Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 12, 2018

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THIS WEEK:

Mutually Inconsistent Verdicts; Venue

Jones v. State, S17G0118 (12/11/17)

Appellant was convicted of theft by conversion and by bringing stolen property into the state. Briefly stated, the evidence showed that on December 3, appellant rented a Mazda in Chattanooga, Tennessee. The signed rental agreement provided that appellant could drive the car no more than 800 miles per week and that appellant would return the car by December 9. At trial, appellant admitted that he had driven the car to California to see his son, stayed only a couple of hours, and then proceeded back. On December 9, however, appellant ran out of gas in Atlanta. When appellant did not return the vehicle on December 9, the rental company reported the car stolen on December 10. On December 11, a police officer driving on Interstate 75 in Gordon County recognized the car from a police alert for a stolen vehicle and stopped the car. Appellant contended that the verdict was mutually exclusive as to the two crimes charged because it was impossible for him to have stolen the car in Tennessee and to have possessed it lawfully in Georgia before converting it to his own use. The Court of Appeals disagreed. *Jones v. State*, 337 Ga. App. 687 (2016). The Supreme Court granted certiorari and reversed. The Court stated that verdicts are mutually exclusive where it is legally and logically impossible to convict the accused of both counts. To find appellant guilty of theft by bringing the stolen Mazda into Georgia, the jury must have determined that he knew or should have known the Mazda was stolen (by him) in another state. If appellant stole or converted the Mazda in another state, he could not at the same time have stolen or converted it in Georgia. Conversely, if appellant stole or converted the Mazda in Georgia, he could not have brought stolen property into the state under OCGA § 16-8-9, because that Code section applies to property stolen in another state. In finding appellant guilty on both counts, the jury necessarily reached two positive findings of fact that logically could not mutually exist. The verdicts were therefore mutually exclusive. Nevertheless, the State argued, the result of the theft by conversion was possessing the stolen motor vehicle in Gordon County, Georgia, which occurred within this state. The theft by conversion in the case was essentially a continuing offense. Furthermore, the State contended, appellant committed the theft by conversion before he entered Georgia, but because he "exercised control" over the already-converted vehicle in Gordon County, venue for the theft by conversion was proper there. However, the Court found, the State conflated venue with the elements of the crimes, and the Court of Appeals likewise improperly applied the applicable venue statute in its analysis. The purpose of OCGA § 17-2-2,

the general venue statute and OCGA § 16-8-11, the venue statute specified for theft crimes, is to provide for establishment of venue in situations in which there is either some doubt as to which county was the scene of the crime or where the crime in fact occurred in more than one county. But, whether two verdicts are mutually exclusive is an altogether different question than whether the State has met its burden of proving venue for the crimes charged. Appellant's exercise of control over the already-converted Mazda for purposes of establishing venue was only relevant to a charge of theft by conversion if the conversion took place within the state. Accordingly, the Court concluded, because the verdicts for theft by conversion and theft by bringing stolen property into the state were mutually exclusive in this case, reversal of both verdicts was required.

Statements; Threats

Carter v. State, S17A1412 (12/11/17)

Appellant was convicted of malice murder of Johnson, a 15-year-old, who was the son of a woman romantically involved with appellant. On September 25, 2011, a week after Johnson's mother told appellant that she was breaking up with him to spend more time with her son, appellant took Johnson out to the woods and shot him. Appellant then buried the body and told no one what happened to Johnson until October 5. At trial, appellant claimed that the shooting was accidental. Appellant contended that the trial court erred when it admitted evidence of pretrial statements that he made on October 5 and October 12. The Court noted that statements were the subject of a *Jackson-Denno* hearing, at which it was revealed that appellant was first interviewed on October 4 after being arrested on an unrelated charge. After the investigators concluded their interview of appellant, they allowed him to meet with Johnson's mother in the interrogation room. Johnson's mother reminded appellant that she knew that he had picked up Johnson from their home on September 25, and she repeatedly asked appellant to tell her where he had taken her son. About halfway through their 26-minute conversation, Johnson's mother told appellant that he was "not going to get out of here until … you tell us where [Johnson's] at." The next day, police officers drove appellant to Dublin, and he spontaneously told them that Johnson was dead and that they should drive him back to Hazlehurst so he could show them Johnson's body. The officers again read the *Miranda* warnings to appellant, and he subsequently led them to the shallow grave in which he had buried Johnson. Appellant contended that the incriminating statements that he made on October 5, and additional statements that he made on October 12, were improperly induced by the "threat" made by Johnson's mother on October 4 about him not "get[ting] out" until he told her where he had taken Johnson. The Court disagreed. Former OCGA § 24-3-50 provided that, "[t]o make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury." The Court agreed with the trial court's finding that appellant's statements were voluntarily made (and not improperly induced by anything said to him by Johnson's mother). The conversation between appellant and Johnson's mother was recorded and viewed by the trial court. Her statement about appellant not getting out of jail was a small part of a 26-minute conversation, in which she repeatedly asked appellant to tell her where he took her son after picking him up from their home. Appellant did not point to any evidence indicating that he was threatened by the statement that Johnson's mother made, that he believed she had any power to prevent him from getting out of jail, or that she was acting as an agent of the State when she made that statement. And, appellant acknowledged that he did not make any incriminating statements on October 4 after speaking with Johnson's mother. Moreover, the Court found no connection between the conversation with Johnson's mother on October 4 and appellant's incriminating statements on October 5 and 12. Instead, the undisputed evidence showed that the officers who were with appellant on October 5 had not asked him any questions about the case either before, during, or after their drive to Dublin. Instead, appellant had been waiting in the lobby of a Georgia State Patrol post in Dublin for about 10 minutes when he asked one of the officers if he could speak to him outside. Appellant then told the officer that "you guys have been real good to me, just bring me back to Hazlehurst and I'll take you to where [Johnson] is." The police officer then read the *Miranda* warnings to appellant, and the remaining conversations between the police officers and appellant were recorded and reviewed by the trial court. Similarly, appellant was read the *Miranda* warnings again on October 12, his interview with investigators on that day was recorded, and the trial court reviewed that recording too. The Court found nothing in those recordings suggested that appellant was concerned about the "threat" made by Johnson's mother on October 4. Instead, he repeatedly acknowledged that he had not been threatened to make a statement. Accordingly, the Court concluded that the trial court did not err when it found that his statements were voluntarily made as required by former OCGA § 24-3-50.

Prosecutorial Misconduct; Sentencing Errors

Dixon v. State, S17A1475, S17A1476 (12/11/17)

Appellants Dixon and Camps were convicted of malice murder, armed robbery and other crimes. Appellants argued that the trial court erred when it refused to declare a mistrial for prosecutorial misconduct. The record showed that on the fifth day of trial, Camps called a witness who was a close friend of the victim. On cross-examination, the prosecuting attorney asked the witness why he was upset. When the witness replied that he was upset at the death of the victim, his "best friend", the prosecutor asked: "Now, this is a murder trial. Did you see [appellants] talking and laughing a while ago?" The witness replied, "Yes I did." The alleged "talking and laughing" referenced by the prosecutor occurred during a break in trial, outside the jury's presence. Appellants contended that this question by the prosecutor was irrelevant, prejudicial, and impermissibly placed their character at issue. The Court stated that pretermitting whether the prosecutor's question was, in fact, improper, the trial court fully com-

plied with OCGA § 17-8-75 and did not abuse its discretion in refusing to grant a mistrial. The defense objected immediately after the cross-examination in question, at which point the trial court held a bench conference outside the jury's presence and rebuked the prosecutor, telling him that the question was "totally inappropriate" and "it's not going to happen in this courtroom." The court then brought the jury back, told them that the prosecution had been admonished, and instructed them "to disregard the question or any response that was elicited as a result of that question." Moreover, the trial court specifically asked the jurors to "indicate by raising your hand if you feel that you would be unable to disregard the previous question and response elicited by the State," and none of the jurors raised their hand. Thus, the Court found, a mistrial was not necessary to preserve appellants' right to a fair trial. The Court noted that the jury found appellants guilty of malice murder and armed robbery, among other crimes. At sentencing, the trial court erroneously merged the armed robbery into the murder and did not sentence appellants for the armed robbery. The State, however, did not raise this error by cross-appeal. The Court stated that it has the discretion to correct merger errors sua sponte — regardless of who is harmed by the error and who benefits from its correction — because a merger error results in an illegal and void judgment of conviction and sentence. There are powerful reasons to exercise that discretion when a merger error leads to an unauthorized conviction and sentence, particularly when it may cause the defendant to serve a total sentence that is longer than the law allows. A deprivation of liberty for even a moment more than the law permits is a serious wrong of constitutional magnitude. However, the Court continued, when a merger error benefits a defendant - resulting in a lesser sentence than the law required - and the State does not raise the error, it is not so clear that it ought to routinely exercise its discretion to correct the error. Such an error implicates no liberty interest. It poses no danger of unnecessary habeas proceedings, and judicial economy is not advanced by its correction. Moreover, the Court stated, an exercise of its discretion to correct such an error effectively penalizes the defendant for having brought his case before the Court. Although a defendant who has been convicted of a crime has neither a vested right to, nor a reasonable expectation of finality as to a pronounced sentence which is null and void, the Court nonetheless perceived some unfairness in a practice that effectively penalizes defendants for exercising their right to seek appellate review of their convictions and sentences. "For these reasons, we have determined that, when a merger error benefits a defendant and the State fails to raise it by cross-appeal, we henceforth will exercise our discretion to correct the error upon our own initiative only in exceptional circumstances." And, the Court found, no such exceptional circumstances here. Thus, it declined to exercise its discretion to correct the erroneous merger of the armed robbery, and affirmed the judgment.

Involuntary Medication; Sells

Henderson v. State, A17A1926 (12/6/17)

Appellant was indicted on four counts of aggravated assault. Following a hearing, the trial court granted the State's motion to medicate him involuntarily in an attempt to make him competent to stand trial. Appellant argued that the trial court failed to follow the four-part test created in *Sell v. United States*, 539 U. S. 166 (123 SCt 2174, 156 LE2d 197) (2003). The Court agreed. In *Sell*, the Supreme Court established a four-part test for determining the rare instances when it is constitutionally permissible to medicate involuntarily a mentally ill criminal defendant for the sole purpose of making him competent to stand trial. Under the four-part *Sell* test, the State must demonstrate: (1) important governmental interests are at stake; (2) involuntary medication will significantly further those governmental interests; (3) involuntary medication is necessary to further those governmental interests; and (4) the administration of the drugs to be used is medically appropriate for the defendant.

Here, the Court found, the State failed to demonstrate the second and fourth steps.The second part of the *Sell* test requires the trial court to determine that involuntary medication will significantly further the governmental interests in bringing the defendant to trial. This inquiry has two components. The court must find that administration of the drugs is substantially likely to render the defendant competent to stand trial and, at the same time, that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair. Thus, the relevant question is whether the State, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, has shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it. Accordingly, the *Sell* test is properly applied only in relation to an individualized treatment plan that specifies, at a minimum, (1) the drug or drugs the treating physicians are permitted to use on the defendant; (2) the maximum dosages that may be administered; and (3) the duration the drugs may be used before the physicians report back to the court. Here, however, the Court found that the trial court failed to specify the medication and dosages the treating physicians were permitted to administer to appellant and thus, the trial court's ruling with respect to the second part of the *Sell* test was plainly insufficient. And the Court held, the same failure to specify the medication authorized for appellant and its possible side effects on him was also fatal to the fourth part of the *Sell* test. Consequently, the Court vacated the trial court's order for involuntary medication and remanded the case for further proceedings.