Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 24, 2010

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THIS WEEK:

Double Jeopardy

Fuller v State, A10A0820 (9/7/2010)

Appellant was accused of prostitution, keeping a place of prostitution, masturbation for hire, giving a massage in an unlawful place, and unauthorized advertising in state court. In the recorder's court, she also was charged and entered a nolo plea to operating a business without a license. Appellant contended that the trial court erred in denying her plea of former jeopardy. The evidence showed that appellant was arrested for the offenses of prostitution and keeping a place of prostitution and was issued two citations for performing massage services without a permit and operating a business without a license. In March, the State filed its accusation, and in April, she entered the nolo plea in recorder's court. Three months later, she filed a plea of former jeopardy arguing that the state failed to prosecute all known charges against her at the time of the April proceeding in recorder's court.

Appellant argued that the knowledge of such charges should be imputed to the assistant solicitor who took her plea because the solicitor general had filed an accusation as to the additional charges a month earlier in state court. The Court disagreed. OCGA §16-1-7(b) provides that when several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution, they must be prosecuted in a single prosecution. However, the Court found that the prosecuting officer who initiates the case and is actually handling the proceedings or the attorney who initiates the case by filing the accusation or achieving a return of the indictment must actually know of such crimes. Here, though the knowledge the solicitor general had could be imputed to the assistant solicitor who handled the plea, appellant presented no evidence that the solicitor general had any knowledge of the offense of operating a business without a license, which was not suggested by the initial accusation. Thus, the trial court did not err in denying the plea of former jeopardy.

Enticing a Child; Merger

Hanson v State, A10A1186 (9/10/10)

Appellant was convicted for child molestation, enticing a child for indecent purposes, and sexual battery. The evidence showed that appellant encouraged his stepdaughter to watch movies that he, himself, characterized as pornographic. At some points during these sessions, he began to touch her inappropriately, occasionally lying on top of her while he had her lie on her stomach and spread her legs. She stated she could feel what she believed to be his erect penis against her, though there was never skin to skin contact. The victim's mother confronted him and he admitted to touching the stepdaughter. Appellant contended that the

trial court committed reversible error by failing to merge Count 2-enticement into Count 1- child molestation. The Court disagreed.

Where crimes charged are based on more than one separate act or transaction, no merger is required even for charges of the same crime. Here, appellant was charged with molestation for an incident where he rubbed his penis against the child's leg, and he was charged with enticing the child to perform indecent acts by having her duplicate acts seen in the pornographic images. The Court found that these are separate events, thus no merger was required.

Search & Seizure

Wilson v State, A10A0923 (9/10/10)

Appellant was convicted of possession of marijuana with intent to distribute, possession of a firearm during the commission of a crime, and possession of marijuana. He contended that the trial court erred in denying his motion to suppress. The evidence showed that a state trooper pulled appellant over after observing that he had a bracket around the car's license plate that blocked the view of the registration expiration date in violation of OCGA § 40-2-41. The trooper noticed an overwhelming odor of air freshener coming from the passenger side, and he noted that appellant grew increasingly nervous and he and his passenger had conflicting stories about their trip. These "indicators" told him that appellant might have drugs in his car, so he called for back up and used his dog to do a free air search. The dog indicated the presence of drugs, and later marijuana and a pistol were found in the car.

Appellant argued that this evidence should have been suppressed because, following the initial stop there was no reasonable suspicion that other criminal activity existed to merit a prolonged detention and the subsequent search of his vehicle. The Court disagreed.

The court recognized that nervousness alone is not sufficient to establish a reasonable suspicion to detain and investigate for illicit drug activity, and that an air freshener is a legal substance that, standing alone, is insufficient to justify further detention. However, looking at the totality of the circumstances, these facts combined with appellant's conflicting stories and knowledge of drug trafficking in the area were sufficient to show that reasonable articulable suspicion existed to support detention for further investigation. The Court found no error in the trial court's order denying appellant's motion to suppress.

McKinnon v State, A10A1281 (9/10/10)

Appellant was convicted of possession of cocaine with intent to distribute, obstruction of an officer, and giving a false name. He contended that cocaine was impermissibly seized incident to his arrest. The evidence showed that after observing what they considered suspicious hand movements by the appellant in his vehicle, they decided to investigate. Appellant exited his car and gave the officers a fake name and conflicting stories about who owned the vehicle. When officers went to verify his information, appellant ran and collided with the parked patrol car. Officers searched the car and found cocaine on the front seat where appellant had been sitting.

Appellant argued that the cocaine was impermissibly seized because he was not in reaching distance of the vehicle. The Court disagreed. The Court found that by running, he abandoned his vehicle before it was searched. The constitutional protection of the Fourth and Fourteenth Amendments does not apply to property which has been abandoned. Thus, regardless of the fact that counsel did not pursue a motion to suppress, any motion to suppress would have been without merit. The judgment was affirmed.

Brint v State, A10A1480 (9/10/10)

Appellant was convicted of possession of cocaine following a bench trial. He contended that the trial court erred in denying his motion to suppress the drug evidence seized during a search of his person. The evidence showed that officers obtained a warrant to search for drugs at a residence. Appellant, who was visiting that residence was the only occupant during the search, but was not named in the warrant. The officers performed a pat-down search of him to insure their safety and felt a package in his front pocket. He told the officers they could remove the package, which contained cocaine, and appellant was arrested.

Appellant argued that the pat-down search was illegal. The Court disagreed. The Court recognized that to justify a pat-down search of a visitor not named in a warrant, the office must have a reasonable belief that he may be armed and dangerous. The standard is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety was in danger. Here, the officer testified that executing a warrant for drugs is a dangerous undertaking since those who possess drugs typically also possess weapons. It is "not unreasonable for officers to anticipate that those who are suspected of involvement in the drug trade might be armed." Thus, the trial court was authorized to determine that the pat down was justified.

Galindo-Eriza v State, A10A1873 (9/10/10)

Appellant was convicted of trafficking in methamphetamine and of obstructing law enforcement officers. He appealed the denial of his motion to suppress. The evidence showed that officers went to a house to conduct a "knock and talk" after seeing a suspect enter the house. They did not have sufficient information at the time to obtain a search warrant. The officers noticed several individuals exiting the house into the backyard, chased them, and while apprehending them one officer could see scales and methamphetamine inside the kitchen. The officers conducted a protective sweep of the house, noticing more suspected methamphetamine. They obtained a warrant to search the house based upon what they observed, and found over 1,500 grams of methamphetamine.

Appellant argued that police arrested him without probable cause and conducted an unlawful protective sweep of the residence. The Court agreed. *Terry v. Ohio*, 392 U.S. 1 (1968), set forth three tiers of police-citizen encounters: (1) communication between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment, (2) brief seizures that must be supported by reasonable suspicion, and (3) full-scale arrests that must be supported by probable cause. The Court found that this "knock and talk" fell under the first tier, and thus the suspects had the right to ignore, or even run from, the police. The Court found that the totality of the circumstances here did not provide reasonable articulable suspicion to justify the investigative stop, since no evidence showed the officers suspected the occupants of criminal activity. Even if the officers had reasonable suspicion based on the occupant's flight, the officers did not conduct a brief, in-

vestigative stop, but a full-blown arrest for obstruction. Thus, the Court ruled that because the officers were not lawfully in a place where the methamphetamine was in plain view, the evidence should have been suppressed.

Mistrial

Johnson v State, A10A1534 (9/8/10)

Appellant was found guilty of rape. He contended that the trial court erred in denying his motion for a mistrial. The evidence showed that appellant took the victim, who was sixteen years old, to a hotel room where he started wrestling with her. He began kissing her, and despite her protests, held her down on the bed and forced her to have sexual intercourse with him against her will. She later called 911, and after an investigation, appellant was indicted and tried.

Appellant argued that the trial court erred in denying his two motions for a mistrial based upon certain allegedly prejudicial statements made regarding his character. The Court disagreed. In denying appellant's first motion for mistrial, the court offered to give a curative instruction, but appellant declined. In denying the second motion, the court sua sponte gave a curative instruction. Appellant did not renew either motion for mistrial, thus the Court found that he failed to preserve any challenge to the denial of these motions and further waived any error in the denial of the motions.

Voir Dire

Nejad v State, A08A1685 (9/10/10) S

Appellant was convicted of rape, aggravated sodomy, aggravated assault with a deadly weapon, and aggravated battery. He contended that a juror's failure to provide a correct response during voir dire made a new trial necessary. The evidence showed that jurors were asked who had been a victim of a crime in which they were interested in what the outcome of the charges were. The juror in question only mentioned a case involving a family member, but later revealed to members of the jury that she had been the victim of an unreported rape.

In order for a defendant to secure a new trial because of a juror's incorrect response to a question posed on voir dire, the defendant must show that the juror failed to answer the question truthfully and that a correct response would have been a valid basis for a challenge for cause. Here, the juror testified that she had no doubt she could be fair and impartial, and that she liked to "listen to what people say" before deciding on an issue. The Court found that in light of this testimony, even if the juror did not answer this one question truthfully, a correct response would not have been a valid basis for a challenge for cause. Because the decision whether to strike a juror for cause lies within the sound discretion of the trial court, the convictions were affirmed.

Merger

Johnson v State, A10A1293 (9/7/10)

Appellant was convicted on two counts of armed robbery, one count of aggravated assault, and one count of possession of a firearm during the commission of a crime. The evidence showed that appellant went to the victim's home in search of money for cocaine. He put something to the victim's neck, and when the victim attempted to retried his sawed-off shotgun, he received a blow to the head and was rendered unconscious. After witnessing appellant with a bloody knife, the shotgun, and the victim's wallet, his female friend contacted law enforcement and reported the events that had taken place. The victim identified appellant as his attacker. At trial, a physician's assistant who treated the victim testified that the blunt force injury and bone fractures on his head were consistent with being hit with a gun barrel and that the laceration on his head might have been caused by a knife.

Appellant contended that his armed robbery conviction and his aggravated assault conviction should have been merged. The Court disagreed. Under the doctrine of merger, a criminal defendant cannot be subject to the imposition of multiple punishments when the same conduct establishes the commission of more than one crime. However, the doctrine does not apply when multiple convictions are not premised upon the same conduct. Here, his conviction on Count 1, armed robbery, was sustained based upon his conduct with the shotgun. His conviction on Count 3, aggravated assault was sustained based upon his conduct with the knife. Though the victim was unable to identify exactly which weapon appellant used to inflict which injuries, the circumstantial evidence was enough to authorize the jury to conclude that the two separate weapons caused the victim's injuries at different times during the crime. Thus, the convictions did not need to merge. The judgment was affirmed.

Jury Charge, Allen Charge

Milligan v State, A10A1343 (9/10/10)

Appellant was convicted of possession of methamphetamine with intent to distribute and misdemeanor obstruction of a law enforcement officer. The evidence showed that during the final charge to the jury at trial, the judge used the word "admissions" when instructing them on how to consider the evidence. Later, after the court received a series of notes from the jury indicating it could not reach a verdict on the charge of possession with intent to distribute, the court gave the jury an *Allen* charge, after which the jury returned a verdict of guilty. Appellant contended that the trial court improperly commented upon the evidence during the final charge and that it erred in giving an *Allen* charge. The Court disagreed.

In reviewing the challenged portion of the jury charge in the context of the charge as a whole, the Court concluded that the trial court's use of the term "admissions" did not assume facts or intimate an opinion relating to the custodial statements made by the Appellant. Turning to the issue of the *Allen* charge, the Court examined whether the instruction given was so coercive as to cause a juror to abandon an honest conviction for reasons other than those based upon the trial or the arguments of other jurors. Here, the jurors sent four notes indicating the foreperson's belief a verdict would not be reached. However, the trial court was not bound by those pronouncements, and thus, was required, in the exercise of sound discretion, to make its own determination as to whether further deliberations were in order. The judgment was affirmed.

Sufficiency of Evidence; DUI

Reynolds v State, A10A1234 (9/10/10)

Appellant was convicted of hit and run and less safe DUI. The evidence showed that the victim reported to police that he had been sideswiped by a car that did not stop. The

victim and another witness gave police a description of the make, model and color of the car, and it was broadcast over the police radio. A tow truck driver testified he was called in to haul a silver Corolla off of the interstate and that he had seen a woman, first near the car on the interstate, then later at a pay phone. Appellant had called 911 from that pay phone, and when officers responded to a call regarding a stolen car, they noted signs of intoxication, including the odor of alcohol, inability to keep her balance, and slurred speech. Appellant submitted to field sobriety tests, which determined she was under the influence of alcohol, but she denied that she had recently been driving and refused to undergo a state-administered test of her breath. Appellant challenged the sufficiency of the evidence underlying her convictions, contending that the State failed to establish that the Corolla was involved in the hit-and-run accident or that she had driven any vehicle during the pertinent period. The Court agreed.

The Court held that the evidence was insufficient to support the hit-and-run charge. None of the officers who testified had any personal knowledge of the hit-and-run incident, no personal knowledge of how or where the car they saw had received its rear end damage, and no personal knowledge of what the fleeing vehicle looked like. Additionally, no evidence was presented that appellant owned the Corolla, was authorized to drive it, or even had keys to it. The fact that appellant had been seen walking away from that vehicle and was later determined to be intoxicated was not sufficient to authorize a finding beyond a reasonable doubt that she had been the driver of a vehicle involved in a hit-and-run incident.

The Court also held that the evidence was insufficient to prove DUI less safe. To be guilty of DUI less safe, one must drive or be in actual physical control of any moving vehicle while under the influence of alcohol, to the extent that it is less safe for that person to drive. Though there are a number of decisions where DUI convictions have been upheld on circumstantial evidence, here, the State did not present any evidence regarding appellant's ownership of the car or evidence of when the car had last been driven. Thus, the evidence was insufficient to show beyond a reasonable doubt the DUI element of "drive or be in actual physical control of any moving vehicle." Therefore, appellant's conviction was reversed.