

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 28, 2009

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THIS WEEK:

- **Juveniles**
- **Statute of Limitations**
- **Probation Revocation**
- **DUI; Implied Consent**
- **Right of Confrontation; Voir Dire**

Juveniles

In the Interest of K. F., A09A1111

Appellant appealed from the denial of his motion for early release from a youth development center, arguing that the juvenile court judge should have recused himself after ruling on the motion without a hearing. The Court held, however, that since the juvenile court lacked jurisdiction to modify its commitment order on the grounds raised in appellant's motion for early release, it was unnecessary to reach the issue of whether the juvenile court judge should have recused himself from the case. OCGA § 15-11-40 (b) provides that: "[a]n order of the court may also be changed, modified, or vacated on the ground that changed circumstances so require in the best interest of the child, except an order committing a delinquent child to the Department of Juvenile Justice, after the child has been transferred to the physical custody of the Department of Juvenile Justice." Here, it was undisputed that appellant was in the physical custody of the Department when he filed his motion for early release. In his motion, he argued that he had made major overall progress, presented no problems to staff or his peers, was passing the majority of his academic classes, and had received a satisfactory rating for his

behavior in his classes. The Court found that these arguments were in essence, "changed circumstances" requiring release to a less restrictive custody "in the best interest of the child." Under these circumstances, OCGA § 15-11-40 (b) prohibited the juvenile court from modifying the commitment order given that appellant was already in the custody of the Department and his motion was premised on the ground "that changed circumstances so require in the best interest of the child."

Statute of Limitations

Desalvo v. State, A09A0935

Appellant appealed from the denial of his plea in bar, asserting that his indictment was barred by the applicable four-year statute of limitations under OCGA § 17-3-1 (c). The record showed that on June 9, 2008, the State indicted appellant on one count of aggravated assault and one count of criminal damage to property in the second degree arising out of an incident that was alleged to have occurred on May 31, 2004. The State pled in the indictment that appellant's identity was unknown until August 24, 2006. Appellant asserted in his plea in bar, however, that his identity was known to the alleged victim at the time of the incident and that the indictment was thus untimely under OCGA § 17-3-1 (c). At the hearing, the State called no witnesses and presented no evidence, relying instead on an offer of proof to support the State's argument that his identity was unknown until later DNA testing placed him at the crime scene.

The Court held that the trial court erred in denying appellant's plea in bar because the State failed to carry its burden of presenting evidence establishing an exception to the statute of limitations. In so holding, the Court

rejected the State's argument that because the trial court's ruling was not based upon any evidence, the Court of Appeals had nothing to review, and it should remand the case for a new hearing on the matter. Instead, the Court held, "[t]he State chose not to present any evidence to support its claim that an exception to the statute of limitations applied in this case, and it is not entitled to another bite at the apple."

Probation Revocation

Legere v. State, A09A0939

Appellant alleged that the trial court abused its discretion in revoking his probation. The Court agreed and reversed. The evidence showed that on May 9, 2008, appellant entered a negotiated guilty plea in which it was agreed that he would plead guilty in exchange for a three-year probated sentence, which he would serve on work release. During this work release, appellant would be allowed to leave the jail during the day to seek employment and would be required to report to the jail in the evenings. A month later, appellant made arrangements online to meet a woman for drinks at lunch. Unfortunately for him, the woman was a sheriff's office employee. He was taken back into custody when they met as arranged. The trial court thereafter revoked his probation.

Probation revocation is governed by OCGA § 42-8-34. This statute authorizes the revocation of a probated sentence upon proof by a preponderance of the evidence of a violation of a "special condition of probation." Here, the State failed to prove at the probation revocation hearing that appellant was notified of any rule specifying the parameters of the work-release program. Thus, the Court held, despite appellant's "dubious behavior," the trial court abused its discretion in revoking his probation where the State failed to offer any evidence that he was informed of the rules of the work-release program to which he was required to adhere. Moreover, while appellant's conduct may have been unlawful under OCGA § 42-1-9 (e), the petition for revocation did not allege a violation of this statute as a basis for revocation.

DUI; Implied Consent

Waterman v. State, A09A0825

Appellant was convicted of DUI (less safe), DUI (per se), and speeding. He contended that

the trial court erred in failing to suppress the results of his breath test because he did not get an independent test of his own choosing. The evidence showed that after appellant was stopped for speeding, the officer noticed signs of intoxication. The officer then asked the appellant to blow into an Alco-sensor which registered positive. After he was arrested, but before the officer read him his implied consent rights, appellant asked, "Is there any way I can blow again?" Appellant then asked three more times if there was any way he could blow again, each request coming before he was read his implied consent rights. After the officer read the rights, appellant agreed to the test and then a few minutes later, asked if he would get the opportunity to "blow again." At the station, appellant took a breath test but did not ask for a second test of his own choosing.

The Court held that the motion was properly denied. During cross-examination, appellant admitted that he did not know the difference between an independent and State-administered test and did not care who administered the test. Appellant's repeated questions of whether he would have the opportunity to blow again was best construed as an attempt to confirm that he was going to have an opportunity to take another breath test, administered by the State, in hopes that his blood alcohol content would fall sufficiently prior to the test such that he would somehow be able to evade driving under the influence charges. Therefore, the trial court did not err in concluding that the officer should not have reasonably construed appellant's question, "am I going to have the opportunity to blow again?" as a request for an independent chemical test.

Right of Confrontation; VoiR Dire

Verdree v. State, A09A1402

Appellant was convicted of multiple counts of armed robbery, aggravated assault, kidnapping, possession of a firearm during the commission of a crime, and use of a firearm by a convicted felon. He contended that the trial court erred in admitting the testimony of the alleged get-away driver, appellant's co-conspirator. The evidence showed that appellant robbed numerous Taco Bell restaurants. Over appellant's objection, the trial court allowed an investigator to testify to the statements given appellant's co-conspirator which implicated

appellant by placing appellant in one of the restaurants at the time of one of the robberies. The Court held that the trial court erred for two reasons and reversed appellant's convictions. First, the Court found that under OCGA § 24-3-5, after the State proves that a conspiracy to commit a crime existed, the declarations by any one of the conspirators during the pendency of the criminal project are admissible against all of them. But, under OCGA § 24-3-52, "[t]he confession of one joint offender or conspirator made after the enterprise is ended shall be admissible only against himself." Thus, a conspirator's post-arrest statement to police incriminating a co-conspirator terminates the conspiracy, rendering the statement admissible only against the declarant. Therefore, the co-conspirator's statements to the investigator were not made during the pendency of the criminal project and, therefore, were not admissible against appellant under OCGA § 24-3-5. Second, the statements to the investigator were testimonial in nature, and appellant did not have an opportunity to cross-examine the co-conspirator in an attempt to discredit the statements because the co-conspirator did not testify at trial. Thus, the statements were inadmissible under *Crawford*. The Court further held that the error was not harmless. Here, the co-conspirator's statements were the only undisputed evidence which conclusively placed appellant inside a Taco Bell at the exact time it was robbed in during one of the robberies. Thus, the investigator's testimony was not cumulative of other evidence presented.

Appellant also argued that the trial court erred in allowing the State to tell prospective jurors during voir dire that the co-conspirator had already been tried and convicted of driving "the armed robber" to the Taco Bell on the morning of the third robbery. Generally, the guilty plea or conviction of a joint offender is not admissible in evidence at the trial of another joint offender. However, this rule does not apply where the joint offender is present at trial and testifies as a witness subject to cross-examination and does not apply where the joint offender's conviction is admitted with instructions that it not be used as evidence of the defendant's guilt. Here, the trial court instructed the jury that they were not to consider the attorneys' statements, both during voir dire and during their opening and closing statements, as evidence in this case. Later, after the State elicited the officer's testimony regarding

the co-conspirator's conviction, the trial court again issued an appropriate instruction. The Court held that "[t]ypically, when the court gives such instructions, the admission of the co-defendant's conviction is rendered harmless." But, given that the trial court erred in admitting the co-conspirator's statements, the statements by the prosecutor and the evidence that showed the co-conspirator had been tried and convicted on charges stemming from the robbery were extremely prejudicial and effectively denied appellant a fair trial.