Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 21, 2015

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THIS WEEK:

Guilty Pleas; Sentencing

State v. Ozment, A15A0495 (7/13/15)

The State appealed from the trial court's order dismissing three counts of an accusation after the court had accepted the defendant's guilty plea to another count in the accusation. The record showed that Ozment was charged in a four count accusation with DUI (per se), DUI (less safe), possessing an open container of alcohol while operating a motor vehicle, and failing to maintain a lane while operating a motor vehicle. Ozment rejected the State's plea offer and proceeded to enter a non-negotiated guilty plea to only the second count of the accusation charging him with DUI less safe. At the plea hearing, Ozment requested that the trial court dismiss the other counts of the accusation. The State objected, noting that the dismissal of any counts should be part of a negotiated plea agreement. The trial judge overruled the objection, accepted Ozment's plea and dismissed the remaining counts, stating, "I've just negotiated it. Thank you for your objection. I will go ahead and I will accept the plea. I will go ahead and dismiss Count One, Count Three and Count Four." The trial court sentenced Ozment to 12 months of probation and entered a final disposition dismissing the other three counts of the accusation.

The Court stated that a trial court's power to control the proceedings before it includes the authority to dismiss criminal charges on its own in limited circumstances, such as when there is a defect on the face of an indictment or for want of prosecution. However, a trial judge's power to control the proceeding of the court is subject to the proviso that in so doing a judge does not take away or abridge any right of a party under the law. A trial court abridges such a right of a party and abuses its discretion when it interferes with the State's right to prosecute by dismissing an accusation without a legal basis to do so. Here, the Court found, the trial court offered no legal basis for dismissing the counts of the accusation over the State's objection. Rather, the only reason articulated by the trial court was that it had "just negotiated it" as part of Ozment's guilty plea. This rationale not only provided no legal basis for the dismissals, but violated the legal prohibition against judicial participation in the plea negotiation process. Thus, by dismissing the three counts of the accusation over the State's objection, the trial court deprived the State of its right to present its case against Ozment, and thus, abused its discretion Accordingly, the trial court's dismissal of the three counts was in error and the case was remanded back to the trial court for consideration under those still pending counts of the accusation.

The State also argued that the trial court erred in failing to sentence Ozment to at least 72 hours of incarceration for his guilty plea to the DUI less safe count of the accusation because it was his second DUI offense within five years and the minimum term of incarceration is mandated by O.C.G.A. § 40-6-391(c)(2)(B) for such a second offense.

However, the Court found, the State did not raise this matter in the trial court, did not request that the court impose such a sentence, and presented no evidence at sentencing that this was Ozment's second DUI offense within five years.

Nevertheless, the State argued, two parts of the record supported its assertion that this was Ozment's second DUI offense within five years. First, at the sentencing hearing, Ozment's attorney responded to a probation officer that this was Ozment's "second" offense. However, the Court noted, no further details about the first offense were offered, there was no explanation as to the type or date of the prior offense, and no documentation of the prior offense was entered into evidence. Thus, this statement by counsel, while indicating some prior offense, failed to prove that the prior offense was a DUI mandating incarceration under O.C.G.A. § 40-6-391(c)(2)(B).

The State also cited to a page of the record that appeared to be a copy of Ozment's driver's license history indicating a prior DUI offense. But, the Court found, this document was not entered into evidence at the sentencing hearing, presumably because the State made no attempt to show that Ozment had a prior DUI offense for sentencing purposes, and certainly no foundation was laid authenticating the admissibility of the document. Without more, this page of the record did not rise to the level of competent evidence that undermined the presumption that the sentence imposed by the trial court was correct. It is well-established that there is a presumption that a sentence was correctly imposed, and the burden of showing that a sentence was not correctly imposed is with the party who asserts its impropriety. Under the circumstances, therefore, the Court concluded that the State had not met its burden and failed to overcome the presumption that the trial court properly imposed punishment upon the defendant.

Sexual Offense Sentencing: Deviation from Mandatory Minimums

Avila v. State, A15A0369 (7/13/15)

As part of a plea deal, appellant pled guilty to one count of child molestation of a girl who was 14 or 15 years old at the time of the offense. The trial court, after finding that it was not permitted to deviate from the mandatory minimum sentencing provisions pursuant to O.C.G.A. § 17-10-6.2(c), sentenced him to ten years, to serve five in prison and the balance on probation. Appellant argued that the trial court erred in finding that it was not authorized to deviate from the mandatory minimum sentence because the offense "involve[d] the transportation of the victim." The Court disagreed.

Pursuant to O.C.G.A. § 16-6-4(b)(1), "a person convicted of a first offense of child molestation shall be punished by imprisonment for not less than five nor more than 20 years and shall be subject to the sentencing and punishment provisions of [O.C.G.A. §§] 17-10-6.2 and 17-10-7." And O.C.G.A. § 17-10-6.2(b) provides that, "[e]xcept as provided in subsection (c) … any person convicted of a sexual offense shall be sentenced to a split sentence which shall include the minimum term of imprisonment specified in the Code section applicable to the offense. No portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court and such sentence shall include, in addition to the mandatory imprisonment, an additional probated sentence of at least one year." Subsection (c) of that statute grants the trial court discretion to deviate from the mandatory minimum sentence, provided that six conditions are met, including that "[t]he offense did not involve the transportation of the victim."

Here, the Court noted, it was undisputed that appellant picked up the victim in his automobile from the front of her subdivision, transported her to a church parking lot, engaged in sex acts with the victim, and then transported her back to the subdivision. Thus, appellant clearly transported the victim to a location for purposes of committing the crime for which he was convicted. The Court stated that "it seems silly to argue, as [appellant] has essentially posited, that the General Assembly intended to punish more severely any of the 10 offenses included herein only if it was committed while a victim was in transit." Instead, the Court found, the aggravating factor which limits the trial court's discretion to deviate from the mandatory minimum sentence is the transportation itself, as it removes the victim from an area wherein the crime may have more easily been detected or where the victim could have more easily escaped.

Indictments; General Demurrers

State v. Wright, A15A0653 (7/13/15)

The State indicted Wright, alleging that he "unlawfully possess[ed] and [had] under [his] control 3, 4-methylenedioxy-N-ethylcathinone (ethylone), a substituted 2-aminopropan-1-one, a Schedule 1 controlled substance, in violation of O.C.G.A. § 16-13-30(a)[.]" The Court granted Wright's general demurrer and the State appealed.

The Court stated that the description of the substance was not sufficient to show that it is a controlled substance within the meaning of the statute. The substance "3, 4-methylenedioxy-N-ethylcathinone (ethylone)" does not appear by name within the statutory list of Schedule 1 controlled substances.

Nevertheless, the State argued, the phrase "a substituted 2-aminopropan-1-one" indicates that the substance falls under O.C.G.A. § 16-13-25(12)(L), which in pertinent part identifies as a Schedule 1 controlled substance "[a]ny compound … structurally derived from 2-aminopropan-1-one by substitution at the 1-position with either phenyl, naphthyl, or thiophene ring systems[.]" But, the Court found, the indictment's language did not clearly refer to a substance under O.C.G.A. § 16-13-25(12)(L). Its use of the term "substituted" was ambiguous and could be construed to include compounds that do not match the precise definition of the statute and, thus, are not controlled substances. So construed, the indictment would not charge a crime. Accordingly, because the indictment could be construed such that Wright would not be guilty of the crime of possession of a controlled substance if the facts as alleged in the indictment were taken as true, the Court upheld the trial court's grant of the general demurrer.