

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 31, 2012

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THIS WEEK:

- **Bond; Detainer**
- **Restrictive Custody; Juveniles**
- **Guilty Plea; Motion in Arrest of Judgment**
- **Sentencing; Eighth Amendment**
- **Search & Seizure**

Bond; Detainer

Denson v. State, A12A1112 (8/22/2012)

An interlocutory appeal was filed from the trial court's denial of appellant's motion for bond. The facts demonstrated that the magistrate court issued warrants for appellant's arrest on the charges at issue in this case. At that time, appellant was serving a sentence of confinement in state prison for his conviction for a different offense. The purported detainer was filed on February 9, 2010. At some point not specified in the record, appellant finished serving his sentence on the prior offense. On November 7, 2011, appellant was released from state prison and transferred to the county jail, and on November 15, 2011, the charges at issue in this case were brought before a grand jury, resulting in appellant's indictment that same day.

Appellant contended that the grant of his motion for bond was mandated by OCGA § 17-7-50. He argued that he was entitled to bail under OCGA § 17-7-50 because the grand jury did not hear the charges against him within 90 days of February 9, 2010, the date the detainer was filed. In essence, he contended that the filing of the detainer constituted his arrest and

confinement on those charges. Pretermitted whether a properly filed detainer could constitute an "arrest" and "confinement" for the crimes for which the detainer was issued, the Court rejected appellant's contention that the purported detainer in this case had that effect, because it found that under OCGA § 42-6-2, the Georgia Department of Corrections was not authorized to accept and file it. That Code section authorizes the Georgia Department of Corrections to "accept and file only those detainers which meet the requirements of [OCGA §§ 42-6-1 through 42-6-6]," except in circumstances not pertinent to this case. The purported detainer in this case, however, did not meet those requirements because it did not meet the statutory definition of a detainer set forth in OCGA § 42-6-1 (3). The detainer was based upon an arrest warrant. The plain language of the statutory definition, however, required that a detainer be based upon a pending indictment, a pending accusation, or a conviction or sentence pending appeal: "Detainer" means a written instrument executed by the prosecuting officer of a court and filed with the [D]epartment [of Corrections] requesting that the department retain custody of an inmate pending delivery of the inmate to the proper authorities to stand trial upon a pending indictment or accusation, or to await final disposition of all appeals and other motions which are pending on any outstanding sentence, and to which is attached a copy of the indictment, accusation, or conviction which constitutes the basis of the request. The Court held that it could not extend the statutory definition of a detainer in OCGA § 42-6-1 (3) to include instruments based upon arrest warrants. In the context of interstate detainers our Supreme Court held, "[w]hile

it may be common practice for the State to attempt to detain a prisoner based upon an arrest warrant for other charges, . . . this Court must conclude that an arrest warrant, in and of itself, is insufficient [to invoke the Interstate Agreement on Detainers, OCGA §§42-6-20 - 42-6-25].” *State v. Carlton*, 276 Ga. 693, 696 (2003). Because the purported detainer at issue here did not meet the statutory requirements for a detainer, the Department of Corrections was not authorized to accept and file it. It was therefore without legal effect, could not constitute arrest and confinement of appellant, did not require the presentment of the charges to a grand jury within 90 days, and did not entitle him to automatic bail under OCGA § 17-7-50. Consequently, the trial court was not required to grant appellant’s motion for bond under OCGA § 17-7-50.

Restrictive Custody; Juveniles

In the Interest of J.X.B., A12A1559 (8/27/2012)

16-year-old J. X. B. was adjudicated delinquent after admitting that he had possessed a weapon (a baseball bat) in a school safety zone, in connection with an assault. The Juvenile Court of Baldwin County ordered J. X. B. placed in the custody of the Georgia Department of Juvenile Justice for 60 months, including confinement in a secure detention facility for 12 months. J. X. B. appealed from the order, contending that the juvenile court erred in ordering restrictive custody: (1) without making the specific written findings of fact required by OCGA § 15-11-63; and (2) when the evidence did not support such a disposition. Because the juvenile court failed to make the required specific written findings of fact, the Court vacated the judgment and remanded the case for the juvenile court to make those written findings and to thereafter enter an appropriate order of disposition.

O.C.G.A. § 15-11-63 (b) pertinently provides that when a juvenile is found to have committed a “designated felony act,” the juvenile court’s order of disposition must include a finding based upon a preponderance of the evidence as to whether the juvenile requires restrictive custody. To determine whether restrictive custody is required, the juvenile court must consider and make specific written findings of fact, related to the particular child, as to each of the following elements: (1) the needs and best interests of the child; (2) the record

and background of the child; (3) the nature and circumstances of the offense, including whether any injury involved was inflicted by the child or another participant; (4) the need for protection of the community; and (5) the age and physical condition of the victim. The Court noted that requiring specific written findings as to each essential element benefits the lower court in its balancing process, and assists the Court in determining whether an abuse of discretion has occurred in a particular case. The Court found that in this case, the juvenile court utilized for its written order a pre-printed form titled “DISPOSITIONAL ORDER OF COMMITMENT FOR DESIGNATED FELONY.” The form, which contained a combination of pre-printed text and “fill-in-the-blank” sections, purported to include findings as to each of the required elements. As entered by the juvenile court, the order pertinently provided the following: In the “FINDINGS OF FACT” section of the order, under the typed heading “NATURE OF THE OFFENSE,” the following was written in a blank space: “child brought a baseball bat to school with the intent to use it in an assault.” Under the heading “RECORD AND BACKGROUND” was the following pre-printed text: “___ has the following history of delinquency and/or unruliness:___[.]” “J. B.” was written in the first space, and “none” was written in the second space. Under the heading “AGE AND CONDITION OF THE VICTIM” was written: “N/A.” Under the heading “NEEDS AND BEST INTEREST OF THE CHILD” was the following pre-printed text: “___ has demonstrated by his conduct a lack of respect for authority, both parental and legal. ___ must learn to obey rules and take direction, respect authority and establish realistic goals and expectations from himself and society. The court, based upon the evidence, has the following concerns:_____”; J. X. B.’s initials were written in the first two spaces, and nothing was written in the third space. Under the heading “NEED FOR THE PROTECTION OF THE COMMUNITY” was the following pre-printed text: “Owing to the nature of the offense and the propensity of said minor child to commit either violent offenses or chronic property damage offenses, the community is in need of protection from said minor child.” Nothing was added to or deleted from that pre-printed language, nor did the form contemplate the addition of any information

under this heading. The form concluded with pre-printed language that the court had made the findings of fact by a preponderance of the evidence and, having “duly considered the foregoing factors,” found by a preponderance of the evidence “that ___ requires restrictive custody.” J. X. B.’s name was written in the blank space.

The State asserted that the juvenile court’s order satisfied OCGA § 15-11-63 (b) and (c) because each of the five elements was specifically included in the order, and the juvenile court was not prohibited from entering an order using “pre[-]printed” language “written in boilerplate fashion.” The Court disagreed. The Court found that although the juvenile court’s order listed all five elements and indicated in boilerplate text that the court had “duly considered the foregoing factors,” the court failed to include in the order the specificity needed to show that its decision to place J. X. B. in restrictive custody was not arbitrary but was made after giving due consideration to each of the required elements as they related to this particular child.

For example, the boilerplate language found under the caption “NEED FOR THE PROTECTION OF THE COMMUNITY” contained no findings of fact specific to J. X. B. and the act he committed, and no findings regarding why restrictive custody was required in this case “for the protection of the community”; the court included no findings of fact showing that J. X. B. had, as the pre-printed language stated, a “propensity” to commit violent or chronic property damage offenses; and the court used “either . . . or” language, not specifying which of the listed offenses J. X. B. had a propensity to commit. Because the juvenile court failed to make specific written findings of fact as to each of the five elements as they pertained to J. X. B., the Court vacated the judgment and remanded the case for the juvenile court to consider each element as it pertains to this particular child, and to enter appropriate written findings of fact addressing each element, after which an appropriate order of disposition shall be entered.

Guilty Plea; Motion in Arrest of Judgment

Tate v. State, A12A1380 (8/24/2012)

Proceeding pro se, appellant contended that 1) the court erred because his indictment

failed to charge “proper venue;” 2) he was improperly convicted and sentenced; and 3) his guilty plea was involuntary and not intelligent because he was not informed of the essential elements of the charge against him. The Court affirmed. The facts showed that appellant was indicted for statutory rape, sodomy, aggravated child molestation, and two counts of child molestation. Pursuant to a negotiated plea, the trial court accepted appellant’s plea of guilty to statutory rape and granted the State a nolle prosequi order on the other counts. Appellant was sentenced on August 12, 2010 to 15 years, 7 to be served in confinement followed by 8 on probation with special conditions. In March 2011, appellant filed an extraordinary motion in arrest of judgment, which the trial court dismissed a week later because the motion included no certificate of service. In April 2011, appellant filed a second motion in arrest of judgment, this time including a certificate of service, and the trial court ordered a hearing on the motion in late May 2011. Before the hearing, appellant filed a motion seeking court-appointed counsel to represent him at the upcoming hearing, which the trial court denied because the proceeding did not involve a direct appeal for which appointed counsel was required. The Court noted that the record did not indicate whether a hearing was held or not, but in July 2011, appellant filed a notice of appeal, stating his desire to appeal “from the judgment of conviction and sentence entered.” The Court dismissed the appeal in October 2011 on jurisdictional grounds because appellant filed the appeal more than 10 months from the judgment of conviction and sentenced entered on him, and more than 30 days after the trial court’s March 2011 order on appellant’s first motion in arrest of judgment. The Court noted that the record contained no order disposing of appellant’s second motion in arrest of judgment.

The trial court subsequently issued a detailed order denying appellant’s second extraordinary motion in arrest of judgment. The court addressed all of the arguments in the motion, holding first that because place was not an element of any of the offenses charged, the indictment sufficiently charged him with having committed the offenses in Whitfield County. Second, the court held that appellant was not improperly convicted of more than one crime for the same conduct, because he pled guilty to and was sentenced for only one

crime, statutory rape. Finally, the court held that appellant could not withdraw his guilty plea because the indictment was not void, his plea was voluntary, and he filed his motion after the term in which he was sentenced.

He appealed this order, arguing that the State failed to charge venue, the charge against him was not supported by the evidence, and his plea was involuntary. The Court affirmed, because “under OCGA § 17-9-61 (a), a motion in arrest of judgment must be based on a non-amendable defect that appears on the face of the record or pleadings and ‘must be made during the term at which the judgment was obtained.’ OCGA § 17-9-61 (b).” *Lay v. State*, 289 Ga. 210, 211 (2) (710 SE2d 141) (2011). The Court found that while appellant raised a proper ground for a motion in arrest of judgment by claiming that his indictment failed to allege an essential element of the crime, his motion was made outside the term of court in which he pled guilty. Specifically, in Whitfield County, the January Term begins on the second Monday of that month, and the July Term begins on the second Monday of that month. OCGA § 15-6-3 (12) (B). Appellant entered his guilty plea in August 2010, during the July 2010 term, but did not file even his first motion in arrest of judgment until March 2011, during the January 2011 term. Accordingly, the motion was untimely and the trial court did not err in denying it.

Sentencing; Eighth Amendment

Lackley v. State, A12A1296 (8/23/2012)

Appellant was indicted for felony murder, aggravated assault and armed robbery. Pursuant to a plea agreement, the State dismissed the felony murder and aggravated assault charges, and appellant pled guilty to armed robbery. The trial court imposed a 20-year sentence, ordering appellant to serve 15 years in confinement and the remaining 5 years on probation. Appellant filed a motion to modify the sentence, which the trial court denied. Appellant argued that the sentence of 15 years in confinement violated the prohibition of the Eighth Amendment of the United States Constitution against cruel and unusual punishment. However, the Court noted that the 20-year sentence did not exceed the permissible maximum for the offense to which appellant pled guilty. See OCGA § 16-8-41

(b) (sentencing range of 10 to 20 years for armed robbery). A “sentence which falls within statutorily mandated parameters is not subject to attack on Eighth Amendment grounds.” *Inglett v. State*, 239 Ga. App. 524, 529 (9) (1999). Accordingly, the trial court did not err in denying the motion to modify the legally appropriate sentence for appellant’s guilty plea to armed robbery.

Search & Seizure

State v. Hamby, A12A1159 (8/24/2012)

The State appealed the trial court’s grant of the motions to suppress marijuana and cocaine filed by co-defendants Kathy L. Hamby and Newman Clark Smith. The Court affirmed. The evidence showed that, close to midnight on July 7, 2008, Officer Orrick was patrolling the highest crime area in Roswell where Studio 6, an extended stay hotel, was located. As he was driving through the parking lot of the hotel, he encountered Hamby, who waved at him. Orrick, in uniform, rolled down the passenger window of his marked police car and started talking with Hamby, who said she was staying there with her husband. Orrick advised her of recent robberies in the area and that she should be careful and remove any valuables from her vehicle. Hamby told Orrick that her name was Kathy Lynn Simms and gave him her birth date. Orrick wrote down the name and, as he was driving away, ran it through G.C.I.C. to check for outstanding warrants. The system reflected that this driver’s name was not on file, which indicated to Orrick that this was a false name. Orrick turned around, encountered Hamby, and again asked her for her name and date of birth. Hamby gave Orrick the same information and told him that she did have a driver’s license in her hotel room and that Orrick could follow her to the room and she would get it. Before Orrick and Hamby arrived at the hotel room, two other officers had come to assist Orrick. When they arrived at the room, Hamby told Orrick her husband was inside and Orrick knocked on the door. Smith opened the door, wearing only a tee shirt and shorts. Orrick noticed that the air conditioning was on high and that really cold air was coming out of the room. Despite the cool temperature, Smith was sweating, his pupils were dilated, and he was licking his lips. These facts raised

Orrick's suspicion that Smith was using a central nervous system stimulant, such as cocaine. Orrick asked Hamby where her identification was located and she indicated her purse on the kitchen table. Orrick asked Smith to bring the purse to him and Smith got the purse, but appeared to remove an item from it and then he appeared to be covering something up on the table. Orrick told him to stop making movements and bring him the purse. Smith started toward Orrick, but at one point stopped, turned his back, and again began to rifle through the purse. At that point, Orrick "stepped inside the doorway" because he feared Smith was searching for a weapon, and told Smith to stop, which he did. Hamby did not find her identification in her purse, but told Orrick it might be in a piece of red luggage on the floor inside the doorway. At this point, all three police officers were "just inside the door frame." Orrick asked Hamby if he could search this luggage and she acquiesced. No identification or illegal items were found.

Orrick had noticed three zipper bags on the kitchen table and he pointed to them and asked if Hamby's identification could be in any of those. Both Hamby and Smith said they had no knowledge of those bags and they were not theirs. Regarding the bags as abandoned, Orrick began walking across the room to retrieve them, when he spotted a sandwich bag on the floor which contained marijuana. In one of the bags on the table, Orrick found five more bags of marijuana and in another he found a red glass smoking pipe commonly used for smoking methamphetamine. As he was walking back toward his sergeant, Orrick noticed an open bag on the bed with a lot of prescription bottles in it. When asked, Smith claimed the bag and consented to Orrick's search of it. Orrick found an STP oil can in the bag and noticed that its false bottom was partly unscrewed. Inside, he found three packages of cocaine.

The State argued that Smith and Hamby "did not have a reasonable expectation of privacy in the abandoned property that was visible in plain view from the doorway of their hotel room and Smith gave consent to search the bag located on the bed as well as the rest of the room." The State conceded that Hamby and Smith had a constitutionally protected reasonable expectation of privacy in their hotel room. The Court noted that the trial

court found Orrick's two conversations with Hamby were appropriate first tier encounters between police and citizen. However, the Court stated that the argument the State overlooked concerned the issue of the entry of the three officers into the occupied hotel room without probable cause, exigent circumstances, or consent. The Court pointed out that at the time Orrick went across the room to retrieve what he deemed to be abandoned three bags on the kitchen table, the most he had was a reasonable suspicion that Hamby had given a false name and that Smith might be under the influence of cocaine. At that point, no illegal substances had been seen by the officers, nor had any consent been given for their entry into the hotel room, as conceded by Orrick. Orrick acknowledged that he had not asked Smith or Hamby if they had had visitors to their room before retrieving the bags. He further acknowledged that "I don't know if he [Smith] ever gave us permission to go into the room." It was on his way to retrieve the bags that he noticed the baggie containing marijuana on the floor of the room. The State relied on the consent of Smith to search his bag on the bed in order to overcome the initial illegality of their entering the room without permission. However, the Court stated that, "The State has the burden of proving the validity of a consensual search and must show the consent is given 'voluntarily.' Consent which is the product of coercion or deceit on the part of the police is invalid. Consent is not voluntary when it is the result of duress or coercion, express or implied." The inquiry is whether a reasonable person would feel free to decline the request to search or otherwise terminate the encounter. The Court noted that here, three uniformed officers had stepped into the hotel room without permission and Orrick directed Smith to retrieve Hamby's purse, to stop moving around, and asked about the luggage and other bags in the room. Just because, following Orrick's further entry into the room to retrieve the three unclaimed bags, Smith acquiesced in Orrick's request to search his bag does not fulfill the State's burden to show that the consent was voluntary. Therefore, the Court affirmed the trial court's grant of Hamby's and Smith's motions to suppress.