted to the examination. The evidence showed that after being arrested for DUI and taking the state-administered test, the officer told appellant that if she would also submit to a detailed drug recognition examination, she would not be booked into jail at that time. The officer explained that she had been arrested for DUI, and that her participation in the further drug recognition examination would not change the fact that she had been charged with DUI, but she would then be given a copy of the charges and taken home. Appellant agreed to the further examination, after which she was transported to her home.

The Court noted that former O.C.G.A. § 24-3-50 provided that "[t]o make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury." The promise of a benefit that will render a confession involuntary under O.C.G.A. § 24-3-50 must relate to the charge or sentence facing the suspect. Generally, the hope of benefit to which the statute refers has been construed as a hope of lighter punishment—a shorter sentence, lesser charges, or no charges at all. Accordingly, an officer's promise that he would see about getting the defendant home once the defendant made a statement does not implicate the provisions of O.C.G.A. § 24-3-50.

Here, appellant did not challenge the admission of a *confession*, and instead challenged the admission of evidence concerning the drug recognition examination performed by the officer. Thus, insofar as the drug recognition examination itself was concerned, there was nothing to suppress under O.C.G.A. § 24-3-50. Moreover, the Court found, even if appellant had challenged the admission of a confession, the evidence showed that the officer made no offer relating to the charges facing her, and certainly did not offer a reduced criminal punishment. Rather, the officer clearly explained that appellant's consent to the drug recognition examination would not affect the fact that she had been arrested and charged with DUI and the officer merely told appellant that she would be taken home after the examination. Accordingly, the trial court did not err in denying appellant's motion to suppress this evidence.

Res Gestae; Jury Instructions

Prado v. State, A14A0365 (5/30/14)

Appellant was convicted of trafficking in marijuana. The evidence showed that while officers were waiting on a search warrant for a residence suspected of being a "grow house," they observed a Dodge Ram pickup truck towing a large recreational trailer emerge from the back yard, followed by a Chevrolet Tahoe. The officers stopped the vehicles. Hernandez was driving the Ram, appellant was driving the Tahoe. A search of the vehicles revealed 900 pounds of marijuana hidden in the trailer. A subsequent search of the residence revealed marijuana growing in the basement and a bedroom.

Although appellant was initially indicted for the manufacture of marijuana based on the marijuana found in the residence, the State dismissed that charge and proceeded only on the trafficking count based on the marijuana in the trailer. Appellant moved in limine seeking to exclude any evidence relating to the reason why the police had the residence under surveillance, the details of the arrests of other suspects at the residence, and the search of the residence. The trial court denied the motion, finding that the evidence was part of the res gestae of the charged crime.

Appellant contended that the trial court erred in denying his motion in limine. Specifically, he contended that the evidence pertaining to the marijuana growing operation uncovered at the residence was irrelevant, improperly placed his character in issue, and was unduly prejudicial because he was not tried for the marijuana found there and any connection between his arrest and the residence was tenuous. The Court disagreed. Under the circumstances, the trial court was authorized to find that appellant's stop at the marijuana "grow house" was part of a continuous course of conduct, closely connected in time, place, and manner to his trafficking of the marijuana found in the trailer. Moreover, the surveillance and search of the marijuana "grow house" were part of the circumstances surrounding appellant's arrest. And because appellant denied knowing about the marijuana found hidden in the trailer, evidence that he was observed visiting a large, active marijuana growing operation moments before driving away in tandem with the trailer was relevant to show that he knowingly possessed the drugs inside the trailer.

For these combined reasons, the Court concluded, the trial court acted within its discretion in admitting evidence of the surveillance and search of the residence as part of the res gestae of the crime.

Appellant also argued that the trial court erred in declining to give his request to charge on the knowledge element of trafficking in marijuana. In his request to charge, appellant requested that the trial court instruct the jury that the State was required to prove beyond

a reasonable doubt that the defendant knew what he possessed was marijuana, and that he knew that the weight of the marijuana was greater than 10 pounds. Appellant argued that under O.C.G.A. § 16-13-31(c) (2007), the State was required to prove that he knew that the weight of the marijuana was greater than 10 pounds, and that the trial court should have specifically instructed the jury on this point by giving his requested charge.

Relying on its decision in *Harrison v. State*, 309 Ga.App. 454, 457(2)(a) (2011), the Court found that the trial court did not err in refusing to give appellant's request to charge. Even if the State was required to prove that the defendant knew the weight of the marijuana, the trial court's charge as a whole adequately apprised the jury of that requirement. The trial court may not have used the precise words that appellant preferred, but even if appellant was right about the plain meaning of O.C.G.A. § 16-13-31(c), the charge accurately and fully apprised the jury of the applicable law, and the failure of the trial court to give the requested instruction was not error. Furthermore, as in *Harrison*, the trial court "did *not* charge the jury that the State was *not* required to prove knowledge of the weight." Finally, the Court found, any error in failing to give the appellant's requested charge was harmless under the circumstances of the case.

Out-of-State Witnesses; Materiality

Aburto v. State, A14A0669 (5/30/14)

Appellant was convicted of aggravated sodomy, criminal attempt to commit rape, and related crimes. The victim was, at the time, a seven year old girl living with her mother, older brother, sister, and younger half-brother, C. A. Also living with them was C. A.'s father and his brother, appellant. The victim did not initially make an outcry after the event giving rise to the charges. Instead, she did so four years after the incident and after her mother moved her and her family to Illinois.

Appellant argued that the trial court erred by not granting his pre-trial petitions under the Uniform Act to Secure the Attendance of Witnesses from Without the State (the "Uniform Act") asking the trial court to certify that the victim's younger half-brother, C. A., and Dr. Jones, residents of the State of Illinois, were material witnesses in the case. The Court stated that the Uniform Act creates a statutory framework for compelling an out-of-state witness to testify at, or to bring relevant documents to, a Georgia criminal proceeding. Under the Uniform Act, a party seeking to secure the attendance of an out-of-state witness in a criminal prosecution pending in a Georgia court may request that the Georgia court issue a certificate of materiality regarding the witness. In such event, the Georgia trial judge presented with a request for a certificate is charged with deciding whether the sought-after witness is a "material witness.'" And a "material witness" for this purpose is a witness who can testify about matters having some logical connection with the consequential facts, especially if few others, if any, know about these matters.

Appellant contended that he needed the testimony of C. A. and Dr. Jones to show that the victim had been accused of molesting C. A. and that the charges against appellant were in retaliation for appellant's mother accusing the victim of molesting C. A. Specifically, that the victim's mother called the police to allege the molestation against the victim within a day or two of appellant's mother's allegations against the victim. Thus, for purposes of appellant's theory of the defense, as presented at the petition hearing, it was consequential to his case if the allegation that the victim molested C. A. preceded the allegation that appellant molested the victim.

The Court noted that the State was willing to concede for purposes of the hearing that the victim had molested her half-brother, C. A., but appellant did not show that such an act, in and of itself, was a consequential fact. Nor did appellant show that C. A. or Jones had any personal knowledge of when the allegation against the victim was first communicated to the victim or the victim's mother. Thus, the Court stated, pretermitting whether they were hearsay, the medical records indicated that Jones could confirm that C. A. was treated at a hospital on June 25, 2010. The State, on the other hand, argued that an Illinois police report would show that the allegation against appellant was made on June 24, 2010, before C. A. was taken to the hospital, and appellant's counsel acknowledged that the police report "may suggest that this allegation against [appellant] occurred on June 24th." Under these circumstances, the Court found, the trial court could properly conclude that appellant failed to come forward with evidence showing that C. A. and Jones would be material witnesses at the criminal trial, and thus, there was no abuse of discretion in its denial of appellant's petitions for certificates of materiality.

BUI; Prosecutorial Misconduct

Hammill v. State, A14A0450 (5/30/14)

Appellant was convicted of serious injury by vessel, reckless operation of a vessel and operating a vessel under the influence of alcohol. The evidence showed that appellant crashed his jet ski into the victim's jet ski, causing the victim to suffer a serious brain injury. Appellant argued that the prosecutor improperly commented in the presence of the jury on his right not to testify and incriminate himself, and that the trial court should have granted him a new trial as a result. The Court disagreed.

The record showed that during the cross-examination of the arresting DHR officer, defense counsel attempted to inquire about a statement made by appellant to the officer in which he asserted that his alcohol consumption was not the cause of the jet ski collision. The question was part of a series of questions by defense counsel aimed at showing that the officer had left certain exculpatory statements made by appellant out of his arrest report even though the statements could be heard on the video recording from the officer's "pin cam." The prosecutor objected to the question, arguing that appellant's statement was self-serving and that if appellant "wants it in he can come testify about it." The trial court overruled the prosecutor's objection to the question on the ground that appellant's statement was already in evidence, given that the video recording in which the statement could be heard had previously been introduced into evidence and played for the jury.

Appellant argued that the prosecutor's remark that if he "wants it in he can come testify about it" was an improper comment on his right not to testify and incriminate himself. First, the Court noted, since appellant's counsel did not object at trial, this issue was waived on appeal. Nevertheless, the Court stated, the prosecutor's remark was not improper. Under Georgia law, a prosecutor may not comment upon a defendant's failure to testify at trial. A criminal defendant alleging

a violation of this rule establishes reversible error if the prosecutor's manifest intention was to comment on the accused's failure to testify or the remark was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. Reading the challenged remark by the prosecutor in context, the Court concluded that the remark was not intended as a comment on appellant's decision not to testify and was unlikely to be interpreted by the jury as such a comment. Rather, the prosecutor's remark was made as part of an evidentiary objection and argument between counsel over whether appellant's alleged self-serving statement was admissible if he elected not to testify. Therefore, the prosecutor's remark was reasonably construed as nothing more than a comment pertaining to the admissibility of certain evidence, and, as such, provided no basis for a new trial. However, the Court commented in a footnote that "[i]t is unlikely that the exclusion of 'self-serving' statements established by Georgia precedent survived the adoption of the new Evidence Code."

Appellant also argued that the trial court erred in denying his motion for mistrial or in failing to give a curative instruction when the prosecutor allegedly made an improper remark in closing argument regarding the inference that could be drawn from his refusal to submit to a State-administered breath or blood test. The Court stated that under Georgia law, the refusal of a criminal defendant to submit to a State-administered breath, blood, or urine test for determining alcohol or drug content itself may be considered as positive evidence creating an inference that the test would show the presence of the prohibited substance. But the refusal to take such a test does not, "by itself," support an inference of impairment. Rather, the refusal to take the State-administered test, "together with other evidence," can support an inference that the defendant was an impaired driver.

During closing argument, defense counsel argued that the "only inference" that could be drawn from appellant's refusal to take the State-administered test was "that he had alcohol in his system." In his closing, the prosecutor argued, "What other evidence of impairment do we have? He refused the tests. All right, [Defense Counsel] sat here and told you that you could only use the refusal of the test as evidence that there was alcohol in his system, and that, ladies and gentlemen, is not the case. It absolutely is not. The judge will instruct you that methods of proving this offense that the driver was impaired, [that] the Defendant's ability to drive was impaired[,] include the refusal to take field sobriety tests and the . . . breath or blood tests…." Defense counsel then objected and moved for a mistrial on the ground that the prosecutor had misstated the applicable law. The trial court overruled the objection, and the prosecutor continued his argument: "[Appellant] refused the tests. That is evidence of impairment. It's circumstantial evidence *and it needs to be taken with other evidence in order to come to a conclusion of impairment*, but it is evidence." (Emphasis added).

The Court found that the emphasized clarification by the prosecutor was consistent with Georgia case law reflecting that a defendant's refusal to take a State-administered test, "together with other evidence, will support an inference that he was an impaired driver." In light of this clarification of the law by the prosecutor, the Court concluded that any error in the earlier statements by the prosecutor was rendered harmless.