Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 17, 2009

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THIS WEEK:

Guilty Pleas

Boykins v. State, A09A0310

When Appellant was 15 years old, he pled guilty to two counts of armed robbery under a negotiated plea deal. He contended that the trial court erred in denying his motion to withdraw his plea because he felt threatened and intimidated by his court appointed attorney to enter his plea. The Court held that his plea was freely and voluntarily entered. Specifically, the Court noted that the record contained a guilty plea statement executed by him, which advised him of the rights he was waiving by entering his plea, the charges to which he was entering his plea, and, also included the following statement, portions of which were in bold print: "I believe that my lawyer has competently done all that anyone could do to counsel and assist me, and I AM SATISFIED WITH THE ADVICE AND GUIDANCE HE HAS GIVEN ME." Although appellant argued that he pled guilty only because he felt "boxed in" by his attorney to do so after he was not allowed to talk to his parents, the Court held that this was a matter of witness credibility, which the trial court was authorized to decide against him.

Appellant also argued that he could not legally plead guilty under contract law because he was a juvenile. The Court found that he procedurally defaulted on this argument by not raising it before the trial court, but that in any event, the same issue was decided adversely to his position in *Foster v. Caldwell,* 225 Ga. 1 (1969).

Brady; Sanctions

State v. Miller, A09A0086

The State appealed from an order dismissing robbery and battery charges against Miller after the trial court determined that the destruction of Miller's cell phone was done in bad faith by the police. In analyzing the *Brady* claim, the Court, citing *California v. Trombetta*, 467 U.S. 479 104 SC 2528, 81 LE2d 413 (1984), and *Arizona v. Youngblood*, 488 U.S. 51, 109 SC 333, 102 LE2d 281(1988), held that there are three types of evidence: (1) that which the police knew "would have exculpated" the defendant, (2) that which the police knew "could have exculpated" the defendant, and (3) that of which nothing more can be said other than that it is potentially useful evidence. The first type of evidence is "material exculpatory evidence" and good or bad faith is irrelevant when the police destroy or fail to preserve such evidence. The second and third types of evidence require a showing of bad

faith i.e., official animus toward the defendant or a conscious effort to suppress exculpatory evidence, before the State's destruction or failure to preserve such evidence rises to the level of a due process violation. And before dismissal of criminal charges is warranted for destruction or failure to preserve any of the three types of evidence, a showing of the inability of the defendant to obtain comparable evidence by other reasonably available means must be made.

Here, the cell phone was erroneously seized as evidence of a robbery and battery allegedly committed by Miller. The trial court dismissed those charges against Miller, in essence because the cell phone contained information that could have led to Miller's acquisition of evidence that could have exculpated him. Under these circumstances, the Court found that the cell phone was properly characterized as type two or three evidence. The trial court found that the police had engaged in conscious wrongdoing and thus acted in bad faith in destroying the cell phone, based on the arresting officer's failure to testify in combination with other facts such as those showing that the police failed to return the cell phone to Miller even though they were obviously aware of his temporary abode (jail), and that they made false statements under oath in obtaining permission to destroy the phone. The Court found that the evidence also supported the trial court's finding that Miller could not obtain the information stored in the cell phone by other reasonably available means. Therefore, trial court was thus authorized to find a denial of Miller's right to due process and to order dismissal of the criminal charges because of the State's destruction of the cell phone.

Guilty Plea; Sentence Review

Vaughn v. State, A09A0546

Appellant pled guilty to one count of criminal attempt to manufacture methamphetamine, one count of possession of methamphetamine, and one count of possession of altered ephedrine. He contended that the trial court erred in denying his motion to withdraw his guilty plea because he was not informed that the sentence review panel would not review his plea. The record showed that he entered a non-negotiated plea in March 2007. He sentencing was delayed for a pre-sentence investigation. On July 1, 2007, the Georgia General Assembly repealed OCGA § 17-10-6 and enacted OCGA § 17-10-6.3 which terminated the right of a defendant sentenced after July 1, 2007, to have his sentence reviewed by a three-judge panel. In November, 2007, the trial judge sentenced appellant to a total of 30 years on the charges, with 25 years to serve.

The Court held that the record from both the plea hearing and the hearing on the motion to withdraw supported a finding that appellant entered his plea knowingly, intelligently and voluntarily. The evidence supported a finding that appellant rejected the State's plea offer and instead entered into a non-negotiated plea. When he made the decision to enter that plea, he was aware that the State was making no recommendation of sentence and that he had the potential to receive a maximum sentence of 66 years. The availability of a sentence review did not alter the possibility that appellant could potentially be required to serve up to 66 years in prison. Moreover, the Court held, appellant had no constitutional right to a sentence review by a three-judge panel because the Georgia Supreme Court held that former OCGA § 17-10-6 was unconstitutional.

Kidnapping; Garza

Flores v. State, A09A0752

Appellant was convicted of kidnapping and child molestation. He contended under *Garza* that the evidence was insufficient to support his conviction. The evidence showed that late one evening, the 12-year-old female victim was returning home after a party when 19-year-old appellant burst from the bushes near the front door of the victim's home and confronted her about her unwillingness to engage in a romantic relationship with him. He then grabbed her arm and forced her out of sight to the unlit back side of the residence, where he tripped her and pulled her pants down. The victim's mother, who had recently arrived home and had been looking for her daughter in the residence and in the yard around its entrance, walked to the back of the residence and saw appellant on top of her daughter with his pants down. The girl shouted that appellant was raping her, and appellant fled.

Under *Garza* there are four factors to be considered in determining whether the movement at issue constituted the asportation needed for kidnapping: 1) the duration of the movement; 2) whether the movement occurred during the commission of a separate offense; 3) whether such movement was an inherent part of that separate offense; and 4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. A divided en banc Court found the evidence was sufficient. Although the duration of the movement was short, and although the movement occurred during the commission of the sexually-motivated aggravated assault, the movement did not constitute an inherent part of that aggravated assault but was clearly designed to present a significant danger to the victim independent of the assault. Further, the movement of the victim to the rear of the residence created an additional danger to the young girl by enhancing the control of appellant over her, as he would not have had such control had he remained in the lighted area in front of the residence, visible and audible to neighbors and the soon-to-arrive mother. Moreover, this movement served to substantially isolate the young girl from protection or rescue, as demonstrated by her mother's inability to locate her and possibly prevent the ensuing rape when the mother was searching the front of the residence.

DUI; Minors

Brown v. State, A09A0774

Appellant was convicted of DUI (per se), DUI (less safe), and underage possession of alcohol. She argued that the trial court should have granted her motion to suppress because as a minor she was entitled to be advised of her *Miranda* rights prior to the administration of the alco-sensor test. Specifically, when an officer administers an alco-sensor test to someone he knows to be a minor, *Miranda* warnings are allegedly required because the "sole and direct focus of the investigation is the minor's guilt or innocence of, at least, the crime of minor in possession of alcohol by consumption[]" in violation of OCGA 3-3-23 (a) (2). However, the Court found that appellant's argument was based on a misapprehension of OCGA § 3-3-23. OCGA § 3-3-23 (a) explicitly provides that underage alcohol consumption is not a crime if the consumption is "otherwise authorized by law." OCGA § 3-3-23 (b) and (c) provide such authorized exceptions. Therefore, appellant's

assertion that "a positive alco-sensor of a minor establishes, without question, guilt of the crime of minor in possession of alcohol by consumption" was incorrect.

Jury Charges

Griffey v. State, A09A1116

Appellant was convicted of armed robbery and possession of a firearm during the commission of a crime. Appellant argued that the trial court violated his right to a fair trial by giving the following charge: "I charge you that when the accused testifies, he at once becomes the same as any other witness, and his credibility is to be tested by and subjected to the same tests as are legally applied to any other witnesses. In determining the degree of credibility that should be accorded his testimony, you, the jury may take into consideration the fact that he's interested in the result of this prosecution." The Court held that this argument was foreclosed by the Supreme Court's decision in *Bell v. State*, 284 Ga. 790 (2009), in which the Supreme Court approved as a correct statement of law an instruction that, in assessing the credibility of witnesses, the jury may take into consideration the fact that the defendant who testifies is interested in the outcome of the prosecution.

Sentencing; Merger

Johnson v. State, A08A1178

This was appellant's third trip to the Court of Appeals and this time, he alleged that the trial court issued a void sentence by sentencing him for both aggravated assault and rape. The Court felt "constrained" to agree. Appellant was charged and convicted on two separate counts of aggravated assault. One count alleged aggravated assault with intent to rape under OCGA § 16-5-21 (a) (1) and the other alleged aggravated assault with a deadly weapon under OCGA § 16-5-21 (a) (2). The trial court merged these two counts and sentenced him only on the count of aggravated assault with intent to rape. By doing so, the trial court rendered the conviction for aggravated assault with a deadly weapon void.

The requirement under the rape statute that a defendant have forcible carnal knowledge of the victim against her will is not a fact required under the aggravated assault statute. But as indicted in this case, aggravated assault could have been proven in either of two ways, and the jury was charged on both methods. First, the assault could have been established by proof that holding a knife at the victim's neck with the intent to rape placed her in reasonable apprehension of violent injury, a fact not necessary to prove rape. Second, the assault could also have been proven by showing that appellant attempted to injure the victim with the intent to have forcible carnal knowledge against her will. The State neither argued that the Court should consider any injury other than the rape, nor argued any evidence of injuries arising from the assault that were not also attributable to the rape. Therefore, while the rape statute *requires* proof of carnal knowledge, which the aggravated assault statute does not, the applicable aggravated assault statute does not necessarily *require* proof of any fact that is not also included in proof of rape, as it could be proven under the indictment in this case without regard to the victim's apprehension and, in the absence of a special verdict, it could not be determined on what basis the jury's verdict on assault was made. Accordingly, under the facts of this case, the aggravated assault with intent to rape charge must merge with the rape charge, and the trial court erred in sentencing appellant separately for aggravated assault.

Identification; Jury Charges

Lee v. State, A09A0653

Appellant was convicted of aggravated assault on a police officer and carrying a concealed weapon. He argued that the trial court erred in denying his motion to suppress the eyewitness's show-up identification because the witness stated that he knew the officers wanted him to identify the person he claimed to be the shooter. But, the Court held, the evidence should be suppressed only if a substantial likelihood of irreparable misidentification exists. Here, the victim was a uniformed officer working security at a night club. The evidence showed that the witness saw the shooter drive away in a champagne-colored Escalade with chrome rims and a South Carolina license plate with a flower on it. He told officers on the scene that he did not think he could identify the shooter because "it was kind of dark" and he "didn't really see his face" but he had "light skin [and a] short, low haircut." But when the witness arrived to the location of appellant's apprehension less than five miles away, he was able to identify appellant "as soon as we pulled up." The witness testified further that he was "a hundred percent" certain that the vehicle he observed at the show-up was the same vehicle he observed at the scene of the shooting, and that the occupant was the shooter. Further, the victim officer testified that he noticed appellant first and his manner of dress when appellant entered the nightclub and that he "sort of stood out." The victim testified further that he was certain as to who shot him after he was released from the hospital although he did not know "his name at the time." At trial, the victim testified that he told investigators that the shooter was a light skinned black male wearing a white shirt. The Court found that under this evidence, there was no likelihood of irreparable misidentification, especially where, as here, the witness stated that his identification of appellant was based upon seeing him at the scene of the crime, and the victim and witness both identified appellant as the shooter at trial.

Appellant also argued that the trial court should have included a charge on the language of OCGA § 16-11-126 (c), which prohibits the concealment of a firearm by a person unless that person has a valid permit issued under OCGA § 16-11-129. However, the Court held that it is appellant, not the State, that has the burden of proving he had a permit to carry the firearm. Since appellant failed to prove that he had such a permit, the trial court was not required to give an instruction which was inapplicable to the case.

Character; Gang Affiliation

Harris v. State, A09A0897

Appellant was convicted of murder and felony murder. He contended that that the trial court erred when it excluded evidence of the victim's gang affiliation while permitting references to appellant's gang affiliation. The record showed that appellant was permitted to testify at length that he was afraid of the victim and knew that he was the type of person who carried out his threats, but was not allowed to talk about the victim's alleged gang affiliation. After trial, appellant was allowed to make a proffer of the evidence he sought to introduce regarding the gang activity of the victim and the witnesses. The Court held that evidence of a defendant's gang affiliation has been

held relevant and admissible to show motive despite the fact that it incidentally places the defendant's character in evidence. However, although evidence of a victim's specific acts of violence against third persons when the defendant is claiming justification is admissible, the mere membership in a gang is not a specific act of violence. Therefore, such evidence is not admissible or relevant, and, in any event, the victim's character is rarely relevant for any purpose in a criminal proceeding.

Cross-Examination

Mayhew v. State, A09A0444

Appellant was convicted of disorderly conduct and of obstruction of a law enforcement officer. He argued that the trial court impermissibly curtailed his cross-examination of the victim of his disorderly conduct. The transcript showed the following during defense counsel's cross: "Q: Well, you understand, do you not, that unless the State proves reasonable fear there can be no conviction for disorderly conduct here? You understand that, correct? " The trial court sustained the State's object as calling for a legal conclusion. The Court held that although a defendant is entitled to a thorough and sifting cross-examination as to all relevant issues, the trial court, in determining the scope of relevant cross-examination, has broad discretion. The Confrontation Clause guarantees an opportunity for effective cross-examination, but not cross-examination that is effective in whatever way and to whatever extent, the defense might wish. Here, the cross-examination at issue sought to allow a witness to testify what the law is. But, witnesses must testify to facts, and the trail court is responsible for the law. Therefore, the witness's understanding of what the State was required to prove was not relevant and the trial court did not abuse its discretion in curtailing appellant's cross-examination on this issue.

DUI; Search & Seizure

State v. Burke, A09A0375

Appellant was charged with DUI, less safe. The trial court found as a matter of law that the officer lacked probable cause to arrest and granted Burke's motion to suppress. The State appealed and the Court reversed. The undisputed evidence showed that Burke was stopped for an expired tag. The officer noticed that Burke's eyes were bloodshot and watery and he smelled a "very strong odor of alcoholic beverage" coming from inside the vehicle. The officer asked Burke to step to the rear of the vehicle. Burke complied and the officer noticed that he was unsteady on his feet, had to hold on to the door as he exited the vehicle, and had to lean against the vehicle as he walked to the rear. The officer also noticed a "very strong odor of alcoholic beverage coming from his breath outside the vehicle." Burke agreed to take an alco-sensor test, which registered positive for alcohol. The officer testified that he then arrested Burke because he believed Burke was under the influence of alcohol to the extent he was less safe to drive. Burke refused to take a breath test.

The Court held that the trial court erred in two respects. First, the trial court erroneously concluded, as a matter of law, that the odor of alcohol, bloodshot and watery eyes, and unsteadiness cannot support a finding of impairment. Moreover, while the presence or odor of alcohol on a driver's breath, or a positive alco-sensor result, would not alone support an inference that the driver was impaired, under the combination of circumstances here, the evidence, including the officer's observation that Burke was unsteady on his feet, had bloodshot and watery eyes, exuded a strong odor of alcohol, and tested positive on the alco-sensor test, was sufficient to support a finding of impairment.

Second, the trial court erroneously concluded that there was "no testimony to suggest that the Defendant was a less safe driver." However, a review of the transcript showed that the officer testified that based on his observations and experience, he was of the opinion that Burke was a less safe driver. Thus, the trial erred in finding no probable cause for arrest because it clearly accepted the facts as presented by the officer, but ignored the officer's testimony that Burke was under the influence of alcohol to the extent he was a less safe driver.

DUI; Implied Consent

Epps v. State, A09A0832

Appellant was convicted of DUI (less safe) and DUI (per se). The Court merged the less safe into the per se for sentencing. Appellant argued that the trial court erred in denying her motion to suppress the results of her blood test because there was insufficient evidence to prove she was notified of her implied consent warnings. The record showed that appellant hit a utility pole and injured her ankle. The arresting officer met her at the hospital, read her the implied consent rights and arrested her. Another witness testified that she heard the officer read the implied consent rights to appellant. However, the State only proved that the implied consent rights were read to her and not the contents of the warnings. Thus, the Court held, the case must be reversed. When the State seeks to prove a DUI violation by evidence of a chemical test, the State has the burden of demonstrating compliance with the implied consent notice requirements. Without doing so, the State cannot admit evidence of a defendant's chemical test results. Here, the actual card from which the officer read was not admitted into evidence and the State failed to produce any evidence of what was read to appellant. Therefore, insufficient evidence was adduced to prove that appellant was read her implied consent warnings and the motion to suppress should have been granted. The case was remanded for sentencing on the less safe count.

Guilty Pleas; Res Gestae

Bertholf v. State, A09A0087

Appellant was convicted of methamphetamine, improper tag, and no proof of insurance. Appellant initially entered a guilty plea to these charges, but withdrew that plea and was tried with his co-defendant. Prior to trial, appellant moved in limine to prevent any questioning about his prior plea. When appellant took the stand in his own defense, the court allowed his co-defendant to impeach him with the plea. Appellant's counsel did not object at that time and the court gave a limiting instruction to the jury. At the close of evidence, appellant moved for a mistrial based on the improper impeachment evidence. Appellant contended that the trial court erred and that his convictions should be reversed.

The Court agreed. The Court first held that appellant's motion for mistrial was untimely and he failed to raise a contemporaneous objection, but nevertheless preserved his right to argue this issue on appeal because he raised it in his pre-trial motion in limine. Under OCGA § 17-7-93 (b), a withdrawn plea of guilty "shall not be admissible as evidence

against him at his trial." The Court held that there are some prejudicial errors that can be corrected by instructions and rebukes on the part of the trial court. There are others, however, that such measures are not sufficient. The error here belongs to the latter class and only a mistrial could serve to correct it. The Court also held that the error was not harmless, noting that the instruction that the trial court gave was "not a model of clarity." The understandable portion of the instruction directed the jury to consider the plea evidence only for purposes of appellant's credibility as a witness, but his defense, in fact, turned almost entirely upon his credibility.

Appellant also asserted that the trial court erred in allowing the State to place his character in evidence. The evidence showed that after the officer pulled his vehicle over and asked for his license, appellant showed him his DOC ID card. When the officer asked again for his license, appellant stated that his license was suspended for a methamphetamine conviction. The Court held that because appellant volunteered the ID card and information, the evidence was part of the res gestae and was admissible despite its prejudicial nature.

Character; Jury Charges

Hobbs v. State, A09A1407

Appellant was convicted of rape, aggravated child molestation, aggravated sexual battery, child molestation, and cruelty to children based on sexual acts directed at his daughter. He argued that the trial court erred in its charge to the jury regarding appellant's evidence of good character. The record showed that appellant presented two good character witnesses and requested the pattern charge on good character. Although the trial court agreed to give appellant's requested charge on good character, the court instead instructed the jury as follows, without giving prior notice to counsel: "Now, members of the jury, by law, good character of the accused must be proved by evidence of the accused's reputation. When evidence of good character is admitted, you may consider it in determining whether or not you have a reasonable doubt about the guilt of the accused."

The Court held that the charge was erroneous for two reasons. First, it stated that the jury "may" consider evidence of good character, and thus failed to inform the jury that the good character of an accused person is a substantive fact, and evidence of such good character should be weighed and considered by the jury in connection with all the other evidence in the case. Second, the charge as given failed to instruct the jury that "good character in and of itself may be sufficient to create a reasonable doubt as to the guilt of the accused." The Court also held that under the facts of the case, the charge was not harmless error. Appellant's sole defense was that he could not have done these acts because he was a man of good character; he testified under oath that he did not commit these crimes; he introduced the favorable testimony of the victim's mother and sister; and he introduced relevant testimony of his good character.