Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 31, 2009

Legal Services Staff Attorneys

David Fowler
Deputy Executive Director

Chuck Olson
General Counsel

Lalaine Briones
Legal Services Director

Joe Burford
Trial Services Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Coordinator

Gary Bergman
Staff Attorney

Tony Lee Hing
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Brad Rigby
Staff Attorney

THIS WEEK:

Disorderly Conduct; Fighting Words

In the Interest of L. E. N., A09A0044

Appellant was convicted of disorderly conduct. The evidence showed that while in a crowed school lunchroom, appellant was observed with a Sharpie pen. A teacher confiscated the pen. Appellant asked if he could get the pen back at the end of the school day. The teacher replied that he would discuss it with the other teachers and let appellant know. At that point, appellant shouted "I better get my f —ing Sharpie back." The teacher then escorted appellant without further incident to the principal's office.

The Court reversed appellant's conviction. The Court held that the mere fact that appellant used a curse word to emphasize his statement can not sustain a finding that the evidence was sufficient to support the disorderly conduct charge under § 16-11-39 (a) (4) because State law no longer criminalizes the use of unprovoked language threatening an immediate breach of peace, which is obscene, vulgar, or profane, that is directed to a person older than 14 years of age, unless such language also constitutes "fighting words". Here, appellant was rude and disrespectful, and obviously angry that his marker had been confiscated by his teacher. However, the Court held, being rude, disrespectful, or angry in conjunction with the use of profanity or an angry statement is not sufficient to support appellant's conviction because nothing he said during the incident threatened an immediate breach of the peace or would have incited a listener to react violently to the language. Moreover, there was no evidence that after making the statement appellant was defiant, that he in any way resisted being escorted to the principal's office, or that he made any physically threatening gesture along with his statement. Therefore, after examining the words used under the circumstances and in the context in which they were said, the Court determined that the evidence did not support a finding of disorderly conduct.

Search & Seizure

State v. Carter, A09A1572

The State appealed from an order granting appellant's motion to suppress. The evidence showed that officers received information from a hotel employee that marijuana was located in

a particular hotel room. The officers went to the door and knocked. An individual named Lawrence answered and the officers came in. Carter entered from an adjoining room. The officers searched and found drugs. The trial court found that neither Lawrence nor Carter consented to the search of the rooms and that both were "mere invitees" visiting the hotel rooms of a third person, identified as "Dresser." The trial court concluded this base on the following facts: 1) the rooms were not registered in Carter's name; 2) Carter did not sleep in Dresser's rooms; 3) Carter had his own room on another floor; and 4) Carter lacked card-key access to Dresser's rooms. A witness also testified that the personal luggage in the rooms belonged to Dresser. The trial court therefore suppressed the marijuana and drug evidence, concluding that even if Carter or Lawrence had consented to the entry, the police lacked authority to search Dresser's rooms because neither Lawrence nor Carter, as mere invitees of Dresser, could give their consent to search the rooms.

The Court reversed, finding that whether Carter or Lawrence consented to the search of the rooms was irrelevant. Instead, the more fundamental question was whether Carter had legal standing to contest the seizure at all. The Court noted that like a householder, a registered guest of a hotel room has an expectation of privacy in that room. Whether this same protection applies to a guest of the renter, however, is determined based on the status of the guest. If the guest is only a casual visitor, as opposed to an overnight guest, the guest does not have the same expectation of privacy as the renter. The trial court concluded that, Carter was a social guest or "mere invitee" in the registered renter's rooms, that he lacked any authority to consent to a search of the rooms, and that the rooms "were not within his dominion or control." Thus, the trial court's legal conclusion was tantamount to a finding that Carter had no reasonable expectation of privacy in the rooms searched. Given that Carter had no reasonable expectation of privacy in the rooms searched, he was not "aggrieved" by the search within the meaning of OCGA § 17-5-30 (a) and the Fourth Amendment and thus, lacked standing to contest the legality of the search. Accordingly, the trial court erred in granting the motion to suppress.

Voir Dire

Garduno v. State, A09A0686

Appellant was convicted of aggravated child molestation and child molestation. He contended that the trial court erred in not striking a prospective juror for cause. The Court agreed and reversed his conviction. The record showed that the juror was employed as an elementary school teacher. Prior to her teaching career, she worked for 10 years with DFACS. In that capacity, she investigated child abuse cases and interviewed child molestation victims. The juror agreed, upon explicit questioning by the prosecutor, that child victims are not always truthful. She also indicated her belief that she could render an impartial verdict. But, the Court stated, "these types of talismanic questions and responses are not determinative." Thus, the juror candidly admitted that, based on her ten years of experience interviewing child abuse and molestation victims, she was biased towards the prosecution's key witness —the child victim. She questioned her ability to be fair and impartial. She then stated that appellant would need to present evidence controverting the child's testimony to sway her opinion. Moreover, after answering the prosecutor's inquiries, the juror again revealed a bias toward the child victim and stated that appellant could not overcome that bias unless he submitted contrary evidence. Under these circumstances, the prosecutor's questioning did not rehabilitate the juror, and the trial court manifestly abused its discretion in refusing to strike her for cause.

Venue; Jury Charges

Rogers v. State, A09A0539

Appellant was convicted for possession of methamphetamine with intent to distribute, two counts of selling methamphetamine, and four counts of using a communication device to commit or facilitate the commission of a designated felony under OCGA § 16-13-32.3. Appellant argued that the State failed to prove venue with regard to three of his convictions for violating OCGA § 16-13-32.3 and the Court agreed. OCGA § 16-13-32.3 (a) provides that "[i]t shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under this chapter." The State's case was premised on telephone conversations between a CI and appellant. Citing federal cases construing a similar federal statute (21 USC § 843 (b)), the Court held that venue may be established in either the county in which the calls were made or in which the calls were received. But here, the State submitted no proof that the informant or appellant were in the county during the calls and therefore failed to establish venue. In so holding, the Court rejected the State's argument that OCGA § 17-2-2 (e) should apply to prove venue. This Code section provides that "[i]f a crime is committed upon any . . . vehicle . . . traveling within this state and it cannot readily be determined in which county the crime was committed, the crime shall be considered as having been committed in any county in which the crime could have been committed through which the . . . vehicle . . . has traveled." The Court held that this Code section cannot be applied here because the record showed that members of the drug task force knew the location of the informant during her phone calls with appellant. Therefore, the State could have readily determined where the crime was committed.

Appellant also argued that the trial court erred in a re-charge to the jury. Again, the Court agreed. The record showed that the jury sent out two questions: "What constitutes the completion of the sale?" and also "[A]s defined by law, what is the sale of meth from beginning to end?" The trial court "danced" around the question and told the jurors that they were the factfinders. The Court found that these questions and the trial court's response demonstrated that both the trial court and the jury were confused about the law on a critical issue in the case with regard to Count 3: Did the State prove that appellant sold methamphetamine on the date alleged in the indictment (September 29, 2003)? Because there was evidence in the record from which the jury might have concluded that the State failed to prove a completed sale on the date alleged in the indictment, the trial court erred by failing to recharge the jury that the State was required to prove that the sale was completed on the material date alleged in the indictment.

Voir Dire; McCollum

Reid v. State, A09A0480

Appellant was convicted of trafficking cocaine and possession of a firearm during

commission of a felony. He argued that the trial court erred in upholding the State's challenge to the defense strike of a white female juror for cause. In *Georgia v. McCollum*, 505 U. S. 42, 112 SC 2348, 120 LE2d 33 (1992), the United States Supreme Court held that the equal protection clause prohibits a criminal defendant from engaging in purposeful discrimination on the basis of race in the exercise of peremptory challenges. To evaluate claims that a defendant used peremptory challenges in a racially discriminatory manner, the trial court must engage in a three-step process: 1) The opponent of a peremptory challenge must make a prima facie showing of racial discrimination; 2) the burden of production shifts to the proponent of the strike to give a race-neutral reason for the strike; and 3) the trial court then decides whether the opponent of the strike has proven discriminatory intent. As to the juror here, the primary reason for the strike given by the defense was that the juror believed that the person likely responsible for the rape and murder of her friend was not sufficiently punished. A black female juror accepted by the defense agreed that "people who are convicted of drug offenses should be incarcerated and not be given probation." The Court held that given that the defense was willing to accept this black juror, who expressed her desire for greater punishment of drug offenders, the very offense for which appellant was on trial, the trial court did not clearly err in finding that the State carried its burden of showing that the defense's proffered reason for striking the juror was a pretext for discrimination.

Thomas v. State, A09A1286

Appellant was convicted of trafficking in cocaine and using a communication facility in committing a felony. He argued that the trial court erred in upholding the State's *McCollum* challenge to the defense strike of a white female juror for cause. The Court, utilizing the three-step process mandated by *McCollum* first found that appellant did not challenge the trial court's ruling that the State made a prima facie showing of racial discrimination. Second, it was unnecessary to consider whether the trial court erred during the second step of the *McCollum* procedure because the trial court continued to the third step as though appellant had come forward with a race-neutral explanation for the strike. Here, in response to the State's allegation of purposeful discrimination, defense counsel stated, "My client . . . is a young black male charged with a drug trafficking offense. [Juror no. 23] is a homemaker. I do not believe . . . that she would be overly sympathetic for my client." The Court held that defense counsel's explanation for the strike explicitly incorporated the racial contrast between appellant and the juror. Counsel also implied that Caucasian female homemakers cannot render fair verdicts in drug cases against African-American males. Given counsel's use of racial stereotyping, the Court could not say that the trial court clearly erred in finding that counsel's other proffered reasons for striking the juror —her reticence, age and occupation —were a pretext for discriminating against Caucasian females.

Fatal Variance; Aggravated Sodomy

Adams v. State, A09A0885

Appellant was convicted of child molestation, aggravated child molestation, aggravated sodomy, and enticing a child for indecent purposes. Appellant contended that insufficient evidence supported his conviction for aggravated sodomy because the State failed to show that he penetrated the victim's anus. The indictment accused appellant of "having committed the offense of aggravated sodomy . . . on December 30, 2005 [by] unlawfully perform[ing] a sexual act, to wit: anal intercourse . . . involving the sex organ of the accused and the anus of [the named victim,] said act being done with force and against the will of [the victim]." The Court, sitting *en banc*, held that under OCGA § 16-6-2 (a), penetration is not an element of sodomy or aggravated sodomy, and, pretermitting whether anal penetration was sufficiently established by the evidence, the State was not required to prove penetration to support the aggravated sodomy charge filed against appellant. Moreover, even where an indictment for sodomy alleges penetration and the evidence establishes only contact, so long as the indictment correctly states whose body parts are involved in the sodomy, there will generally be no fatal variance. The Court further held that appellant's reliance on *Taylor v. State*, 292 Ga. App. 846, 850 (4) (2008), in support of his claim that evidence of actual penetration was required to uphold his conviction for aggravated sodomy, was misplaced. The Court held that the decision in *Taylor* erroneously relied on rape cases, in which penetration is a required element of the offense. Thus, "[t]o the extent that *Taylor* suggests evidence of actual penetration is required in such a case without consideration of whether the indictment satisfactorily informed the defendant of the charge against him and protected him from subsequent prosecutions for the same offense, it is hereby overruled."

Prosecutorial Misconduct

Prince v. State, A09A0465

Appellant was convicted of possession of methamphetamine with intent to distribute and trafficking in methamphetamine. She contended that the State violated the Georgia Supreme Court's ruling in *Cuzzort v. State*, 271 Ga. 464 (1999). In *Cuzzort* , the Court held that a district attorney was without authority to independently calendar and call cases out of the order listed on the criminal trial calendar. OCGA § 17-8-1 provides that "[t]he cases on the criminal docket shall be called in the order in which they stand on the docket unless the defendant is in jail or, otherwise, in the sound discretion of the court." The record showed that a "priority calendar" was created in order to dispose of the oldest cases, speedy trial cases, and cases in which defendants had not bonded out of jail. The Court held that a district attorney's actions generally must rise to the level of prosecutorial misconduct or result from a structural defect in the trial mechanism before an appellate court will reverse a defendant's conviction. Here, the record revealed that the decision to create a "priority calendar" originated with the trial judge who requested the assistance of the assistant district attorney to help determine which cases to calendar. The assistant district attorney did not independently calendar the cases nor call them for trial. Under these circumstances, therefore, no violation of *Cuzzort* was found.

Kidnapping; Garza

Brashier v. State, A09A1418

Appellant was convicted of one count of kidnapping with bodily injury and one count of theft by taking. He contended that under

Garza, the evidence was insufficient to support his conviction for kidnapping. The Court disagreed. The evidence showed that appellant lured the victim into his grandmother's basement where he allegedly raped her. He then moved her approximately 30 steps away and tied her against a pole with duct tape. After some time, he returned to the basement, and again allegedly raped her. Later that same day, appellant untied the victim from the pole, forced her onto the ground, and tied her feet together. Appellant then tied the victim's hands to her feet, picked her up, and carried her to the front of the basement into a corner. There, he put something under her head and covered her with a blanket. He covered her mouth, nose, and ears with duct tape. After leaving the victim in the basement, appellant took the victim's vehicle.

The Court held that *Garza* requires a balancing of a four factor test. Here, appellant's movement of the victim following the second alleged rape constituted asportation beyond a reasonable doubt. Although the duration of the movement was minimal, in that it consisted of the victim being carried from a pole in the middle of the basement to a corner at the front of the basement, not all elements under the *Garza* test must favor the prosecution for there to be asportation. Importantly, the movement did not take place during the commission of another crime as the alleged rape had already been completed, and as such was unrelated to appellant's subsequent stealing of the victim's car. Given that no other offense was taking place at the time of the movement, the movement could not have been an inherent part of a separate offense. Finally, the movement itself created an additional danger to the victim independent of any alleged sexual assault or theft. In fact, the movement served to conceal the victim and diminish her opportunity to be rescued. The corner to which the victim was moved would have made it more difficult to be heard by appellant's grandmother who was in the residence, which increased the chance that the victim could have died from suffocation as a result of the tape on her nose and mouth. Furthermore, appellant admitted that he did not want his grandmother to find the victim and his acts of covering the victim with the afghan blanket and taping up her mouth demonstrated his intent to conceal the victim and to decrease the opportunity for rescue.

DUI; Implied Consent

State v. Rowell, A09A1390

The State appealed from an order suppressing the results of Roswell's breath test. The evidence showed that Roswell was stopped after being observed driving in an unsafe manner. The officer smelled alcohol emanating from her and asked her to complete some field sobriety tests. Rowell's performance indicated to the officer that she was intoxicated, so he asked her to undergo an Alco-Sensor test. Rowell declined. The officer then placed her under arrest and read her the implied consent warnings. Rowell refused to submit to a state-administered chemical test. The officer then transported her to jail. Later, he again asked her whether she would submit to a breath test. Roswell asked what would happen if she was under the legal limit and the officer told her she could go home to her son.

The Court emphasized that it does not second guess the credibility determinations of the trial court. A law enforcement officer may attempt to persuade an accused to rescind her refusal to submit to chemical testing, as long as the procedure utilized by the officer in attempting to persuade a defendant to rescind her refusal is fair and reasonable. Here, the trial court concluded that the procedure utilized by the officer to persuade Rowell to rescind her refusal —telling her that she could go home to her son if she blew under the legal limit —was not fair or reasonable. As the ruling in this case depended on the credibility of the witnesses and the trial court correctly applied the law, the Court affirmed the grant of Rowell's motion to suppress.

Search & Seizure; Attenuation

Lawson v. State, A09A1482; A09A1483

Appellants, Damaris and Marcus Lawson, were convicted of various crimes, including one count of armed robbery, one count of robbery, four counts of aggravated assault, and one count of possession of a weapon during the commission of a crime. They contended that the trial court erred in denying their motion to suppress. The evidence showed that the victim taxi driver was called to pick up a fare on Pineland Dr. Unable to locate the address, he blew his horn. Appellants came out of a house and stated they called for a taxi. After driving to a gas station, appellants then asked for a return home, but made the victim detour to another location where they robbed him and then fled into the woods. The victim called 911. Officers arrived with a K-9 unit. The dog followed the scent through a wooded area to a location on Pineland Drive and alerted to an area between two addresses on Pineland Drive. The victim identified one of the two homes as that from which appellants had exited to get into his cab. The officers knocked on the door for approximately 30 minutes but no one answered. One officer then located an open window and yelled in "Police, anyone inside?" A male voice from inside the home replied, "What's going on?" The officer explained that the blinds on the window were down, but that after the man spoke, he used his expandable ASP baton to move the blinds back "so [that] the subject could see that it was, in fact, the police." The officer then told the man that an armed robbery had occurred in the area and that the subjects had run to that location and they were checking to make sure everyone inside was alright. Appellant, Marcus Lawson, then opened the front door. The officer asked him for identification. Marcus replied he didn't have any and then struck the officer on the side of the head. A struggle then ensued at the door as the officers attempted to arrest Marcus for simple battery. He was eventually handcuffed and taken away from the door. The victim's I.D. was found by the door. The officers then made a protective sweep of the house and found the other appellant. A search warrant was then successfully obtained and executed.

Appellants first contended that the motion should have been granted because the officer's use of the baton to look inside the house was illegal and tainted everything that came thereafter. The Court disagreed. Even if the act was illegal, if the prosecution can show that any connection between official illegality and the prosecution's evidence has "become so attenuated as to dissipate the taint," the evidence will be admissible. Factors to be considered include the time elapsed between the illegality and the acquisition of the evidence; the presence of intervening circumstances; and the purpose and flagrancy of the official misconduct. Here, little time elapsed between the officer's act of pushing aside the blinds and the acquisition of the inculpatory evidence. With regard to the third factor, the officer pushed aside the blinds for safety reasons and

only after Marcus voluntarily questioned what was going on. The officer also did not view any evidence in the home that was ultimately gathered pursuant to the search warrant. Finally, the Court held that the second factor was dispositive; Marcus's act of voluntarily opening the door of the home, attacking the officer, and then resisting arrest were intervening acts that completely purged the taint from the officer's initial unlawful act.

Appellant also contended that the trial court erred in concluding that Marcus's warrantless arrest justified a protective sweep of the home. The Court found otherwise. Police officers are authorized to make a protective sweep in conjunction with an in-home arrest when they possess articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. Here, the officers' observation of the victim's identification card in plain view, their knowledge that two men were involved in the armed robbery, and the fact that Marcus opened the door to the home identified by Pittman, gave the officers sufficient reason to suspect that the second person related to the armed robbery was concealed somewhere in the home and that he could pose a danger to those on the arrest scene. Therefore, the protective sweep was authorized.

Jury Selection; Batson

Allen v. State, A09A1541

Appellant was convicted of aggravated assault. He contended that one juror was improperly impaneled in that she was not summoned nor on the jury list, and that the court erred in denying his *Batson* motion that challenged the State's striking of six African-American jurors. The record showed that a jury summons was duly issued for Brenda Jean Davis (born 28 June 1974) at a certain address, which summons was sent to that address. The mother of Brenda Jean Davis, who bore the same name, received the summons and believed it was directed at her, as no birth date appeared on the summons and as her daughter had since married and moved away. The mother appeared at the courthouse and, after voir dire questioning, was accepted by the State and appellant as a juror and served on the jury. Not until after the trial did appellant claim that the wrong "Brenda Jean Davis" had been impaneled on the jury. Citing *Gormley v. Laramore*, 40 Ga. 253, 253-254 (1869), the Court held that jurors are disqualified for two classes of reasons: propter affectum, as when they are unfit to sit by reason of some affirmative fault, as interest, bias, infancy, etc.; and propter defectum, as when they are wanting in some qualification required by law, as residence, age, etc. Objections to the manner in which a jury is chosen, when such objections do not relate to the favor or bias of the juror but rather to his or her qualifications to serve on a jury (such as being on the jury commissioner's list or properly summoned), come too late when raised after the verdict is rendered, even if the defect was not discovered until after the verdict. Therefore, appellant's argument was untimely and was therefore waived.

The Court also found appellant's *Batson* argument meritless. As to the first juror, the State explained that the juror had previously served on a hung jury. As to the second and sixth jurors, the State explained that they both had spent time with appellant personally and knew some of his family. As to the third juror, the State noted that not only did this juror know appellant and appellant's sister, but he knew a prosecution witness and was also unemployed. Finally, as to the fourth juror, the State explained that the 21-year-old juror was young and also inattentive. As to the last juror, appellant argued that the State did not strike a 19-year-old white juror. Nevertheless, the Court held that the inattentiveness of the juror was reason enough to justify the strike.

Attempt

Heard v. State, A09A1568

Appellant was convicted of attempt to commit robbery, attempting to elude a police officer, and reckless driving. The facts, briefly stated, showed a law enforcement officer, wearing unmarked military tactical-type clothing and possibly a badge on his belt, went to a bank in an unmarked sheriff's vehicle. While parking his vehicle, the officer noticed two men, one of whom was appellant, standing in the grassy area near the bank. The two men were engaged in an intense conversation. They kept glancing at the officer and then looking away. They started walking toward the door of the bank just as the officer did. They arrived almost simultaneously, but then the two turned away and did not enter. This aroused the officer's suspicions even further. The officer immediately left the bank to observer the two. Appellant and his co-conspirator walked away from the bank and then back towards it. Eventually, they did not go in. Instead, they walked across the street and got into a car parked behind another building. The officer followed in his vehicle. The officer then attempted to stop the two. A high speed chase ensued. The two were caught. Inside the vehicle was a hand-written note which read, "This is a robbery so don't panic because if you do you would put," and then ends.

Appellant argued that the evidence was insufficient to support his conviction for criminal attempt because he abandoned his criminal purpose. When a person's conduct would otherwise constitute an attempt to commit a crime, it is an affirmative defense that he abandoned his effort to commit the crime or in any other manner prevented its commission under circumstances manifesting a voluntary and complete renunciation of his criminal purpose. However, a renunciation of criminal purpose is not voluntary and complete if it results from a belief that circumstances exist which increase the probability of detection or apprehension of the person or which render more difficult the accomplishment of the criminal purpose. The Court found that appellant had not abandoned his criminal purpose because the evidence showed that he repeatedly walked around the bank, made at least one move to enter the bank, and only abandoned his decision to enter the bank after repeatedly making eye contact with the officer. Although appellant argued that he did not know the officer was law enforcement, the Court stated "the fact remains that [appellant] was acutely aware of the individual's presence, and a reasonable jury could conclude that [appellant] believed the individual's presence increased the probability of his apprehension."

Appellant also argued that his actions constituted mere preparation to commit a crime. The court disagreed. Appellant wore a hat pulled abnormally low over his head, he scouted the bank, he moved to enter the bank but diverted his steps at the last minute, and a note indicating a bank robbery was going to occur was found in the car he drove. The fact that further steps needed to be taken before the crime could be completed did not preclude a finding that appellant took a substantial step toward committing a robbery.

Criminal Contempt; Mootness

In re: Hughes, A09A0218

Appellant, an attorney, was summarily cited for criminal contempt by a juvenile court judge during a hearing concerning child custody. The trial court first cited her $100.00 and removed her from the "approved attorney" list for her "sarcastic looks" and "sarcastic attitude." When the attorney sought to explain, the trial court raised the amount of the fine to $1000.00 or ten days in custody. She contended that the trial court denied her due process.

The Court held that this case is controlled by *In re Jefferson*, 283 Ga. 216 (2008). In *Jefferson*, the Supreme Court held that an attorney may be held in contempt for statements made during courtroom proceedings only after the court has found (1) that the attorney's statements and attendant conduct either actually interfered with or posed an imminent threat of interfering with the administration of justice and (2) that the attorney knew or should have known that the statements and attendant conduct exceeded the outermost bounds of permissible advocacy. Because contempt is a crime, the evidence must support these findings beyond a reasonable doubt. Here, the Court held, appellant was not afforded the opportunity to be heard and therefore her citation for contempt must be reversed. Furthermore, the evidence did not show that appellant's conduct either actually interfered with or posed an imminent threat of interfering with the administration of justice. Therefore, the Court also directed the juvenile court to vacate and dismiss its contempt citation.

The State sought to have the appeal dismissed as moot because appellant had already paid the fine. The Court denied the State's motion finding that the issue was not moot because of the collateral consequences that could befall the attorney as a result of this contempt charge on her record.

Search & Seizure; Gant

Simmons v. State, A09A0279

Appellant was convicted of trafficking in cocaine. He argued that the trial court erred in denying his motion to suppress. The evidence showed that appellant was a back-seat passenger in a Buick. The vehicle stopped at a fast food restaurant. A law enforcement officer recognized the car from the previous day, when he discovered that it was neither covered by insurance nor registered. As the driver was walking toward the restaurant, the officer arrested him. The officer then asked appellant and the front seat passenger to step out of the Buick so that it could be searched. Marijuana was found in the center console. Appellant was arrested and transported separately to jail. After the transporting officer brought appellant into the jail, he went back and searched the back seat of his vehicle and found a bag of cocaine.

The Court held that although appellant argued that the search of the Buick was illegal, he has no standing to challenge the search directly because he asserted no possessory interest in the vehicle or in any items found in it. Nevertheless, by arguing that he was illegally detained during the search of the Buick, appellant may indirectly challenge that search. Because the case was briefed prior to the U. S. Supreme Court's decision in *Arizona v. Gant*, __U. S.__ ,129 SC 1710, 173 LE2d 485 (2009), the case must be remanded to the trial court for reconsideration in light of that decision. In *Gant*, the Court held that police are authorized "to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."

Garza; Recusal

Hargrove v. State, A09A0474

Appellant was convicted of kidnapping with bodily injury, family violence aggravated battery and two counts of family violence aggravated assault. He contended under *Garza* that there was insufficient evidence of asportation to support his kidnapping conviction. The Court agreed. The evidence showed that appellant became enraged after finding a business card with a man's name on it in his girlfriend victim's car. He started beating her in the living room of the house. He then cut her with a sword, and then continued to beat her with a hammer. He became upset at her for getting blood all over the furniture and rug. He dragged her to the bathroom, still hitting her with the hammer. He intended to cut her head off, but had to use the facilities and call work to let them know he was running late. While preoccupied with these two endeavors, the victim was able to escape.

The Court reversed appellant's kidnapping conviction. The Court held that the movement of the victim from one room to another was of minimal duration, and it occurred during the assault and battery inflicted by appellant and in furtherance of those offenses. The movement itself did not present a significant danger to the victim independent of the danger she already faced as a victim of appellant's violent crimes. Appellant had not completed his attack before he moved the victim to the bathroom and the movement of the victim was a criminologically insignificant circumstance attendant to the family violence aggravated assault with a hammer. He continued beating her with the hammer until he paused to use his cellular phone and the bathroom simultaneously. Thus, under the factors set forth in *Garza*, the Court held that the asportation element was not established, and the kidnapping conviction was reversed.

Appellant also argued that the trial judge erred in failing to sua sponte recuse himself when the victim referred to the judge by name in connection with a temporary protective order (TPO) she obtained against the appellant. The record showed that this came up during appellant's cross-examination of the victim. The trial court excused the jury and expressed his concern that if the protective order was admitted, the jury would know that he had made findings of fact related to that order. The petition for the TPO was admitted but not the order and the trial court instructed the victim not to refer to the TPO or to the fact that he had made any type of ruling in the case.

The Court held that there is no duty for a trial judge to sua sponte recuse himself absent a violation of a specific standard of OCGA § 15-1-8 or Canon 3 (E) (1) (a) through (c) of the Code of Judicial Conduct, which is not waived by a party after disclosure. Here, the trial judge did not violate OCGA § 15-1-8 (a) (3), as claimed by appellant, because the TPO he issued was not the subject of review at appellant's trial. The fact that the trial court granted a TPO against him was not alone sufficient to require a sua sponte recusal. Moreover, to the extent that appellant alleged a violation of the Code of Judicial Conduct, Canon 3 (E) (1) states that judges shall disqualify themselves in any proceeding where their impartiality might reasonably be questioned. Here, appellant failed to point to any conduct or remark by the trial court that would meet this standard as defined by the Court.