

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 18, 2009

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THIS WEEK:

- **Statements; Independent Source Rule**
- **False Swearing**
- **Search & Seizure**

Kidnapping; Garza

Abernathy v. State, A09A1788

Appellant was convicted of numerous felonies, including kidnapping with bodily injury. He argued that the evidence was insufficient under *Garza* to support his kidnapping and that the trial court erred in its instructions to the jury regarding asportation. The evidence showed that the appellant believed the victim was responsible for burglarizing the appellant's home. The victim was lured to appellant's house whereupon appellant beat him in his yard and then dragged him to the carport and beat him some more. Appellant then dragged him into the house and locked him in a television cabinet. The victim escaped after appellant left the house to attend a birthday party. The Court held that the evidence of asportation was sufficient. Although the duration of both movements was minimal, not all of the *Garza* factors must favor the State in order to prove asportation. Thus, while the movement of the victim to the carport arguably occurred as part of the beginning of the attack by appellant, it did not constitute an inherent part of the aggravated assault or aggravated battery. In addition, the movement of the victim from the carport to the television cabinet inside of appellant's house occurred after the attacks were completed and was not an inherent part of those attacks. Furthermore, both movements created

an additional danger to the victim independent of any of the other offenses. In fact, both served to conceal the victim from the potential view of appellant's neighbors and diminished his opportunity for rescue or escape.

The Court also held that the trial court did not commit reversible error in its charge. The Court found that the trial court erred in its charge to the jury because it charged under pre-*Garza* law that only slight movement was sufficient. But, the Court held, given the overwhelming evidence of guilt, the error was harmless under the circumstances.

Fugitives

Harper v. State, A09A1977

Appellant appealed from the trial court's order denying his motion to reinstate his motion for a new trial. The evidence showed that appellant failed to return during the course of his trial, which then proceeded without him. Following his conviction, he was sentenced on Feb. 28th. His defense attorney filed a motion for new trial within 30 days. A few days after the 30 day period in which to file a motion for new trial had past, appellant was located and arrested. The trial court subsequently dismissed the motion for new trial.

Appellant argued that the trial court erred because he was in custody before the court dismissed the motion. The Court held "Georgia law is clear, however, that where a defendant becomes a fugitive before filing any post-conviction motions and then remains a fugitive during the time in which he could assert such a motion, he waives his right to seek post-conviction relief." So long as appellant remained a fugitive, his attorney was not entitled to assert his rights to post-conviction relief on appellant's behalf. Therefore, since

appellant remained a fugitive during the entire time in which he could have filed a motion for a new trial, he waived his right to seek such relief and the trial court properly dismissed his new trial motion.

Search & Seizure

Pritchard v. State, A09A1181

Appellant was convicted of possession of methamphetamine. She argued that the trial court erred in denying her motion to suppress. The Court agreed and reversed. The evidence showed that a deputy answered a call to investigate suspicious vehicles near a suspected “drug house.” The officer observed two vehicles that he was told by the caller had just left the house. One of those vehicles was that of appellant. Although the officer did not see any traffic violations, he initiated a traffic stop of the vehicle. Methamphetamine was subsequently found in the vehicle.

The Court held that an officer does not have reasonable, articulable suspicion to stop an individual who is driving near or parking near a location where crimes have been committed. Here, the only evidence to support the traffic stop was that appellant’s car was in front of a residence that had been previously raided by the police. This evidence did not constitute an objective manifestation that appellant was, or was about to be, engaged in criminal activity sufficient to warrant the intrusion of a traffic stop. Therefore, because the officer lacked a particularized and objective basis for suspecting appellant of criminal activity sufficient to justify an investigatory stop, the trial court erred in denying her motion to suppress the evidence obtained as a result of the stop.

Obstruction; Jury Charges

Wilcox v. State, A09A1835

Appellant was convicted of one count of felony obstruction and three counts of misdemeanor obstruction. He argued that the trial court erred by not giving the following charge to the jury: “[F]or an act to constitute obstructing an officer, the act must evidence some forcible resistance or objection, not mere argument to the officer, in the performance of his official duties.” The Court held that this instruction, which pertained to the misdemeanor obstruction counts, was an incorrect statement of the law.

Under OCGA § 16-10-24 (a), forcible resistance is not required to prove that an officer was hindered or obstructed in a misdemeanor obstruction case. Instead, the Court held, argument, flight, stubborn obstinance, and lying are all examples of conduct that may satisfy the obstruction element. The authorities cited by appellant for this instruction were interpreting a prior version of the statute and are no longer applicable. Accordingly, the trial court did not err in refusing to give this incorrect instruction.

Voluntary Manslaughter; Jury Charges

Branford v. State, A09A1191

Appellant was convicted of voluntary manslaughter as a lesser-included offense of malice murder. He argued that the trial court erred by giving the State’s requested charge on voluntary manslaughter over his objection. He contended that the evidence warranted either a finding of murder or self-defense, but nothing in between. The Court held that a charge on voluntary manslaughter should be given whenever there is some slight evidence of voluntary manslaughter. Here, the fact that appellant claimed self-defense did not preclude a charge on the lesser-included crime of voluntary manslaughter because evidence of voluntary manslaughter may be found in a situation which arouses the sudden passion in the person killing so that, rather than defending himself, he willfully kills the attacker, albeit without malice aforethought, when it was not necessary for him to do so in order to protect himself. A person is justified in using force only if he reasonably believes that it is necessary to prevent death or great bodily injury to himself. Justification provides no defense, however, unless the person had effectively withdrawn from the encounter and the other person continued or threatened to continue to use unlawful force. The evidence was sufficient here to justify a charge on voluntary manslaughter.

Identification; Photo Line-ups

Pinkins v. State, A09A1636

Appellant was convicted of numerous counts of armed robbery, aggravated battery, kidnapping, aggravated assault, and possession

of a firearm during the commission of a crime. He contended that the trial court erred in not suppressing the results of the photo-lineup shown to the three victims. The evidence showed that all the crimes occurred when appellant, who was wearing a ski mask from which only his eyes were visible to the victims, robbed the victims’ store. Appellant argued that the photo array used was impermissibly suggestive because: (1) he was the only person pictured that had slanted or characteristically Asian eyes; and (2) his photograph differed from the other five in that it was smaller, lighter in color, grainier, and less-focused, and because his head was more tilted than those of the other men whose pictures were used in the line up.

The Court held that in determining whether an identification procedure was fair, the question is not whether the array of photographs used by police could have been more nearly perfect, but rather, whether the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Here, the record showed that the photographic lineup included pictures of six males, all of whom were similar in age to appellant and who had the same general facial features and complexion. At least three of the men pictured had what could be considered slanted or characteristically Asian eyes. Moreover, any slight variations in the facial features among the men pictured would have been insufficient to render the line-up impermissibly suggestive. Second, the physical differences in the photographs themselves did not taint the line-up because slight differences in the size, shading, or clarity of photographs used in an identification line-up will not render the line-up impermissibly suggestive. Thus, there was no indication that the procedures used in showing the victims the photographic display were improper and the individuals whose photographs were displayed with appellant’s picture shared many of his general physical characteristics. Therefore, the trial court properly concluded that the line-up procedure was not impermissibly suggestive.