Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 4, 2009

Legal Services Staff Attorneys

David Fowler
Deputy Executive Director

Chuck Olson
General Counsel

Lalaine Briones
Legal Services Director

Joe Burford
Trial Services Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Coordinator

Gary Bergman
Staff Attorney

Tony Lee Hing
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Brad Rigby
Staff Attorney

THIS WEEK:

Search & Seizure

State v. Miller, A09A1005

The State appealed from an order granting Miller's motion to suppress. The Court reversed. The evidence showed that a van full of officers was patrolling an area after receiving information of drug activity and of weapons being fired in there. The officers saw several men standing around a car in a vacant lot. One of the men was tinting the windows on the car and the car did not have a tag. Officers testified that it was common for thieves to put a "quick tint" on the outside of windows of stolen cars. The van carrying the officers stopped and several officers got out and walked toward the men standing around the car. Although the officers told the men not to move, Miller "started walking . . . at a fast pace" toward the house next door. One of the officers chased him and told him to stop, but Miller resisted. As the officer forced Miller to the ground, he saw a gun sticking out of Miller's pants' pocket. The officer patted Miller down and found three rocks of crack cocaine in a plastic baggie in his pocket. The Court agreed with the State that the officers had a reasonable articulable suspicion to momentarily detain the men when they saw them surrounding a car without a tag while tinting the car's windows because, based on the officers experience, the window tinting was often performed on stolen cars and the men gathered around the car could have been trying to conceal a stolen automobile. Therefore, the officers made a valid *Terry* stop and Miller was not free to leave.

Walker v. State, A09A1539

Appellant was convicted of possession of cocaine and misdemeanor obstruction of an officer. He contended that the trial court erred in denying his motion to suppress and that his detention was illegal, justifying his resistance to arrest. The Court agreed. The evidence showed that officers were patrolling an area in which they had previously received complaints regarding drug activity. The day in question, however, no complaints were received. The officers noticed four males standing in the street. The men looked at the police car as it approached and, as the car began to come to a stop, the men turned and started to walk out of the street and into a yard. The men had not gotten far when one of the officers said, "hey, hold on guys, come here, come here." Three of the men, including appellant, stopped. The other was brought back to the scene. Appellant was made to sit on the curb. An officer then patted him down for weapons. The officer then asked him "field questions" like who are you, where do you live, and what are you doing here? The officer then asked appellant if he could search him. Appellant said you just did. The officer then explained that he just patted his pockets, but now wanted to look inside his pockets. Appellant consented. After the officer found nothing in appellant's pockets, he pulled out on appellant's belt buckle and noticed a bag in the crotch area of appellant's pants. Suspecting that this was hiding drugs,

the officers attempted to handcuff appellant and appellant resisted, albeit unsuccessfully after he was tasered.

The Court held that the stop was a second tier encounter but that the officers failed to articulate any objective basis for suspecting that appellant was or was about to be involved in criminal activity. Thus, there were no complaints that day of drug activity or of appellant's involvement in such activity; the officer did not know appellant or know if he had been involved in drug activity in the past; the officers did not see him or the other men "flagging people down," as one officer testified that persons involved in roadway drug transactions typically do; the encounter was during daylight hours on a public street; the police were in an unmarked vehicle; appellant did not flee, but had only taken a couple of steps away, then stopped and came back when called by police; and appellant's apparent nervousness in the presence of a group of police officers, even in a known drug area, did not provide a basis for the reasonable articulable suspicion required by *Terry v. Ohio.*

The Court also held that the officers exceeded the scope of the consent given by appellant when they looked inside appellant's pants after explicitly telling him that the consent to search was to look inside his pants pockets.

Forfeiture

Sims v. State, A09A1077

The trial court forfeited appellant's vehicle and he appealed, arguing that the trial court erred in denying his motion to dismiss the State's complaint on the ground that a hearing was not held within 60 days of service of the complaint, as required by OCGA § 16-13-49 (o) (5). The record showed that the hearing was held outside the 60 day period as alleged by appellant. However, the Court found that the State "invoked a hearing" within the required time limits because it requested in its complaint that a hearing be set within 60 days of service and then, in a timely fashion, sent the trial court a written request for a hearing, including a blank rule nisi. The trial court thereafter set the case down outside the 60 day period but noted on the rule nisi a handwritten notation: "Crowded court calendar." The Court held that this notation was tantamount to a finding of good cause for a continuance of the hearing outside the 60 day period pursuant to § 16-13-49 (o) (5). Since the trial court continued the case for good cause, the hearing was timely held and the trial court did not err in failing to dismiss the complaint.

Statements

Cantrell v. State, A09A1218

Appellant was convicted of armed robbery of one restaurant and robbery by intimidation of another restaurant. He argued that his statements to the police were involuntary and should have been suppressed. The evidence showed that after a few of appellant's co-conspirators were caught, an officer met with appellant and his mother. Appellant gave a statement admitting part of his actions while his mother was present. After his mother left, appellant asked to speak with the officer and gave another incriminating statement. Appellant asserted that the officer offered him a hope of benefit by advising him that if he talked, the officer would help him out. The Court disagreed. It found that the officer spoke to him about the need to tell the truth and "[e]xhortations to tell the truth are not a hope of benefit that renders a confession inadmissible under OCGA § 24-3-50." Any statement that the officer may have made after the confession was given that could have been considered a hope of benefit was irrelevant because the officer's statements could not be said to have induced the confession and thus did not affect its voluntary nature.

Appellant also argued that his confessions were involuntary because, during the interviews, the officer threatened to "tag" him with additional crimes. However, the Court found that the officer had probable cause to charge him with additional robberies he did not confess to in his statements. Thus, the officer's remark that he would "tag" appellant with another armed robbery was a mere "truism" or statement of the potential legal consequences of the statements provided by appellant's co-defendants. Such statements do not constitute a threat of injury or promise of benefit within the meaning of OCGA § 24-3-50.

Restitution

Zipperer v. State, A09A1616

Appellant was convicted by a jury of leaving the scene of an accident, OCGA § 40-6-270 (a), but acquitted her of failure to maintain a lane, OCGA § 40-6-48 (1). She argued that the trial court erred in ordering her to pay restitution to the other driver for the damage to her car that allegedly resulted from the collision. OCGA § 17-14-9 provides that "[t]he amount of restitution ordered shall not exceed the victim's damages." For purposes of restitution, OCGA § 17-14-2 (2) defines damages as "all . . .damages which a victim could recover against an offender in a civil action . . . based on the same act or acts for which the offender is sentenced. . . ." Here, the jury found appellant guilty of failing to stop after the collision but, it found her not guilty of failing to maintain a lane, the offense which the State had alleged was the cause of the collision. Thus, the trial court's sentence on appellant's conviction for failure to stop after the collision could not, as a matter of law, include restitution for damages that were not caused by her failure to stop. Moreover, even though defense counsel waived a restitution hearing and stipulated to the amount of damage to the other driver's car, such actions did not waive appellate review of the legality of the restitution order because a sentence or portion thereof that is unauthorized by law is a nullity and void.

Merger

Lavigne v. State, A09A1554

Appellant was convicted of two counts of theft by deception (OCGA § 16-8-3), two counts of theft by conversion (OCGA § 16-8-4), and four counts of violating the Georgia Securities Act of 1973 (OCGA § 10-5-12) in connection with a real estate swindle involving two separate victims. Appellant argued that contrary to OCGA § 16-1-7 (a) (2), the trial court erred in failing to merge the securities violation counts into the theft by conversion counts because the former alleged specific instances of conduct generally prohibited by the latter. OCGA § 16-1-7 (a) (2) precludes multiple convictions where one crime differs from another "only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct." Count 1 of the indictment alleged a violation of OCGA § 10-5-12 (a) (2) (A), stating that appellant "unlawfully and willfully employ[ed] a device, scheme and artifice to defraud [victim 1] when, prior to inducing [victim 1] to give the accused

$65,000 as an investment, [appellant] stated to the purchaser that the investment funds would be used to develop real estate, when in fact, [appellant] converted said investment funds to his own personal use. . . ." Count 2 alleged an identical violation of OCGA § 10-5-12 (a) (2) (A), with the exception that the victim was different and the investment sum was $75,000. Appellant argued that the phrase "in connection with the sale of securities, to wit, an investment contract," alleged in Count 1, is a specific instance of the phrase alleged in the theft by conversion counts, i.e., "an agreement to make a specified application of such funds or a specified disposition of such property." The Court found, however, that inasmuch as these phrases do not allege any type of *conduct*, no violation of OCGA § 16-1-7 (a) (2) occurred. The aforementioned phrases were merely descriptive of the subject matter of the two offenses and failed to allege any type of general or specific conduct.

Appellant also argued that the securities violations factually merged with the theft by conversion offenses, under the "required evidence" test espoused by *Drinkard v. Walker*, 281 Ga. 211 (2006). But, the Court held, the securities violations charges required proof of a scheme or artifice to defraud another person, whereas the theft by conversion counts required no such proof. Instead, the proof required to show theft by conversion was evidence that appellant spent the victims' funds for his own personal expenses. Additionally, the State could have proven theft by conversion with evidence that appellant sold the real estate without the victims' knowledge. Since the State had to prove separate facts to find appellant guilty of the theft by conversion offenses and the violations of the Georgia Securities Act, the two offenses do not factually merge.