

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 21, 2009

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THIS WEEK:

- Severance; Subject Matter Jurisdiction
- Fatal Variance; Jury Charges
- Juveniles; Transfer of Jurisdiction
- Jury Charges; No Duty to Retreat
- Double Jeopardy; Manifest Necessity
- Motions for New Trial
- Search & Seizure
- Search & Seizure; Medical Records
- Evidence; Impeachment

Severance; Subject Matter Jurisdiction

Hunsberger v. State, A09A1411

Appellant was convicted of kidnapping with bodily injury. He contended that the trial court erred in denying his motion to sever his case from that of his co-defendant brother. A motion to sever is addressed to the discretion of the trial court. Factors to be considered by the court are as follows: (1) Will the number of defendants create confusion as to evidence and law relative to the separate defendants?; (2) Is there a danger that evidence admissible against only one defendant (or, where there are more than two defendants, only against certain ones of them) will nevertheless be considered against another?; and (3) Are the defendants' respective defenses antagonistic to the defenses, or the rights, of another? Appellant argued that the trial court erred in failing to sever the trial when his brother decided to testify in his own defense, because "at that point, the defenses of the co-defendants became

antagonistic and [there was] a very clear danger that evidence admissible against only one defendant would become admissible against the other defendant." The record showed that before the brother testified, the trial court admitted the brother's confessions to police into evidence, after they were redacted to omit references to appellant and following an instruction to the jury that the confessions could not be considered against appellant. After the brother testified, the confessions implicating both appellant and his brother were admitted into evidence in their entirety. The Court held that a co-defendant's confession is not admissible against another defendant at a joint trial but only where the co-defendant does not testify and is not available for cross-examination. Since the brother testified, his confessions were admissible against both defendants. Accordingly, appellant failed to show that there was a danger that evidence admissible against his brother would be improperly considered against him. Further, his brother's defense did not become antagonistic to appellant because his brother simply denied making the alleged statements to the police or having participated in anything connected with the victim's death.

Appellant also argued that because the victim was killed in South Carolina that Georgia lacked subject matter jurisdiction to convict him for the offense of kidnapping with bodily injury. The Court held that under OCGA § 17-2-1 (b) (1), "a person shall be subject to prosecution in this state for a crime which he commits, while either within or outside the state, . . . if . . . [t]he crime is committed either wholly or partly within the state." Since the victim was abducted in Georgia, the kidnapping occurred within the state. When the victim was later injured in South Carolina,

it was nevertheless a bodily injury for purposes of the Georgia kidnapping. Therefore, appellant was subject to prosecution and conviction in Georgia for the offense of kidnapping with bodily injury, notwithstanding that the victim was killed in South Carolina.

Fatal Variance; Jury Charges

Jarrett v. State, A09A0880

Appellant was convicted of two counts of possession of a motor vehicle with a vehicle identification number removed. He contended that a fatal variance existed between the indictment and the proof at trial. The Court held that it no longer adheres to an overly technical application of the fatal variance rule, focusing instead on materiality. The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the accused. The test is whether (1) the allegations definitely inform the accused as to the charges against him so as to enable him to present his defense and not to be taken by surprise, and (2) the allegations are adequate to protect the accused against another prosecution for the same offense. Only if the allegations fail to meet these tests will there be the fatal variance. OCGA § 16-8-83 (c) (1) provides that “[a]ny person who . . . possesses a motor vehicle . . . with knowledge that the vehicle identification number of the motor vehicle . . . has been altered, counterfeited, defaced, destroyed, disguised, falsified, forged, obliterated, or removed shall be guilty of a felony.” The indictment charged appellant with possession of a motor vehicle with a vehicle identification number removed “in that the said accused . . . did unlawfully and knowingly possess a motor vehicle, to wit: a 1986 Chevrolet El Camino, from which the vehicle identification number had been removed, altered and defaced.” Appellant contended the State failed to prove an alteration of the VIN numbers by any method set forth in OCGA § 16-8-83 (c) (1), let alone by removal. The Court held, however, that the evidence was more than sufficient for the jury to infer that the original VIN numbers on the stolen vehicles registered to appellant were removed and replaced with false VIN numbers. Thus, there was no fatal variance.

Appellant also contended that there was a fatal variance between the trial court’s charge on possession of a motor vehicle with

a vehicle identification number removed and the language of the indictment. Appellant contended that the jury instruction was erroneous because it used the conjunction “or” instead of “and” as charged in the indictment. The Court held that when a person is charged in an indictment with a crime in two ways by using the conjunctive “and” but the statute contains “or,” if it is proven that the defendant violated the statute in either way he may be convicted. There was therefore no fatal variance between the trial court’s charge and the indictment.

Juveniles; Transfer of Jurisdiction

In the Interest of D. M., A09A0941

Appellant, a 16-year-old, was charged in the juvenile court with multiple drug-related crimes in addition to several serious traffic offenses. He appealed from an order transferring his charges to superior court. Before transferring jurisdiction from juvenile to superior court, the juvenile court must find that there are reasonable grounds to believe that the child committed the delinquent act alleged; the child is not committable to an institution for the mentally retarded or mentally ill; the interests of the child and the community require that the child be placed under legal restraint and the transfer be made; and the child was at least 15 years of age at the time of the alleged delinquent conduct. Appellant argued that the juvenile court’s ruling was erroneous because his commendable performance in school demonstrated that he is amenable to treatment through the juvenile system. The Court held that while evidence of his good grades was commendable, evidence that appellant is intelligent and performs well in school does not demand a finding or necessarily demonstrate that he is amenable to the treatment solutions offered in the juvenile court. Appellant also argued that “any interests of the community in having [him] face prosecution as an adult in superior court for the alleged acts, when he has demonstrated that he is amenable to treatment, will never outweigh the interests of the child.” The Court held that the trial court specifically found that he was not amenable to treatment and in any event, appellant’s “assertion is simply inconsistent with existing Georgia law.” Thus, the Court held, even if there was evidence that the child may be amenable to treatment, the juvenile

court may still transfer the case if it determines that the amenability factor is outweighed by the interest of the community in treating the child as an adult.

Jury Charges; No Duty to Retreat

Buggle v. State, A09A1416

Appellant was convicted of aggravated assault. He argued that the trial court erred by not sua sponte giving a jury charge on no duty to retreat. The rule in Georgia is that if the person claiming self-defense was not the original aggressor, there is no duty to retreat. Where self-defense is the sole defense, and the issue of retreat is raised by the evidence or placed in issue, the defense is entitled to a charge on the principles of retreat. In order for a charge on no duty to retreat to be required, the issue of retreat must be raised by the evidence or placed in issue. A trial court’s failure to charge the jury on retreat may be reversible error when the prosecution has raised the issue when questioning witnesses or in closing arguments. Here, however, the Court found no error because the only evidence that appellant acted in self-defense was his own testimony; which was belied by his acknowledgment that the videotape of the entire incident showed that he was the one who approached the victim and it was the victim who was retreating. Moreover, because the jury saw the videotape of the entire altercation, it did not have to speculate on how the aggravated assault occurred. Since the evidence of appellant’s guilt was overwhelming, there was no error as a matter of law.

Double Jeopardy; Manifest Necessity

Freeman v. State, A09A1864

Appellant was charged with DUI (less safe). He appealed from the denial of his plea in bar following a grant of the State’s motion for mistrial on the grounds of manifest necessity. The record showed that prior to jury selection the trial court ruled it would exclude the State’s testimony regarding a correlation between HGN test results and blood-alcohol content. After the jury was impaneled, the State moved for a continuance for a couple of days to research the issue. The trial court granted the continuance. When the trial re-

convened, the State moved to suspend the trial so that an evidentiary hearing could be held on the issue. After determining that it had surprised the State with its sua sponte exclusion of the HGN-result-blood-alcohol-correlation evidence, the trial court declared a mistrial on the ground of manifest necessity.

The Court held that once a jury is impaneled and sworn, jeopardy attaches and an accused is entitled to have the trial proceed to an acquittal or conviction by that jury. The trial court may interrupt the proceedings and declare a mistrial over the defendant's objections only if there is a demonstration of manifest necessity for the mistrial, and manifest necessity requires urgent circumstances. Here, the Court found no manifest necessity. First, the evidence showed that the trial court did not consider any less drastic alternatives to declaring a mistrial for what, essentially, was the State's objection to one of the court's evidentiary rulings. In fact, the Court noted, the trial court did not discuss any other possible alternatives to mistrial. For example, the trial court could have immediately held a hearing on the issue, just as many motions to suppress and motions in limine hearings are held at the beginning of a trial. Second, the facts in this matter did not suggest that urgent circumstances existed that required a mistrial. The State contended that a mistrial was necessary so that it could argue for the admissibility of its evidence of the correlation between the HGN test results and blood-alcohol content. However, a prosecutor cannot seek a mistrial in order to buttress weaknesses in the State's evidence. Moreover, the State's contention that urgent circumstances existed here had little merit in light of the fact that evidence of a defendant's blood-alcohol content is not required in order for the State to prove that a defendant is guilty of DUI less-safe beyond a reasonable doubt. Thus, because the record was devoid of evidence establishing urgent circumstances, the trial court abused its discretion in declaring a mistrial without first considering alternatives that would have preserved appellant's "valuable right" to be tried by the originally impaneled jury.

Motions for New Trial

Hartley v. State, A09A0956

Appellant was convicted of aggravated assault against two separate victims. He con-

tended that the trial court erred by failing to exercise its discretion and decide on the merits whether he was entitled to a new trial pursuant to OCGA §§ 5-5-20 and 5-5-21. The Court agreed. OCGA § 5-5-20 empowers the trial court to grant a new trial "[i]n any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity." Similarly, OCGA § 5-5-21 authorizes the trial court to grant a new trial "where the verdict may be decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding." OCGA §§ 5-5-20 and 5-5-21 afford the trial court broad discretion to sit as a "thirteenth juror" and weigh the evidence on a motion for new trial alleging these general grounds. Where a defendant raises a claim under OCGA §§ 5-5-20 and 5-5-21 in his motion for new trial, the law imposes upon the trial court an affirmative duty to exercise its discretion and weigh the evidence to determine whether a new trial is warranted. If the record reflects that the trial court failed to exercise its discretion and sit as the thirteenth juror, the case must be vacated and remanded for the trial court to fulfill its affirmative statutory duty.

Here, appellant expressly raised the issue of whether the verdict was contrary to evidence and the principles of justice and equity, and decidedly and strongly against the weight of the evidence, in his motion for new trial. Nevertheless, in its order denying the motion for new trial, the trial court declined to exercise its discretion and rule on the merits of appellant's claims under OCGA §§ 5-5-20 and 5-5-21 because appellant did not present any evidence or argument concerning those claims at the hearing on his motion for new trial. The trial court erred because appellant did not waive or abandon his claims under OCGA §§ 5-5-20 and 5-5-21. Instead, his claims were predicated upon the already existing trial record, even though he did not separately raise those claims in an evidentiary hearing where the focus was upon his ineffective assistance claim. Because the trial court failed to exercise its discretion and rule on the merits of appellant's claims under OCGA §§ 5-5-20 and 5-5-21, the Court vacated the trial court's order denying the motion for new trial on that ground and remanded the case for the trial court's proper consideration of his claims.

Search & Seizure

Allison v. State, A09A0974

Appellant was convicted of felony theft by receiving (three counts), misdemeanor theft by receiving (one count), and possession of a gun by a convicted felon. He argued that his motion to suppress should have been granted because the warrant was not particular enough in that it did not give the officers explicit authority to seize "anything" particularly. The evidence showed that the warrant authorized the officers to search for methamphetamine and an engine joist. Thus, appellant contended, the seizure of a shotgun, welder, and street sign were outside the scope of the warrant. The Court held that although the only stolen item listed in the warrant was the engine joist, police officers are not compelled to overlook relevant evidence simply because it is not listed in the search warrant, and the fact that they seized items that were not listed did not convert the warrant into a general warrant. An officer executing the warrant testified that the welder was in plain view in the outside storage building. The officer had information prior to the execution of the warrant that a welder had been stolen and testified that the officers actually confirmed that it was the stolen welder before seizing it because it was a large piece of equipment. The gun was also in plain view. Although it was covered with fabric, the officer could tell it was a weapon and knew that appellant was a convicted felon. Likewise, so was the street sign in plain view. Since officers are not required to ignore that which is in plain view and readily observable, there was not error in denying appellant's motion to suppress.

Search & Seizure; Medical Records

Brogdon v. State, A09A1269

Appellant was convicted of DUI (less safe), DUI (per se) and other related traffic charges which arose after he ran his truck into another at vehicle at a stop light. He contended that the trial court erred in denying his motion to suppress. He specifically challenged the validity of the search warrant issued for his medical records from the hospital which treated him following the traffic accident. The Court rejected his first argument that the medical records were "private papers" under OCGA § 17-5-21 (a) (5), finding that the issue was

foreclosed by the decision in *King v. State*, 276 Ga. 126 (2003). Appellant also argued that the affidavit contained false and misleading information because it incorrectly referred to beer cans inside of the vehicle, when there was only one opened and empty beer can inside his truck, and incorrectly described the number of cars involved in the accident. The Court held that these misstatements were not so material that they would have affected the finding of probable cause. Finally, appellant argued that the search warrant impermissibly authorized a general search of his medical records. Here, the search warrant sought all medical records of appellant, “who appeared at Gwinnett Medical Center on or about December 16, 2007 [at] 8:34 p.m.” The Court held that the search warrant was narrowly drafted to seek only the medical records from the hospital where appellant was treated on the day of the accident and thus was not a general warrant.

Evidence; Impeachment

Clements v. State, A09A1774

Appellant was convicted of felony shoplifting. She argued that the trial court erred in precluding her from impeaching her accomplice, a State witness, with a prior misdemeanor conviction for theft by conversion. OCGA § 24-9-84.1 (a) (3) provides as follows: “Evidence that any witness or the defendant has been convicted of a crime shall be admitted if it involved dishonesty or making a false statement, regardless of the punishment that could be imposed for such offense.” The Court, citing *Adams v. State*, 284 Ga. App. 534, 537-541 (3) (2007) (physical precedent only), held that crimes of “dishonesty” are limited to those crimes that bear upon a witness’s propensity to testify truthfully. Such crimes include perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused’s or witness’s propensity to testify truthfully. A prior conviction for misdemeanor theft is not a crime involving dishonesty within the meaning of OCGA § 24-9-84.1 (a) (3) where the party seeking to use a theft conviction has not shown that the conviction involved fraud or deceit. Here, appellant made no effort to show that the misdemeanor theft by

conversion conviction, which she intended to use to impeach the accomplice who testified, involved fraud or deceit. Accordingly, the trial court did not err in excluding the conviction for use for impeachment purposes.