Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 9, 2018

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THIS WEEK:

DUI; Implied Consent

Diaz v. State, A17A1821 (1/23/18)

Appellant was convicted of homicide by vehicle in the first degree, DUI (drugs), and failure to maintain a lane. The evidence showed that appellant was transported to the hospital after the two-car accident. At the hospital, the officer requested a blood sample from appellant and appellant signed a written consent form. A forensic toxicologist employed by the state crime lab testified that appellant's blood test results showed he had methadone and Clonazepam (benzodiazepine) in his system. Appellant argued that the State failed to prove the officer read him the implied consent notice because the officer did not record in his police report that he had given the notice. The Court disagreed. The Court noted that during the motion to suppress hearing, the officer testified that it was his standard practice and procedure to read the implied consent notice to individuals suspected of DUI prior to obtaining a blood sample. He testified that he read the required notice to appellant, but he acknowledged that he had accidentally failed to document in his internal report to the supervising investigator that he had read the notice. The officer further explained that he specifically remembered the details of this case because of its "magnitude" and because he had grown up near the collision site and passed it every day on his way to work. Further, the nurse who obtained appellant's blood sample testified that she was in the room with appellant when the officer arrived and that, as a matter of her standard practices and procedures, she never drew a patient's blood for law enforcement purposes unless she had personally observed the requesting officer read the implied consent notice to the patient. Thus, the Court found, viewing the evidence in favor of the trial court's ruling, there was no error in the trial court's conclusion that the officer read appellant the necessary implied consent notice before the blood sample was obtained. Moreover, the Court stated, even if the officer had, in fact, failed to read the implied consent notice, appellant's voluntary written consent to the blood test eliminated the need for the officer to read the notice. Thus, this alleged error lacked merit. Appellant also contended that he did not give his actual consent knowingly or voluntarily

because, at the time he signed the form, he was under the influence of pain medication administered to him in the emergency room, was in pain and in shock from his injuries, and was upset upon learning of the other driver's death. The Court stated that the determination of whether appellant knowingly and voluntarily gave actual consent to the blood test depends on a consideration of the totality of the circumstances. Here, the Court found, the undisputed evidence showed that appellant had methadone and Clonazepam in his system at the time of the collision. In addition, during the almost three hours between the collision and appellant's signing of the consent form, appellant was transferred to the hospital and received an "x-ray and/or CT scan" and other tests, as well as medication, in the emergency room. Even so, the emergency room's medical records showed that appellant was "oriented" and "obey[ed] commands" when he was examined at approximately 11:00 p.m. and when he was checked again five, thirty, and sixty minutes later. Furthermore, the officer testified that, when he spoke with appellant in the emergency room, 1) appellant was alert and appeared to understand what was going on; 2) appellant responded appropriately to questions; 3) appellant asked him questions about the collision and the condition of the other driver; 4) he (the officer) told appellant that the blood test was voluntary and did not threaten appellant or promise him anything in exchange for his written consent; and 5) there was nothing that suggested to the officer that appellant was not able to consent or was not freely and voluntarily giving his consent to the blood test. Moreover, the nurse who obtained appellant's blood sample testified about the medications appellant received in the emergency room and their effects on a patient's system. According to the nurse, the medication combination was typically used to relax a patient's muscles in order to reposition a dislocated joint, and, based upon the amount given to appellant, the drugs' effects would last for only five to seven minutes. The nurse also testified that the hospital only gave enough medication to appellant to take "the edge off" the pain, and opined that most people would be "totally lucid" a few minutes after receiving the drugs in the amounts given to appellant. It was undisputed that the officer obtained appellant's written consent to the blood test at 12:38 a.m., over an hour after the hospital gave appellant the medications at issue. Finally, the forensic toxicologist testified that only two drugs were found in appellant's blood sample: methadone and Clonazepam (benzodiazepine). Thus, the medications administered in the emergency room were no longer detectable in appellant's blood at the time the blood sample was obtained, which was after he signed the written consent form. Therefore, the Court concluded, the trial court did not err in finding that, under the totality of the circumstances, appellant freely and voluntarily consented to the blood test.

Criminal Street Gangs; Sufficiency of the Evidence

In re T. W., A17A1681 (1/25/18)

Appellant was found delinquent for committing the offenses of possession of a pistol by a person under the age of 18 and participation in criminal street gang activity. He argued that the evidence was insufficient to find he participated in criminal street gang activity. The Court agreed and reversed. The evidence showed that a corrections officer called the police after he noticed a group of young people at an abandoned house and saw one of them break a window. A police officer approached appellant as he was walking away from the house with Simmons, his cousin. The officer eventually searched appellant and found a pistol. During a police interview, appellant stated that Bell, another young person who had been at the house, originally had the gun. When police officers approached them, Bell slid the gun toward appellant and told him to take it because, as a juvenile, appellant would get a lighter sentence if he was caught. Although appellant claimed he initially refused to pick up the gun, he ultimately picked up the gun and put it in his pocket before walking away from the house. In 2014, Bell – then a juvenile – admitted to participating in street gang activity as a member of the Folk Nation gang. Simmons had previously been adjudicated delinquent for participating in street gang activity as a member of the "Bloods" street gang. The State's gang expert testified that it is common for ranking gang members "to pass guns to juveniles" who face reduced scrutiny and lesser sentences. He further opined that appellant "[wa]s an associate of … Bell's and the Folk Nation" gang, an umbrella street gang organization. The Court stated that in order to prove a violation of OCGA § 16-15-1 et seq, the State must show: (1) that appellant was associated with a criminal gang; (2) that he committed the act of possessing a firearm; and (3) that the firearm possession was intended to further the interests of the criminal gang activity. Here, the Court found, the only evidence that appellant was involved with a criminal street gang was that he was in the presence of two people who had previously been adjudicated as gang members and that he performed an act which might be expected of a junior gang member. However, the commission of an enumerated offense by a defendant is not itself sufficient to prove the existence of a criminal street gang. Thus, the State was required to present more evidence than the fact that appellant was in the mere presence of gang members and in possession of a gun belonging to a gang member (Bell). But, the State presented no evidence that appellant was wearing any colors or attire that were uniquely associated with the Folk Nation gang, that he had

ever displayed signs or symbols affiliated with Folk Nation gang membership, or that he had previously spent time with members of Folk Nation. Moreover, while appellant's conduct in socializing with gang members and accepting a gun from a Folk Nation gang member might create a mere suspicion that he was affiliated with the Folk Nation gang, such circumstantial evidence was legally insufficient to meet the State's burden of establishing that appellant was a member of or associated with the Folk Nation gang beyond a reasonable doubt. Accordingly, the Court reversed appellant's adjudication as a delinquent to the extent such adjudication was based upon a finding that appellant participated in a criminal street gang.

RICO; Media Access to Courtroom Proceedings

Roberts v. State, A17A1608 (1/25/18)

Appellant was convicted in Dekalb County of one count of violating the Georgia Racketeer Influenced and Corrupt Organizations Act ("RICO"), one count of identity fraud, one count of financial-transaction-card fraud, and two counts of exploitation of an elder person. During a hearing just prior to the start of her trial, appellant moved to prohibit a local news organization from setting up a camera and microphones in the courtroom. Appellant argued generally that she believed cameras would have an adverse impact on the court. She also maintained that cameras would impact her due-process rights, claiming that she had been harassed and subjected to abuse by officers at the jail because they had been made aware, via media reports, that she was charged with defrauding elderly people. Nevertheless, the trial court denied her motion, finding that the reasons provided by appellant did not outweigh the State's policy in favor of open judicial proceedings. Appellant argued that the trial court abused its discretion in denying her motion to prohibit news media from taking still photographs in the courtroom during trial. The Court disagreed. The Court noted that Rule 22 (P) of the Uniform Rules of Superior Court provides that "[a] request for installation and use of electronic recording, transmission, videotaping or motion picture or still photography of any judicial proceeding shall be evaluated pursuant to the standards set forth in OCGA § 15-1-10.1." And here, the Court found, appellant's allegations that she was harassed and abused by officers at the jail where she was held were troubling if true. However, she has failed to demonstrate how such actions, which (even if true) occurred *outside* the courtroom, impacted upon the due process and the truth-finding function of the judicial proceeding. Accordingly, the Court concluded, the trial court did not abuse its discretion in allowing cameras in the courtroom. Appellant also argued that the trial court erred in admitting into evidence earlier indictments for, and her guilty pleas to, similar crimes in Fulton Superior Court. The record showed that just before the State rested its case, the prosecutor sought to admit into evidence two indictments from Fulton Superior Court, in which appellant had been similarly charged with identity fraud, financial-transaction-card fraud, and exploitation of an elder person, and her guilty pleas to those offenses. Specifically, the State argued that the indictments and appellant's guilty pleas were admissible as evidence of a pattern of racketeering activity. Appellant argued that the prejudice in admitting the Fulton County indictments and her guilty pleas into evidence far outweighed their probative value, and thus, such evidence should have been excluded. The Court again disagreed. The RICO statutory provisions provide for evidence under OCGA § 16-14-3 (2) of "a carefully defined '[p]attern of racketeering activity' that the defendant has engaged in 'within four years after the commission of a prior incident of racketeering activity[.]'" This, in turn, comports with the provisions of OCGA § 16-14-2 (b), which specifically provides that RICO does not apply to isolated instances of criminal activity. Consequently, the Court held, given that the State was required to prove a series or pattern of illegal activities, the trial court did not err in admitting the Fulton County indictments and appellant's guilty pleas to them.

Search & Seizure

State v. Herman, A17A1978 (1/26/18)

Herman was charged with multiple counts of VGCSA. She moved to suppress, arguing that the traffic stop leading to her arrest was prolonged unconstitutionally to enable an open-air dog sniff. The court granted the motion and the State appealed. The Court stated that conducting an open-air dog sniff around a vehicle during a traffic stop does not itself violate the Fourth Amendment. Rather, the relevant question is whether the open-air dog sniff prolonged the stop for any amount of time. If it did not, the open-air dog sniff was lawful. Accordingly, the Court stated, the issue is whether the open-air dog sniff was done while some other task related to the mission of the traffic stop was still being conducted, so that the sniff did not add any time to the stop. The Court found that the undisputed evidence showed that police did not prolong the traffic stop in order to conduct the open-air dog sniff. After observing that the car had an unreadable temporary license tag and that the license tag light was not working, both of which are traffic violations, the officer initiated the stop. Before he began the computer check of the driver's license, the officer contacted the K-9 handler. The K-9 unit arrived within three to four minutes, and the handler conducted the open-air sniff while the officer was still checking the driver's license. The law is clear that checking a driver's license is part of

the mission of a traffic stop. Thus, the undisputed evidence showed that the open-air dog sniff occurred while the officer conducted the mission of the traffic stop, and it did not prolong the traffic stop at all. As a result, the open-air dog sniff did not violate the Fourth Amendment. Consequently, the Court held, the stop and Herman's subsequent detention were lawful. Accordingly, the Court reversed the trial court's order granting Herman's motion to suppress.

Motions in Arrest of Judgment; Indictments

Kaufman v. State, A17A1881 (1/26/18)

Appellant was convicted of three counts of stalking, two counts of criminal trespass, five counts of engaging in harassing communications, eleven counts of criminal attempt to commit a misdemeanor by violation of a protective order, and one count of violation of a protective order, all regarding the victim, S. Z. He contended that the trial court erred in denying his motion in arrest of judgment as to the stalking convictions charged in Counts 2 and 3 of the accusation, specifically arguing that those two counts were fatally defective. The Court disagreed. A motion in arrest of judgment must be based upon a defect that the accused might otherwise have challenged by a timely general demurrer. Under Georgia law, a general demurrer challenges the validity of an indictment by asserting that the substance of the indictment is legally insufficient to charge any crime, and it should be granted only when an indictment is absolutely void in that it fails to charge the accused with any act made a crime by the law. The Court noted that OCGA § 16-5-90 (a) (1) provides: "A person commits the offense of stalking when he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person. …" And in this matter, Count 2 of the accusation alleged that in Cherokee County, appellant "did unlawfully then and there commit the offense of stalking by contacting [S. Z.], without the consent of said person, for the purpose of harassing and intimidating said person, in violation of OCGA § 16-5-90 contrary to the laws of this State. …" Similarly, Count 3 alleged that in Cherokee County, appellant "did unlawfully then and there commit the offense of stalking by contacting [S. Z.] via mail, without the consent of said person, for the purpose of harassing and intimidating said person, in violation of OCGA § 16-5-90 contrary to the laws of this State. …" Appellant argued that Count 2 of the accusation was defective because it alleged neither the means by which he contacted S. Z. nor the place at which he contacted her. Similarly, he argued that Count 3 was defective because it also failed to allege the place where S. Z. received the letter appellant sent to her from a detention center. But, the Court stated, Georgia law does not require expression of a charge contained in an indictment, in the verbatim language of the statute. And here, while not verbatim, the allegations in Counts 2 and 3 sufficiently stated the offense of stalking in the terms and language of the statute. Consequently, the accusation was sufficient to put appellant on notice of the crimes with which he was charged; and he could not admit the facts as alleged and still be innocent of committing a crime under OCGA § 16-5-90 (a) (1). Moreover, the Court found, appellant's specific contention as to the manner in which Counts 2 and 3 of the accusation were defective was more of a special demurrer issue. And importantly, in contrast to a general demurrer, a special demurrer merely objects to the form of an indictment and seeks more information or greater specificity about the offense charged. But a special demurrer is waived if not raised before pleading to the merits of the indictment and cannot be raised after conviction by a motion in arrest of judgment. Thus, by failing to timely file a special demurrer, appellant waived his right to seek greater specificity in the form of the indictment, and he could not now resurrect his challenge to the indictment in the guise of a motion in arrest of judgment. Furthermore, the Court added, even assuming that Counts 2 and 3 of the accusation lacked adequate specificity, to prevail on a claim that the indictment failed to give adequate notice and thereby worked a substantial denial of due process, appellant was required to show prejudice. But at trial, appellant's defense was not a denial that he made repeated attempts to contact S. Z. Rather, the primary defense was that his attempts to contact S. Z. were not for purposes of intimidation or harassment but were based on his expressions of love and a desire to see his son. And, had the jury accepted that defense, it would have been effective against all of the stalking charges. Accordingly, the Court concluded, appellant failed to show that he was prejudiced by the alleged lack of specificity in the accusation.

Out of Time Appeals; Indigency

Roberts v. State, A17A1577 (1/29/18)

Appellant was convicted of child molestation in 2008. Years later, he filed a motion for an out of time appeal, accompanied by a sworn pauper's affidavit. When the trial court did not rule on the motion for out of time appeal, appellant filed a notice of intent to file mandamus, in which he requested that the trial court render a decision on his motion. This notice was accompanied by a sworn affidavit of indigence. The trial court construed this affidavit as a formal motion to proceed in forma pauperis, and denied it on the basis that it was not supported by any evidence. The Court noted that

while the merits review of the trial court's indigence determination is generally unauthorized, it may review the trial court's procedure in making its decision. OCGA § 9-15-2 (a) (1) provides: "When any party, plaintiff or defendant, in any action or proceeding held in any court in this state is unable to pay any deposit, fee, or other cost which is normally required in the court, if the party shall subscribe an affidavit to the effect that because of his indigence he is unable to pay the costs, the party shall be relieved from paying the costs and his rights shall be the same as if he had paid the costs." And here, the Court noted, appellant filed a sworn affidavit averring that due to his indigence, he cannot afford to pay required costs and fees. Further, the record did not evince that the State filed a traverse contesting the affidavit. Although the trial court was authorized to sua sponte inquire into the truth of the affidavit, a hearing was required if the trial court was inclined to deny appellant pauper's status. OCGA § 9-15-2 does not require appellant to submit additional evidence with his affidavit of indigence, and the affidavit alone was sufficient to entitle him to pauper's status in the absence of a traverse and hearing. Therefore, the Court reversed the order of the trial court and remanded for the trial court to either grant appellant pauper's status or hold an evidentiary hearing on the issue. In so holding, the Court noted that the trial court's suspected reliance on OCGA § 42-12-5, a part of the Prison Litigation Reform Act, was in error because the Act pertains only to civil proceedings and not to an out of time appeal in a criminal case.

Sentencing; Statutory Retroactivity

Hardin v. State, A17A1558, A17A1668 (1/30/18)

Appellant was convicted of three counts of rape, statutory rape, aggravated sexual battery, and thirteen counts of child molestation. He argued that in light of the Supreme Court's interpretation of former OCGA § 17-10-6.2 (b) in *State v. Riggs*, 301 Ga. 63 (2017), his sentences for statutory rape and child molestation are void because they do not each include a split sentence. The Court noted that the legislature recently passed legislation amending OCGA § 17-10-6.2, which became effective on July 1, 2017. OCGA § 17-10-6.2 (b) now makes clear that "the requirement that the court impose a probated sentence of at least one year shall only apply to the final consecutive sentence imposed." The State argued that while some of appellant's sentences would need to be vacated, his sentence as a whole was nonetheless proper because it complies with the current version of OCGA § 17-10-6.2 (b), which should be applied retroactively. The Court disagreed. The Court stated that laws generally prescribe only for the future; they cannot ordinarily have a retrospective operation, unless the language so imperatively requires. And here, OCGA § 17-10-6.2 includes no such retroactive language. Moreover, even if OCGA § 17-10-6.2 contained language requiring retroactive application, the ex post facto doctrine forbids the application of any new punitive measure to a crime already committed. An ex post facto law punishes conduct which was innocent when done; alters the quality or degree of, or inflicts a greater punishment for, a crime committed previously; requires less or different evidence than was required before the crime was committed; or deprives the offender of any substantial right possessed at the time the offender committed the act. Because the current form of OCGA § 17-10-6.2, which governs the punishment for certain sexual offenses, reduces the amount of probation required for sentencing on multiple counts, it alters the quality or degree of punishment for the crimes of which appellant was convicted. Thus, the Court held, this statute cannot retroactively apply to alter appellant's sentences, and he must be resentenced according to *Riggs*. Furthermore, the Court noted that on some of the child molestation counts, the trial court sentenced him to only probation. And, although neither party raised this as error, such probation-only sentences are void, unless the trial court enters written findings regarding each of the OCGA § 17-10-6.2 (c) (1) factors to justify the deviation below the mandatory minimum. The mandatory minimum sentence is five years for child molestation. Thus, the Court held, for those counts in which the trial court did not sentence appellant to the mandatory minimum, with the required split sentence, those sentences were also void for this additional reason.