Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 6, 2012

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THIS WEEK:

Intoxilyzer 5000 Source Code; Out-of-State Witness

Holowiak v. State, A10A2021 (6/22/2012)

In *Holowiak v. State*, 308 Ga. App. 887 (2011), the Court affirmed the trial court's denial of appellant's motion for new trial following his jury conviction for driving under the influence of alcohol (per se) in violation of OCGA § 40-6-391 (a) (5). In *Holowiak*, the Georgia Supreme Court granted appellant's petition for certiorari and remanded the case "for reconsideration in light of this Court's decision in *Davenport v. State*, 289 Ga. 399 (2011)." Appellant had sought an out-of-state subpoena under the Uniform Act to Secure the Attendance of Witnesses from Without the State for a representative of CMI, Inc., the manufacturer of the Intoxilyzer 5000, to produce the software source code of the Intoxilyzer 5000 for inspection. The trial court denied the request, finding that appellant did not carry his burden of showing that the subpoena was "material and necessary" to the case, and the Court of Appeals affirmed on that basis.

In *Davenport*, the Georgia Supreme Court held that "necessary and material" is not the standard that a trial court should apply when it considers whether to issue a certificate under the Uniform Act. The trial court must first determine whether a witness is "material," and if a witness is material, the trial court "may issue a certificate under seal that is then presented to a judge of a court of record in the out-of-state county in which the witness is found." The out-of-state judge then determines whether to issue a summons directing the out-of-state witness to testify in Georgia. Thus, the Supreme Court vacated Division 2 of *Holowiak*, and remanded for the trial court to apply the standard under *Davenport* in reviewing appellant's motion for the issuance of the out-of-state subpoena.

The Court of Appeals stated that if the trial court determines that the witness for whom a certificate was requested is a "material" witness, it then must consider whether it ought to have issued a certificate in this case, and if so, whether appellant is entitled to a new trial or a new trial conditioned on the issuance by the appropriate out-of-state court of a subpoena to compel the appearance of the witness in Georgia. If the court determines that no new trial is warranted, the judgment of conviction will stand affirmed, provided that appellant may file a timely appeal from that determination.

Double Jeopardy

State v. Stewart, A12A0551 (6/22/2012)

The Court found that the trial court erred when it concluded that the traffic offenses to which Stewart pled guilty and the obstruction crimes for which he subsequently was indicted

arose from the same conduct. This case arose after Stewart was arrested and charged with driving while his license was suspended and three other misdemeanor traffic offenses. Stewart eventually pled guilty to the traffic offenses, but before he did, he attempted to convince the prosecuting attorney that, at the time of the stop, he was lawfully operating his motorcycle under a limited driving permit, which apparently allowed him to drive when he was engaged in the business of his employer. Stewart allegedly caused a letter to be written and sent to the prosecuting attorney, which purported to be written by an officer of "CSF Invest" and represented that Stewart was employed by "CSF Invest" as a "real estate research and assessment assistant." In addition, Stewart allegedly gave a statement to an investigator for the prosecuting attorney, in which Stewart represented that he was employed with "CSF Investments" as a real property evaluator. The State contended that these representations were false, and indicted Stewart for making a false statement and tampering with evidence, all in an effort to obstruct his prosecution for the traffic offenses. Stewart entered his plea of guilty to the traffic offenses, before the indictment for the obstruction charges was returned. Based on this sequence of events, Stewart filed a plea in bar with respect to the obstruction indictment. He argued that his prosecution on the obstruction charges was barred by OCGA § 16-1-7 (b), which forbids the separate prosecution of crimes "arising from the same conduct," so long as the prosecuting attorney knew of all the crimes when the first prosecution was commenced, and so long as all the crimes are within the jurisdiction of the same court. Stewart reasoned that the traffic charges to which he had already pled guilty and the crimes that he allegedly committed months later in an effort to obstruct the prosecution of the traffic charges were crimes "arising from the same conduct." The trial court accepted these arguments and granted the plea in bar. The State appealed and the Court reversed.

The Court noted that crimes "arising from the same conduct," OCGA § 16-1-7 (b), are those that arise from the same transaction or continuing course of conduct and when a court considers whether two crimes arise from the same conduct, it should consider, among other things, whether one crime could be proven without evidence that the accused committed the other. Further, a court should consider whether the crimes occurred on the same date, at the same time, and in the same place, and whether the crimes had the same object and involved the same circumstances and parties. The Court reasoned that to prosecute the obstruction crimes, although it might be necessary to prove that Stewart had been charged with traffic offenses, it would not be necessary to prove that he actually committed those traffic offenses. That Stewart intended to obstruct a pending prosecution—regardless of whether the prosecution had any merit—is enough to show the requisite intent to tamper with evidence. Accordingly, proof that Stewart committed the traffic offenses would not be necessary to prove the obstruction charges and proof that Stewart made a false statement or tampered with evidence would not be necessary at all to prove that he committed the traffic offenses. Moreover, the traffic offenses and the alleged crimes of obstruction occurred on different dates, in different places, and involve different circumstances and parties. Thus, the Court concluded, the trial court erred when it granted the plea in bar.

Search & Seizure; Inventory of Vehicle

Scott v. State A12A0624 (6/22/2012)

Appellant was convicted of possession of methamphetamine and possession of drug-related objects. She asserted that the trial court erred when it denied her motion to suppress evidence that was recovered during a search of her car. Specifically, she contended that the search was unlawful because the police did not have probable cause to search the car for contraband, and further that the search could not be justified as an inventory search because it was not necessary to impound her car.

Pretermitting whether probable cause was present under the circumstances, the Court found that the trial court correctly denied appellant's motion to suppress because the evidence was lawfully seized during an inventory search prior to impounding the car. Impoundment of a vehicle is valid only if there is some necessity for the police to take charge of the property. In each instance, the ultimate test for the validity of the police conduct is whether, under the circumstances then confronting the police, the conduct was reasonable within the meaning of the Fourth Amendment. Appellant asserted that the officer's decision to impound her car was unreasonable under the circumstances because the officer did not ask her first if she had a preference as to the disposition of her car. The Court disagreed and noted that an officer is not required to ask the owner what she would like to do with her car when the owner has been arrested and there is no one present at the scene to take custody of the car and safely remove it. Here, the owner of the vehicle was under arrest, she had implicated her companion in criminal activity, and no one else remained to take custody of the car and remove it from the shopping center premises. Although the officer did not inquire whether the appellant could make other arrangements for the retrieval of her car, he was not required to do so. In addition, the officer testified that, although the car was off the roadway, it would have impeded a large truck attempting to exit the highway, and the trial court found that appellant's car was not legally parked on the side of the exit ramp. Moreover, there was no evidence in the record that appellant even requested an alternative arrangement for removing her car. Thus, the Court concluded, the resulting inventory search of the car was valid, and the trial court did not err in denying appellant's motion to suppress evidence discovered during the inventory that followed the impoundment.

Judicial Comments; Merger

Copeny v. State A11A1876; A12A0283 (6/25/2012)

Appellant was tried with two other co-defendants who were each convicted of armed robbery, hijacking a motor vehicle and two counts of possession of a firearm during the commission of a crime. Appellant and one of his co-defendants contended that the trial court improperly commented upon the evidence when it charged the jury, and that the court should have merged the convictions for armed robbery and hijacking a motor vehicle.

During the trial both appellant and his co-defendant mentioned another man named Donnio who planned the crime but who was not one of the defendants in this trial. During deliberations, the jury sent two notes contemporaneously to the trial court. In the first, the jury asked "Where is Donn[i]o? Was he indicted?" The second note stated: "Ask the judge the guideline for co-conspiracy." The trial court responded to the first note

by informing the jury that "those are facts. I cannot go into the facts. The facts are closed." The judge added, "That's immaterial to your consideration of the case anyway, as it would be explained by the re-charge that you have asked for." The trial court then recharged the jury on party to a crime.

Appellant argued that the trial court improperly commented on the evidence while instructing the jury, namely that it erred by informing the jury that it was "immaterial that [Donnio] wasn't here." Appellant argued that the trial court violated OCGA § 17-8-57, which provides that "[i]t is error for any judge in any criminal case . . . to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused." But, the Court noted, the statute is only violated when the court's charge assumes certain things as facts and intimates to the jury what the judge believes the evidence to be." The Court found that the record did not show that the trial court expressed any opinion as to what had been proven at trial, and the court did not breach the limitations of OCGA § 17-8-57.

The co-defendant also contended that the trial court erred in denying his motion to merge the offense of armed robbery into the offense of hijacking a motor vehicle for purposes of sentencing. However, the Court found, the hijacking statute itself precluded a merger of these offenses.

Juveniles; Indictment

State v. Armendariz, A12A0194 (6/26/2012)

The State appealed from the trial court's order granting Armendariz's plea in bar based on the statute of limitations and finding that a second indictment against Armendariz was untimely, as it did not comply with the special procedural requirements of OCGA § 17-7-50.1. That statute provides that charges against a juvenile whose crimes are within the jurisdiction of the superior court must be presented to a grand jury within 180 days of his detention.

The record showed that Armendariz, who was fifteen years old at the time of the alleged crimes, was arrested after he sold two pistols and a small amount of methamphetamine to an undercover agent. A delinquency petition was filed with the juvenile court and, after a hearing, the juvenile court granted the State's request to transfer the petition to the superior court so that Armendariz could be tried as an adult. On August 16, 2010, a grand jury returned a 15-count indictment. On August 26, 2010, the court revoked Armendariz's bond and he was placed in restrictive custody. Armendariz filed a demurrer/motion to quash, arguing that twelve of the indictment's fifteen counts were void ab initio because they were not included in the juvenile court petition. The superior court granted the demurrer as to Counts 1 and 5 through 15 of the indictment, finding that because the juvenile court never considered those counts, it had not divested itself of its exclusive jurisdiction, thus rendering the superior court without jurisdiction. The superior court denied the State's motion for reconsideration. The State filed a new complaint and petition for delinquency in the juvenile court, re-alleging nine of the twelve quashed counts. After a hearing on the second juvenile court petition, the case was transferred back to the superior court, and a grand jury returned a second indictment on all nine counts on May 9, 2011. Armendariz filed a plea in bar-statute of limitations, arguing that the State failed to timely indict him pursuant to OCGA § 17-7-50.1. After a hearing, the trial court found that Armendiraz was detained beginning on August 26, 2010, and that OCGA § 17-7-50.1 mandated he be charged within 180 days of that detention. Because the second indictment was returned May 9, 2011, more than 250 days after Armendariz's detention, the trial court found that the second indictment was not timely returned and granted the plea in bar.

The State argued that the trial court erred because it should have found that OCGA § 17-7-50.1's 180-day time requirement tolled only as to the three surviving charges in the first indictment. The State reasoned that Armendariz could not have been detained on the nullified charges, and therefore the 180-day requirement never applied to those charges, meaning the second indictment was timely. The Court noted that the legislature did not address the issue of a subsequent indictment, and no case law resolved the issue. In interpreting OCGA § 17-7-50.1, the Court stated it must examine the intent of the General Assembly. The Court held that it was clear that OCGA § 17-7-50.1 (a)'s 180-day time clock began running when Armendariz was detained, as "the statute plainly adopts the date of detention . . . as the point from which the time is calculated." Furthermore, the Court noted that nothing in the statue indicated that the clock stopped running when some charges against him were deemed invalid, an event that preceded the expiration of the 180-day period. The State did not request an extension of time, as allowed by the statute and when the invalid portions of the first indictment were re-indicted out of time, they represented the State's failure to obtain the timely return of a true bill, as addressed in OCGA § 17-7-50.1 (b), which required that the case then be transferred back to juvenile court.

Juveniles; Sentencing

In the Interest of L.R. III A12A0594 (6/25/2012)

Appellant, a juvenile, entered an admission to acts which, if committed by an adult, would constitute the crime of aggravated assault, and further admitted to possession of a weapon by an underage person. Following a dispositional hearing, the juvenile court adjudicated appellant to be a designated felon and entered a restrictive custody commitment order requiring that he be confined in a youth development center for a statutorily authorized period of time, but expressly declined to give him credit for the time he served in pre-disposition detention. On appeal, he argued that his sentence was unlawful because the governing statute required that the juvenile court give him credit for time served. The Court agreed and vacated the trial court's order and remanded for resentencing.

The undisputed facts show that the State filed a delinquency petition alleging that appellant committed criminal attempt to commit murder, aggravated assault, possession of a weapon by an underage person, and participation in a criminal street gang. The allegations arose out of an incident in which appellant engaged in a fight with the victim and subsequently shot him, inflicting a non-lethal wound. At the time of the dispositional hearing, appellant had been detained a total of 225 days—as his case was being transferred between the juvenile and superior courts. The juvenile court accepted his admission to acts which, if committed by an adult, would constitute aggravated assault and to possession of a weapon by an underage person. The court also adjudicated him to be a designated felon. The juvenile court then recognized that he had "been incarcerated for quite a while," but nonetheless ordered that he be committed to

the Department of Juvenile Justice for roughly 45 months, with no less than 24 months to be served in a youth development center, and expressly stated in its order that appellant would receive "no credit for time served."

Appellant did not challenge the juvenile court's findings of fact nor did he assert that the court's imposition of restrictive custody fell outside of the statutorily authorized range of confinement. Rather, he contended that the juvenile court's failure to give him credit for time served rendered the restrictive custody order unlawful pursuant to OCGA § 15-11-63 (e) (1) (B). Upon reviewing the statutory language, the Court found that the juvenile court's commitment order on its face violated the plain language of OCGA § 15-11-63 (e) (1) (B) to the extent that the statute mandated that a juvenile's pre-disposition detainment must be credited to the time set for confinement. Therefore, the Court vacated the trial court's dispositional order of commitment as written and remanded this case to the trial court for resentencing.

Family Violence Battery; Physical Harm

Futch v. State, A12A0644 (6/25/2012)

Appellant was convicted of one count of battery (family violence-first offense) and one count of influencing a witness. Appellant's main contention of error was that the evidence was insufficient to prove his guilt beyond a reasonable doubt. The Court affirmed his conviction of influencing a witness but reversed as to the count of battery.

The record showed that appellant and his estranged wife, with their daughter, agreed to meet and after having lunch went to the grocery store. However, appellant noticed his wife was nervous and suspecting that she would try to leave, he "put his hand" on his wife's neck and warned: "You can think it, don't try it. I'll kill you, I'll kill her and I'll kill myself." Shortly thereafter, appellant's wife noticed that their daughter's hands had become sticky from a lollipop, and—seizing the opportunity—suggested that she take their daughter to the bathroom to wash the child's hands. In the bathroom, appellant's wife started "shaking and crying" with fear, and asked a woman in the bathroom "if she could please help [her]" by locating a manager or police officer. The Good Samaritan then tracked down a manager, who called the police. Appellant was indicted on one count of making terroristic threats and one count of battery (family violence-first offense). And then, prior to a trial, appellant contacted his wife and threatened her not to testify against him, warning, "[i]f you testify against me I'll kill you." Based on this threat, the charge of influencing a witness was added and presented as a Special Presentment to the Grand Jury and ultimately true billed. At trial, appellant's wife testified to the alleged battery and to appellant's threat to kill her if she testified against him.

Appellant contended that the evidence was insufficient to support his convictions of family-violence battery and influencing a witness. According to the statute, a defendant commits the offense of battery when he "intentionally causes substantial physical harm or visible bodily harm to another." As defined in the statute, the term "visible bodily harm" means bodily harm "capable of being perceived by a person other than the victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, or substantial bruises to body parts." And when a defendant commits the offense of battery against a spouse or other family member, then the offense constitutes family-violence battery.

The Court noted that whether substantial physical harm or visible bodily harm occurred was typically a question for the trier of fact. However, the Court stated that did not mean that any type of physical contact with the victim was sufficient to support a conviction for battery. To establish battery, the State must introduce evidence of pain or harm. Moreover, the State must introduce some evidence that the physical harm was substantial or visible to others. Indeed, the severity of the harm inflicted is precisely what distinguishes battery from the lesser offense of simple battery. In family-violence-battery cases, the State typically establishes substantial physical harm or visible bodily injury by introducing evidence that the defendant's conduct produced bruises, swelling, cuts, or some other physical mark. Evidence that the victim suffered significant pain is also sufficient to support a conviction for family-violence battery. However, the Court found that here, the victim's testimony that appellant "put his hand" on her neck fell short of the evidence required to permit a reasonable trier of fact to infer that she suffered substantial physical harm or visible bodily harm. Consequently, the Court held the evidence was insufficient to authorize a rational trier of fact to conclude beyond a reasonable doubt that appellant was guilty of family-violence battery.

Res Gestae; Rule of Sequestration

Hawkins v. State, A12A0459; A12A0460 (6/26/2012)

Two appellants were convicted of three counts of armed robbery and possession of a firearm during the commission of a crime for robbing a waitress, a cook and a customer at a restaurant.

One appellant asserted that the trial court erred by allowing the State to introduce evidence that he had used cocaine and marijuana before the robbery. However, another party to the robbery testified that the evening of the crime, he had used marijuana and cocaine, and he remembered the defendants smoking marijuana in the truck. Appellant argued that this testimony was not relevant and the only reason for introducing evidence of his marijuana use was to place his character in evidence. The Court stated that evidence is not inadmissible simply because it might incidentally reflect on the defendant's character. What is forbidden is the introduction by the State in the first instance of evidence whose sole relevance to the crime charged is that it tends to show that the defendant has bad character. The witness/accomplice's testimony that he and appellant used drugs on the day of the crime was relevant evidence of appellant's state of mind and admissible as part of the res gestae. The Court stated that whether the effects due to their use may have worn off by the time of the crime was a question for the jury to decide.

Another appellant argued that the trial court erred by denying his motion for mistrial when the assistant district attorney violated the rule of sequestration by informing one witness about the testimony of other witnesses. On cross-examination, appellant's counsel asked the witness whether he remembered the assistant district attorney telling him "what the story was to the jury already," and "what the evidence of all three attorneys was to the jury already." The witness answered affirmatively. After a lunch recess, appellant moved

a mistrial on the grounds of prosecutorial misconduct, specifically because the assistant district attorney had told the witness the substance of other witnesses' testimony. The trial court denied the motion, concluding that, based on the witness's responses the assistant district attorney was simply "trying to figure out what his testimony [was] going to be." The Court held that pretermitting whether the assistant district attorney violated the rule of sequestration, the trial court did not err by denying the motion for mistrial. The Court stated that when the rule of sequestration is violated, the violation goes to the credibility rather than the admissibility of the witness' testimony and a party's remedy for a violation of the rule is to request the trial court to charge the jury that the violation should be considered in determining the weight and credit to be given the testimony of the witness. The trial court responded to the first note by informing the jury that "those are facts. I cannot go into the facts. The facts are closed." The judge added, "That's immaterial to your consideration of the case anyway, as it would be explained by the re-charge that you have asked for." The trial court then recharged the jury on party to a crime.

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