Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING SEPTEMBER 21, 2012

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## THIS WEEK:



## Jury Charges

*Ingram v. State, A12A0843 (9/13/2012)*

Appellant was convicted of two counts of felony obstruction of an officer and one count of interference with government property. He asserted that the trial court erred in failing to charge the jury on misdemeanor obstruction as a lesser included offense of the felony obstruction counts. The Court found no error and therefore affirmed.

The State presented evidence showing that a deputy witnessed appellant clogging the toilet in his cell and making it overflow. When the deputy and another officer approached the cell, appellant started throwing his shoe into the light fixture and ceiling tiles. After several other officers arrived to help, the deputy instructed appellant to halt, turn around, and put his hands on the wall. However, appellant refused to cooperate with the officers' attempts to place him in a different holding cell. When the officers tried to forcibly place him in the cell, he kicked the deputy in the shin and another officer in the groin. The officers then subdued appellant by using a Taser before placing him in the cell. Based upon this conduct, the State charged appellant with four felony counts of obstruction of an officer and interference with government property.

Defense counsel did not request a charge on the lesser included offense of misdemeanor obstruction of an officer in writing before trial or orally during the charge conference held after all of the evidence had been presented. In the motion for new trial hearing, defense counsel testified that he made a strategic decision not to request such a charge, adopting "an all or nothing approach" to the trial because, in his opinion, the videotape of the incident played for the jury did not show appellant kicking the officers. The jury found appellant guilty of the two remaining counts of felony obstruction and one count of interference with government property. Appellant contended that the trial court erred by failing to charge the jury sua sponte on a lesser included offense—misdemeanor obstruction of an officer. However, the Court noted, absent a written request for a charge on a lesser included offense, made at or before the close of the evidence, the failure to so charge is not error. Further, the Court stated that to the extent it is required to evaluate whether plain error resulted from the trial court's failure to charge on the lesser included offense, it found that none existed. Thus, the Court held that the trial court did not err by failing to charge the jury on the lesser included offense of misdemeanor obstruction of an officer.

## Probation Revocation; Sentencing

*Floyd v. State, A12A1233 (9/13/2012)*

The Court granted appellant's application for discretionary review of a trial court order revoking her probation. The Court found that because the trial court did not err in revoking appellant's probation, but did err in refusing to give her credit for time served, it affirmed in part and vacated in part, and remanded the case with direction.

The Court noted that it could not interfere

with a probation revocation unless the trial court manifestly abused its discretion. In reviewing the record, the Court found that on May 17, 2010, appellant pled guilty to five counts of the possession of various drugs. The trial court sentenced her to "seven years to serve two years in custody," with a credit of 14 days for the time she served following her arrest. As a condition of probation, appellant was required to complete a drug treatment program called "Odyssey," in which she was already enrolled at the time of her plea. As a "condition of sentence" the trial court ordered: "custodial sentence to be backloaded. If [appellant] does not complete probation and Odyssey program successfully, [appellant] to be placed in custody." Less than six months after receiving her probated sentence, appellant was arrested for allegedly committing the offense of possession of a controlled substance. The State filed a petition to revoke appellant's probation on the ground that she had been arrested for a controlled substance and failed to complete the Odyssey program as directed. The Court thus noted that since appellant "violated [a] rule . . . prescribed by the court" in failing to complete the program she had already begun, the trial court did not manifestly abuse its discretion in revoking her probation.

However, the Court found that the trial court erred in failing to give appellant credit for 14 days for time served as outlined in her sentence. The trial court refused to give appellant credit for the 14 days because "she got credit for the 14 days when she was sentenced." However, the Court noted that while appellant received the 14 days' unspecified credit at sentencing, the credit was not applied specifically to either her period of confinement or to her probationary period. Therefore, the Court held that the trial court erred in failing to credit appellant for 14 days when it revoked her probation and vacated this portion of the trial court's revocation order and remanded with direction that the trial court give appellant the 14 day credit for time served.

## Right to Counsel

*Farley v. State, A12A1625 (9/14/2012)*

Appellant was convicted of sale of cocaine, sale of ecstasy, and illegal use of a communication facility. Appellant contended that he did not knowingly and intelligently waive his right to counsel before deciding to represent himself at trial. Discerning no error, the Court affirmed.

The Court noted that the determination of whether there has been an intelligent waiver of the right to counsel must depend upon the particular facts and circumstances surrounding each case, including the background, experience, and conduct of the accused. The trial judge has the responsibility of determining whether the accused has intelligently waived his right to counsel. Appellant argued that the trial court and prosecutor failed to make certain inquiries before allowing him to represent himself, specifically referencing the six factors cited in *Banks v. State*, 260 Ga. App. 515, (2003). However, the Court noted that the Supreme Court of Georgia has emphasized "that the rote application of [this] six-part test . . . is not mandated, and a defendant's waiver of his right to counsel is valid if the record reflects that the defendant was made aware of the dangers of self-representation and nevertheless made a knowing and intelligent waiver." *State v. Evans*, 285 Ga. 67, (2009). Furthermore, the Court found that the record showed that approximately one week prior to his trial, appellant informed the trial court that he wanted to represent himself because he disagreed with his attorney about how to present the case.

The Court noted that at this hearing, the trial court warned appellant that the State was represented by an experienced attorney, who would be abiding by the rules of evidence, and that the court could not relax those rules for him. Appellant indicated that he understood the trial court's concerns and the consequences of representing himself. The record showed that the trial court again cautioned appellant that it was important to have representation by an attorney, who could help him understand his right not to incriminate himself and the State's burden of proof at trial. At this same hearing, the State then proceeded to inform appellant of the charges against him, lesser included offenses, and the ranges of punishment for each offense and lesser included offense. The State advised appellant that, due to a prior drug conviction, he could be facing life imprisonment on some counts, and further that, since the various sentences could run either concurrently or consecutively, appellant was potentially facing more than one life sentence. After hearing the dangers of self-representation, appellant nevertheless decided he was going to represent himself. At the start of appellant's trial, the trial court once again brought up his decision to represent himself, inquiring into appellant's education, ability to read and write, his mental state, and whether anyone had made any threats or promises in exchange for his self-representation. The State then proceeded to reiterate the ranges of punishment that appellant was facing for each offense. The Court emphasizes that appellant consistently stated that he understood and was familiar with each aspect of the trial and stated, on the record, that he was choosing to represent himself, and that he understood his rights during the trial. Furthermore, the Court noted that the trial court allowed appellant's former attorney to sit at the defense table and be available to appellant for questions and research purposes. Given the trial court's repeated words of caution to appellant about the dangers of self-representation, repeated discussions about the benefits of having representation by a trained and experienced attorney, and appellant's repeated indications that he understood what he was undertaking, the Court held that the record clearly reflected that appellant's waiver of his right to counsel was made knowingly and intelligently and affirmed.