Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 16, 2016

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Todd Ashley
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General Counsel

Lalaine Briones
State Prosecution Support Director

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Director of Capital Litigation

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Joseph L. Stone
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Kenneth Hutcherson
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

Invasion of Privacy; Interpretation of "Public Place"

Gary v. State, A16A0666 (7/15/16)

Appellant was convicted of a single count of criminal invasion of privacy, in violation of O.C.G.A. § 16-11-62(2). The undisputed facts showed that while employed at a supermarket, appellant aimed his cell-phone camera underneath the skirt of the victim and recorded video (a practice known as "upskirting"). Film from the store's security cameras showed that appellant aimed his camera underneath the victim's skirt at least four times as the victim walked and shopped in the aisles of the store. When questioned by police, appellant admitted to using his cell phone to take video recordings underneath the victim's skirt as she walked in two separate areas of the store.

Appellant was indicted on a single count of "Unlawful Eavesdropping and Surveillance," with the indictment alleging that appellant's admitted conduct "did invade the privacy of the victim." Although the indictment did not identify the specific statute appellant allegedly violated, the State maintained that the indictment charged appellant with violating O.C.G.A. § 16-11-62(2). That statute, which is part of Georgia's Invasion of Privacy Act (O.C.G.A. § 16-11-60, et seq.), makes it illegal for "[a]ny person, through the use of any device, without the consent of all persons observed, to observe, photograph, or record the activities of another which occur in any private place and out of public view." Prior to trial, appellant moved to quash the indictment, arguing that because appellant filmed the victim as she walked and shopped in the aisles of a public store, the victim's activities were not occurring in a private place and therefore his conduct did not violate the statute. The trial court rejected his argument and denied the motion to quash, finding that the area of the victim's body underneath her skirt constituted a "private place" within the meaning of O.C.G.A. § 16-11-62(2).

The Court stated that in determining the meaning of "private place," it must read subsection (2) in its entirety and view that subsection in the context of O.C.G.A. § 16-11-62 as a whole. Read in its entirety, subsection (2) prohibits the observation or recording of the activities of a person "*which occur in* any private place and out of public view." (Emphasis supplied.) The use of the phrase "which occur in" demonstrates that the term "private place" refers to the location of the person being observed or filmed — i.e., the statute refers to a person being observed or filmed while he or she is "in any private place." O.C.G.A. § 16-11-62(2), therefore, criminalizes certain conduct as to an individual

who is in a specific physical location — i.e., a place which is out of public view and in which the individual could reasonably expect to be free from intrusion or surveillance.

Thus, the Court found, it is clear that O.C.G.A. § 16-11-62(2) does not criminalize the observation or filming of an individual who is in a public place. Instead, that language makes clear that to convict an individual of violating O.C.G.A. § 16-11-62(2), the State must allege and prove both that the accused observed or filmed the activities of the victim, and that those activities were occurring in a location which was out of public view and in which the victim could reasonably expect to be free from intrusion or surveillance. The activity recorded in this case was the victim's acts of walking and shopping. Given that this activity occurred in a grocery store open to the public, appellant did not record any activities of the victim that were occurring in a private place and out of public view. Therefore, the indictment in this case failed to allege, and the State failed to prove at trial, a material element of the crime of invasion of privacy, namely that the recorded activities of the victim occurred in a private place and out of public view. Accordingly, the trial court erred both in denying appellant's motion to quash the indictment and in finding that there was sufficient evidence to convict appellant of violating O.C.G.A. § 16-11-62(2).

In so holding, the Court stated as follows: "[I]t is regrettable that no law currently exists which criminalizes [appellant]'s reprehensible conduct. Unfortunately, there is a gap in Georgia's criminal statutory scheme, in that our law does not reach all of the disturbing conduct that has been made possible by ever-advancing technology. The remedy for this problem, however, lies with the General Assembly, not with this Court. Both our constitutional system of government and the law of this State prohibit the judicial branch from amending a statute by interpreting its language so as to change the otherwise plain and unambiguous provisions thereof."

DUI; Independent Tests

Wright v. State, A16A0240 (7/15/16)

Appellant was convicted of DUI (per se), DUI (less safe) and speeding. He argued that the trial court erred in admitting the results of the state-administered test because he was not given an independent test after requesting one. The Court agreed and reversed his convictions for DUI.

Quoting *Ladow v. State*, 256 Ga.App. 726, 728 (2002), the whole Court stated that "[a]n accused's right to have an additional, independent chemical test or tests administered is invoked by some statement that *reasonably could be construed, in light of the circumstances, to be an expression of a desire for such test*." (emphasis added). But, although *Ladow* sets forth the "reasonably could" standard, Georgia's implied consent warning itself does not specify to the accused any requirements for requesting an independent test — linguistically, temporally, or otherwise. Therefore, in evaluating whether a particular statement or question is a request for an independent test, context matters. In reviewing appellant's statements to the arresting officer in context, the Court found that appellant's question after arrest —"Where I gotta do my blood test at?" — was ambiguous. And thus, the fact that appellant's ambiguous statements reasonably could support two different interpretations — either as a request for an independent test or not — required the Court to resolve the ambiguity in his favor, because his statements "reasonably could" be construed as a request for an independent test. Accordingly, because the evidence of state-administered results had to be excluded, there was insufficient evidence to support the DUI (per se) offense, and appellant could not be retried on that count.

The Court then addressed the DUI (less safe) count. The Court found that the results of the state-administered test were relevant to the key issue of the case — whether appellant was driving under the influence — and this evidence was not cumulative of other evidence and was detrimental to appellant. Although the remaining evidence in the case was sufficient under *Jackson v. Virginia*, that standard of review is a lower standard than the Court applies for harmless error. To support a conviction for DUI less safe, there must be evidence that the defendant was operating a moving vehicle while under the influence of alcohol to the extent that it was less safe for him to drive. Although appellant admitted to drinking alcohol, which was confirmed by the positive reading from the alco-sensor, and he failed several parts of the field sobriety tests, he also passed other parts of the field sobriety testing and there was no evidence that appellant had other indicators of being under the influence, like slurred speech. Additionally, although appellant was speeding along I-285, the parties did not suggest this is an unusual occurrence along that interstate, and there was no evidence that he was otherwise driving unsafely. Because there was not considerable evidence that appellant was under the influence of alcohol to the extent that it was less safe for him to drive, and because the results of the state-administered test was relevant to this issue, the Court found that it was likely that the erroneous admission of the state-administered test results contributed to the guilty verdict for DUI less safe. Accordingly, the finding of guilt for DUI less safe was vacated. However, because the evidence was sufficient to support a finding of guilt on that count, double jeopardy does not bar the State from retrying appellant for that offense.

Ineffective Assistance of Counsel; Conflict of Interest

McNorril v. State, A16A1016 (8/3/16)

Appellant was convicted of hijacking a motor vehicle, possession of marijuana with intent to distribute, and possession of a firearm during the commission of a crime. He contended that he was denied his constitutional right to effective counsel because his trial counsel had an actual conflict of interest that adversely affected the representation. Specifically, an actual conflict of interest arose because his trial attorney was employed in the same circuit public defender's office as the attorney who represented his co-defendant, and he and his co-defendant had antagonistic interests that precluded them from being represented by attorneys in the same office. The Court disagreed.

Citing *In re Formal Advisory Opinion 10-1*, 293 Ga. 397, 400 (2) (2013), the Court stated that if it is determined that a single public defender in the circuit public defender's office of a particular judicial circuit has an impermissible conflict of interest concerning the representation of co-defendants, then that conflict of interest is imputed to all of the public defenders working in the circuit public defender office of that particular judicial circuit. The critical question is whether the conflict significantly affected the representation, not whether it affected the outcome of the

underlying proceedings. That is precisely the difference between ineffective assistance of counsel claims generally, where prejudice must be shown, and ineffective assistance of counsel claims involving actual conflicts of interest, which require only a showing of a significant effect on the representation.

Here, the Court found, while appellant and his co-defendant were represented by attorneys in the same trial team at the same circuit public defender's office, there was no evidence of any communications or collaboration between the attorneys regarding this case. Rather, appellant's trial counsel testified at the hearing on the motion for new trial that she recalled no such communications or collaboration with the other attorney in her office. Furthermore, trial counsel testified that she felt no constraints in her representation of appellant and did not feel that there was any conflict that inhibited her trial performance, and there was nothing in the trial transcript reflecting otherwise. Trial counsel also testified that if a conflict had existed, she would have reviewed the issue with her supervisor, but there had been no need to do so under the circumstances here. Given this record, the trial court was entitled to find that appellant failed to show that his trial counsel was laboring under an actual conflict of interest that negatively impacted her pre-trial preparation or her performance during trial.

Appellant nevertheless argued that an actual conflict of interest arose at one point before trial when the prosecutor offered him a plea conditioned on appellant testifying against his co-defendant, thereby causing appellant and his co-defendant to have interests that were antagonistic to one another. However, appellant's trial counsel testified at the new trial hearing that she fully informed appellant of the plea offer, that she told him that it was his decision whether to accept the offer, and that "it [had been] of no account to [her]" whether appellant chose to testify against his co-defendant. Trial counsel also testified that appellant was very "deferential" to his co-defendant and looked to his co-defendant "for cues … in making decisions about what he wanted to do." The trial transcript reflected that when the plea offer was later brought up in open court, appellant rejected the offer, stating, "I would take the offer, but I don't want to testify." In light of this combined record evidence, the Court found that the trial court was entitled to find that any potential conflict arising from the plea offer did not adversely affect the manner in which trial counsel handled the offer or conveyed it to appellant, and that appellant made his own independent decision not to accept the offer because he did not want to testify at trial.

Accordingly, the Court held, the trial court was authorized to conclude that appellant failed to establish that the simultaneous representation of himself and his co-defendant by two public defenders in the same office created an actual conflict of interest that significantly affected his own lawyer's performance before or during trial.

DUI; Williams

State v. Domenge-Delhoyo, A16A0362 (7/15/16)

Domenge-Delhoyo was charge with DUI and hit-and-run. The trial court granted her motion to suppress the results of a state-administered blood test. In its order, the trial court stated as follows: "The facts of this case simply do not support a finding that the Defendant actually consented to the state-administered blood test. The Defendant stated that she would submit to the state-administered test only after she was … pushed upon the hood of a patrol car, forcibly placed in handcuffs, and read the Implied Consent advisement. The Court finds that the most probative evidence of whether the Defendant actually consented to the state-administered blood test was the Defendant's refusal to submit to a preliminary breath test. The preliminary breath test, which is less invasive tha[n] a blood test, was requested prior to arrest, and the Defendant was told by [the officer] that the preliminary breath test was voluntary. Because the Defendant did not voluntarily submit to a pre-arrest preliminary breath test, it does not logically follow that after bring forcibly arrested and read the Implied Consent advisement, the Defendant would actually consent to a more invasive blood test." The State appealed and a divided whole Court reversed.

The Court noted that the trial court did not conclude that Domenge-Delhoyo was too intoxicated to consent. Rather, it found the officer's conduct in pushing her on the hood of the patrol car and forcibly placing her in handcuffs before reading the implied consent warning significant to its conclusion that the consent was not voluntary. But, the Court found, the record showed without dispute that the officer did not read the implied consent warning to Domenge-Delhoyo while she was on the hood of the car. Instead, he did so after she was assisted from the hood of the car, after she asked him to retrieve her shoes, which he agreed to do, and after he asked her in a calm and polite voice to "have a seat" in the patrol car. Before reading the implied consent notice, he informed her that there would be a question at the end, he asked whether her answer was yes or no after he read the notice, he confirmed again that her answer was indeed yes after she had already answered in the affirmative once, and the evidence included the hospital's consent form that gave her the option of refusing consent.

The trial court's logic that Domenge-Delhoyo would not have actually consented to the state-administered test because she chose not to participate in the alco-sensor field sobriety test utilized an improper subjective standard for determining consent. The standard is one of "objective reasonableness," requiring consideration of whether a reasonable person would feel free to decline the request, not whether the defendant may have subjectively preferred not to consent, but nonetheless made a decision to actually consent. The trial court also overlooked that Domenge-Delhoyo was properly advised that she could lose her driver's license if she refused, a consequence not attendant with a refused alco-sensor test. Therefore, the Court held, based upon the undisputed evidence in the video recording and the application of the law to the undisputed facts, the Court concluded that the State met its burden of proving actual consent under the totality of the circumstances.

The Court next addressed the dissent's argument that the trial court should have been affirmed because the police officer failed to timely inform the defendant of her implied consent rights. The evidence showed that when Domenge-Delhoyo initially refused to perform field sobriety tests, the officer told her she was under arrest. Domenge-Delhoyo then stated she would allow the field sobriety tests, which the officer had her perform after first reading her her *Miranda* rights. Twenty minutes later, the officer again told her she was under arrest and read her the implied consent warnings.

The Court found that based upon the particular facts and circumstances of this case, the officer's implied consent notice was given at a time as close in proximity to the instant of arrest as the circumstances of the individual case might warrant. The 20-minute delay resulted from the exigencies of police work based upon the defendant changing her mind about performing field sobriety tests and the officer complying with her request to check her to see if she was safe to drive. While there was no testimony on this issue, probably due to it not being raised in the motion to suppress hearing, it was reasonable to conclude that Domenge-Delhoyo changed her mind with the hope that she could change the officer's mind about arresting her if she performed well on the field sobriety tests. When the officer placed her in handcuffs after the field sobriety tests concluded, he promptly read the implied consent notice after placing her in the back of the patrol car. This record failed to show how the defendant would have benefitted from the notice being read earlier. Indeed, it may have caused confusion for it to have been read before the officer asked for an alco-sensor test as part of the field sobriety evaluation.

Sentencing; Recidivists

Cook v. State, A16A1105 (8/8/16)

Appellant was convicted of rape. He contended that the trial court erred in sentencing him as a recidivist. The State conceded the issue and the Court remanded for resentencing.

The record showed that on April 9, 2012, approximately one month prior to the rape, appellant entered an *Alford* plea to one count of false imprisonment. Appellant was sentenced as a first offender. The rape occurred on May 6, 2012. Several days later, on May 10, 2012, appellant's first offender status was revoked based on a misdemeanor traffic offense, and appellant was sentenced to ten years' imprisonment for the false imprisonment. On June 5, 2013, the trial court sentenced appellant as a recidivist to life in prison for the rape, consecutive to the ten-year term for false imprisonment.

A crime must be construed and punished according to the provisions of the law existing at the time of its commission. On May 6, 2012, at the time of the commission of the rape, O.C.G.A. § 17-10-7(a) (2012) provided that "any person convicted of a felony offense in this state … who shall afterwards commit a felony" shall be sentenced to the maximum possible punishment for the subsequent offense. A first offender's guilty plea does not constitute a "conviction" as that term is defined in the Criminal Code of Georgia. Rather, under the first offender statute, until an adjudication of guilt is entered, there is no conviction. The case has, in effect, been suspended during the period of probation until eventually the probation is either revoked or it is discharged; unless it is revoked, there is no conviction.

Here, the Court found, appellant's first offender status was revoked and an adjudication of guilt was entered — and he was thus convicted of a felony — on May 10, 2012, after the rape. Because appellant's first offender status had not yet been revoked, appellant was not a convicted felon when he committed the rape and he could not be sentenced as a recidivist for that crime. Although appellant was a convicted felon at the time he was convicted of the rape, the recidivist sentencing statute is clear that the commission of the subsequent felony must occur *after* the prior conviction. Moreover, even if there was some ambiguity in either the first offender statute or the recidivist sentencing statute, it must be construed in favor of appellant.

Guilty Pleas; Void Sentences

Hanh v. State, A16A1409 (8/8/16)

Appellant pled guilty to child molestation and was sentenced to 20 years' imprisonment. He subsequently filed a "Motion to Vacate Void Sentence," arguing that O.C.G.A. § 17-10-6.2 required the trial court to impose a split sentence that included at least one year of probation. He also requested to withdraw his guilty plea. At a hearing on appellant's motion, the court declared that the sentence was void and announced a sentence of 20 years, of which appellant would serve 19 years in prison and the balance on probation. Appellant then reminded the trial court that he "ha[d] another matter," but the trial court cut him off, concluded the hearing, and entered the amended sentence.

Appellant contended that the trial court did not allow him to pursue at the hearing his claim that he was entitled to withdraw his guilty plea. The Court agreed. Appellant's "Motion to Vacate Void Sentence" included a request to withdraw his guilty plea. Relying on *Kaiser v. State*, 285 Ga.App. 63 (2007), the Court stated that where a void sentence has been entered, it is as if no sentence has been entered at all, and the defendant stands in the same position as if he had pled guilty and not yet been sentenced. And pursuant to O.C.G.A. § 17-7-93(b), the defendant may withdraw his plea as of right prior to sentencing, even if the motion was filed outside the term of court in which the original sentence was imposed. Accordingly, the Court concluded, because the original sentence was a nullity and appellant filed a motion seeking to withdraw his guilty plea prior to resentencing, the trial court erred by not allowing appellant to withdraw his plea of guilty prior to resentencing.

Void Sentences; Split Sentences

Jackson v. State, A16A1058 (8/10/16)

In 2013, appellant pled guilty to three counts of child molestation and ten counts of sexual exploitation of a minor. The trial court imposed concurrent 20-year prison sentences on each of the child molestation counts and concurrent sentences of 20 years' probation on each of the sexual exploitation counts, to be served consecutively to the prison terms. In July 2015, appellant filed a motion to correct a void sentence, which the trial court denied.

Appellant argued that his sentences were void because the trial court (1) failed to impose split sentences on his child molestation convictions, as required by O.C.G.A. § 17-10-6.2(b), and (2) failed to exercise and "cast upon the record'" its discretion to deviate below the statutory minimum sentences, under § 17-10-6.2(c). The Court found that his second contention did not state a void-sentence claim. The failure to deviate — or consider deviating — below a minimum sentence does not render the sentence one that the law does not allow, so long as the sentences imposed remain within the range of punishments permitted by law.

However, the sentences imposed for appellant's child molestation convictions are void because they do not comply with the § 17-10-6.2 split-sentence requirement. The court was required to impose a total sentence on each of these counts that included at least

one year of probation. See O.C.G.A. §§ 16-6-4(b); 17-10-6.2(a)(5), (b). Consequently, appellant's 20-year prison sentences were void because they included no probation. Moreover, the Court found, even though not raised by either party, appellant's probation-only sentences for sexual exploitation of children also were void. The trial court was required to impose sentences for his sexual exploitation convictions of at least five years in prison, to be followed by at least one year of probation. See O.C.G.A. §§ 16-12-100(f); 17-10-6.2(a)(10), (b). By imposing probation-only sentences for these convictions, the trial court deviated below the mandatory-minimum five-year prison sentence, but failed to enter the required written findings regarding each of the § 17-10-6.2(c)(1) factors that must be considered when doing so. See O.C.G.A. § 17-10-6.2(c)(2). Accordingly, because each of the sentences imposed in this case were void as a matter of law, the Court vacated his sentences and remanded for resentencing under § 17-10-6.2, in accordance with its opinion.

Voir Dire; Excusals for Cause

Jones v. State, A16A1048 (8/10/16)

Appellant was convicted of two counts of distribution of cocaine. The record showed that during voir dire, a juror stated, "Well, my brother got hooked on crack cocaine and it's definitely changed the whole dynamics of my family and we've been struggling with that dynamic for a long time. …And so, you know, I'd like to think that I would be fair and impartial but, you know, there's probably some bias there." In a follow-up question regarding his possible bias, the juror stated, "Like I said, it's a possibility. But I'm not — I think being the person that I am and that I put God before everything, so I believe that I could make that fair and impartial judgment. But I just wanted to bring it up and let you know that the whole psychology of the thing is that, you know, when you've got that going on within your family dynamic, you know, there's the possibility that, you know, that could enter." Appellant contended that the trial court erred by not excusing the juror for cause based on the juror's statement that "there's probably some bias," and his remark that he would put "God before everything[,] instead of the law of the State of Georgia and the instructions" from the trial court.

The Court stated that the fact that a potential juror may have some doubt as to his impartiality, or complete freedom from all bias, does not demand as a matter of law that the juror be excused for cause and it would not hold, as a matter of law, that a juror who has fear of, or some trepidation to, or some particular abhorrence to, a specific crime, is per se disqualified for cause as a juror in a trial of that type criminal case. Here, the Court found, the juror expressed "possibl[e]" bias given the nature of the charges. Thus, the fear and doubt he expressed went to the particular offense, not the particular offender. Moreover, a prospective juror's doubt as to his or her own impartiality does not demand as a matter of law that he or she be excused for cause. And here, there was no showing that the juror held an opinion of appellant's guilt or innocence so fixed and definite that he would be unable to set the opinion aside and decide the case based on the evidence and the court's charge upon the evidence.

Finally, the Court found, the juror's remark that "I put God before everything" could not reasonably be interpreted as showing a disregard for Georgia law. Rather, when considered in the context in which it was made, and given the presumption that potential jurors are impartial, the remark was more reasonably construed as the juror's attempt to explain his willingness to set aside his possible bias (related to the impact of his brother's drug use on his family) so that he "could make [a] fair and impartial judgment" in this case. Accordingly, the Court concluded, the trial court did not abuse its discretion in denying appellant's challenge for cause as to the prospective juror.

Void Sentences; Split Sentences

Barton v. State, A16A0745 (8/15/16)

In 2013, appellant was convicted of two counts of sexual battery, including one count against a child under the age of sixteen (O.C.G.A. § 16-6-22.1) and sentenced to two consecutive five-year terms. He appealed from the denial of his motion to set aside his sentence, contending that the trial court erred when it failed to sentence him to a split sentence, which would have included at least one year of probation, as required by O.C.G.A. § 17-10-6.2(b).

The Court noted that O.C.G.A. § 17-10-6.2 required the trial court to issue a split sentence that included a mandatory minimum sentence of at least five years of imprisonment and at least one year of supervised probation. Here, although appellant's sentence fell within the applicable statutory range set forth in O.C.G.A. § 16-6-22.1, the trial court failed to impose a split sentence. Consequently, the Court vacated appellant's sentences for the two counts of sexual battery and remanded for resentencing.

Criminal Trespass; Bond Recovery Agents

Harper v. State, A16A1008 (8/18/16)

Appellant was convicted of two counts of criminal trespass in violation of O.C.G.A. § 16-7-21(a) and (b)(2). The evidence showed that appellant, acting alone as a bail recovery agent for a professional bondsman, entered the residence of Tina McDaniel through a locked door, without McDaniel's knowledge or permission, and arrested Stephen Collier inside the residence on behalf of the bondsman for the purpose of surrendering Collier to state custody because his criminal bond had been forfeited. Appellant damaged the door when he entered the residence.

Appellant first contended that he was justified in his entry to McDaniel's home. But, the Court stated, even assuming (without deciding) that there was compliance with the licensing, registration, and other requirements for bail recovery agents, there was no merit to appellant's contention that his conduct as a bail recovery agent justified his entry into the residence without McDaniel's consent for the purpose of seizing and arresting Collier on the forfeited criminal bond. The bond agreement between Collier and the bondsman carried with it Collier's implied consent that the bondsman or appellant (as the bail recovery agent) may use reasonable force necessary to arrest Collier on a forfeited bond, including the use of reasonable force to enter *Collier's* residence for that purpose. But nothing in the bond agreement between the bondsman and Collier can be construed to provide authority for the bondsman, or the bondsman's agent, to enter *McDaniel's* residence (where Collier did not reside) without obtaining McDaniel's consent. And here, the Court found that appellant, acting as the bondsman's bail

recovery agent, had no authority to enter McDaniel's residence for the purpose of arresting Collier without first obtaining McDaniel's consent.

Appellant also argued that the evidence was insufficient to support his criminal trespass conviction under O.C.G.A. § 16-7-21(b)(2) which provided that "[a] person commits the offense of criminal trespass when he or she knowingly and without authority . . . [e]nters upon the . . . premises of another person . . . after receiving, prior to such entry, notice from the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant that such entry is forbidden. . . ." The Court agreed. Citing *Murphey v. State*, 115 Ga. 201, 202 (41 SE 685) (1902), the Court stated that to be found guilty of this offense requires proof that the accused entered knowingly and without authority after having received express notice that the entry was forbidden. Express notice is required because inherent in the statute's notice provision is a requirement that notice be reasonable under the circumstances, as well as sufficiently explicit to apprise the trespasser what property he is forbidden to enter. And here, the Court found, the State failed to produce any evidence showing that appellant was given the required prior express notice not to enter McDaniel's premises. The State's allegation and proof that appellant was given prior "constructive notice" not to enter the premises when he entered without permission through a locked door was not sufficient to establish the prior express notice required for violation of O.C.G.A. § 16-7-21(b)(2).