Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 6, 2018

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THIS WEEK:

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Search & Seizure

Douglas v. State, S17A1348 (3/5/18)

Appellant was convicted of malice murder and associated offenses. The evidence showed that appellant's vehicle was stopped for failing to signal prior to making a right turn. Thereafter, the officers conducted a search of the vehicle based on the smell of marijuana emanating from the vehicle. Appellant contended that the trial court erred in denying his motion to suppress the evidence found in his vehicle. The Court disagreed.

The trial court found that appellant's vehicle was stopped for failing to signal a right turn during a "high traffic time" in a "high traffic area." The Court agreed with the trial court that the initial traffic stop was lawful. OCGA § 40-6-123 generally requires motorists to signal before turning or changing lanes. Nevertheless, relying on a line of decision from the Court of Appeals, appellant contended that OCGA § 40-6-123 does not always require the use of a turn signal. See, e.g., *Clark v. State*, 208 Ga. App. 896 (1) (432 SE2d 220) (1993) (physical precedent only). But, the Court stated, even if it were to accept the Court of Appeals' reading of OCGA § 40-6-123 in *Clark* and its progeny, those cases involve roadways with little, if any traffic. Here, however, the trial court found that appellant failed to signal before a right turn in a "high traffic area" at a "high traffic time" with numerous cars in the vicinity of the intersection. Thus, the Court found, the officers had cause to initiate a traffic stop.

The Court also agreed that probable cause sufficient to justify a warrantless search of the vehicle developed during the course of the traffic stop. Based on the testimony presented at the suppression hearing, the trial court found that the officers had the training and experience to recognize the smell of marijuana and that, during the course of the stop, the officers detected just such an odor emanating from the vehicle. The odor of marijuana provided probable cause, authorizing the search.

HGN Testing; Foundation for Admission

Walsh v. State, S17G0884 (3/5/18)

Appellant was charged with DUI. The evidence showed that after appellant was stopped, the officer conducted field sobriety tests, including a horizontal gaze nystagmus ("HGN") test. Although appellant was wearing eyeglasses, the officer did not ask him to remove his eyeglasses during the test. The officer testified that his training requires him to have the subject remove his eyeglasses before an HGN test is performed, and he could not recall any other case in the more than 800 HGN tests he had administered in which he did not ask the suspected offender to remove

his eyeglasses. The officer testified that the manner in which this test was conducted was a "substantial deviation" from his training regarding proper HGN procedures. He also testified that this deviation from the correct protocol was nonetheless "substantial compliance with the guidelines [that could] still yield informative results," that it did not cause a difference in the test results, and that he was still able to make a fair observation of the six validated clues of the HGN test.

The trial court found that the State failed to meet its burden to establish that the HGN test was performed in an acceptable manner and granted appellant's motion to exclude evidence derived from it. The State appealed and the Court of Appeals reversed. *State v. Walsh*, 339 Ga. App. 894 (2016), The Supreme Court granted certiorari.

Relying on *State v. Tousley*, 271 Ga. App. 874 (2005), the Court stated that for the admission of HGN test results, the State has a two-prong burden. First, show that the general scientific principles and techniques involved are valid and capable of producing reliable results — a burden which can be met by the trial court taking judicial notice of that fact in the case of HGN testing. Second, the person performing the test substantially performed the scientific procedures in an acceptable manner. Here, the Court noted, the trial court concluded that the State failed to present evidence that performing the HGN test while a subject was wearing glasses was an appropriate manner in which to conduct the test. But, the trial court also scrutinized the officer's testimony and found not only did the officer testify that conducting an HGN test in such a manner was contrary to his training regarding proper procedures, but that allowing such a test to occur was contrary to "standard practice," and contrary to "better practice." Accordingly, the Court found, it was plain that the trial court found a conflict in the officer's testimony that, allowing a subject to wear glasses is a "substantial deviation" from the proper procedures for conducting the test, and that doing so was nonetheless "substantial compliance" with the guidelines such that the test was conducted in an acceptable manner. As that evidence was inconsistent and in conflict, the trial court could reject some portion of it, and was certainly authorized to reject the testimony that the test was done in substantial compliance with the guidelines. And, under the trial court's resolution of that conflict, it was clear that the State failed to meet its foundational burden to show that the officer substantially performed the scientific procedures in an acceptable manner. Accordingly, the Court held, it was error for the Court of Appeals to state that "the evidence that [appellant]'s glasses remained on while the HGN test was administered goes to the weight of the test results, not their admissibility."

In so holding, the Court stated that the crux of the matter is that the HGN test, and its procedures, have been accepted by a sufficient number of courts because the test and procedures have reached a scientific state of verifiable certainty. It is the examination by multiple courts, and the consequent establishment of verifiable certainty to those courts, that authorizes a trial court to take judicial notice of the reliability of the HGN test. The established procedures have created that reliability, and that is why the State must produce satisfactory evidence that the test at issue was done consistently with those procedures. The proper administration of appellant's HGN test was part of the State's foundational burden, and under the evidence presented during the hearing on the motion to suppress, the trial court did not clearly err in granting the motion. Consequently, it was error for the Court of Appeals to reverse the ruling of the trial court.

Alternate Jurors; Expert Testimony

Eller v. State, S17A1549 (3/5/18)

Appellants Eller and Murphy were convicted of malice murder, felony murder and other crimes. The evidence showed that the victim had been shot in the head. They contended that the trial court erred by allowing the two alternate jurors to remain in the jury room during deliberations. The Court noted that OCGA § 15-12-171 provides that upon final submission of the case to the jury "the alternate jurors shall not retire with the jury of 12 for deliberation," and if the court deems it advisable that one or more of the alternate jurors be kept available, they shall be kept "separate and apart from the regular jurors, until the jury has agreed upon a verdict." If an alternate juror does, in fact, sit in on the jury's deliberations over the defendant's objections, there is a presumption of harm to the defendant that the State must overcome by presenting affirmative evidence that the alternate juror did not participate in deliberations and that the jury was not influenced by the alternate juror's presence.

Here, the Court found, at the motion for new trial hearing the State submitted affidavits from all 12 jurors and both alternates. The affidavits stated that the alternates followed the trial court's instructions while in the jury room and did not participate in jury deliberations, and that the jurors were not influenced by the alternates. Thus, the Court found, although it was error for the alternate jurors to be allowed to retire with the other jurors during deliberations, appellants failed to show that they were harmed by this error.

Moreover, the Court noted, appellants waived any claim of error. When the trial court asked the attorneys about the alternate jurors, both defense counsel acquiesced in allowing them to go into the jury room with instructions that they not to participate. Nevertheless, the Court stated, "We should be clear…that the trial court's action was inappropriate, and we do not approve of permitting alternate jurors to be present during deliberations. To do so is plainly contrary to Georgia law. See OCGA § 15-12-171."

Appellants also argued that their respective counsel were ineffective for failing to object to expert testimony that the gunshot wound was inconsistent with accident. The Court noted that under OCGA § 24-7-704, in criminal proceedings, expert witnesses "testifying with respect to the mental state or condition of an accused" cannot "state an opinion or inference as to whether the accused did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto" because "[s]uch ultimate issues are matters for the trier of fact alone." But "the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses." OCGA § 24-7-707. The Eleventh Circuit has noted that the operative language of Rule 704(b) says that an expert may not state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. In other words, the expert cannot expressly state a conclusion that the defendant

did or did not have the requisite intent. Our Rule 704 (b) likewise provides that an expert may not "state an opinion or inference as to whether the accused did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." Thus, the Court stated, it agrees with the Eleventh Circuit that the Rule forbids experts from expressly stating a conclusion that the accused did or did not have the requisite intent. Whether the accused committed an intentional act to harm the victim is a different question than whether someone likely committed an intentional act to harm the victim.

Here, the Court found, because the medical examiner's testimony that the victim's injuries were inconsistent with an accidental shooting did not supply or mandate a conclusion that appellants did or did not have the requisite mental intent for any crime or defense, there was no violation of Rule 704. And because the expert's opinion was based on her specialized knowledge and training, as permitted by Rule 707, her testimony was admissible and any objection to it would have been meritless Accordingly, the Court concluded, appellants' claim of ineffective assistance of trial counsel lacked merit.

Edge; Sentencing

Anthony v. State, S17A1722, S17A1723, S17A1724 (3/5/18)

Appellants were convicted of murder and criminal street gang activity in connection with the beating and death of the victim. The evidence, briefly stated, showed that appellants wore red clothing and were associated with a criminal street gang known as "Re-Up." The victim was intoxicated, and he waved a blue bandana in sight of the men and started talking about the "Crips" gang. Appellants beat the victim and left him unconscious on a darkened roadway, where he almost immediately thereafter was struck by a car and killed.

The Court found that the evidence was legally sufficient to authorize the jury to find appellants guilty of felony murder predicated upon criminal gang activity involving a simple battery, as well as criminal gang activity involving an aggravated assault and criminal gang activity involving an aggravated battery. However, because the jury also found appellants guilty of voluntary manslaughter as a lesser included offense of malice murder, citing *Edge v. State*, 261 Ga. 865 (1992), appellants argued that the trial court should have set aside the verdicts on felony murder and convicted them only of voluntary manslaughter. The Court disagreed.

Here, the Court found, appellants were found guilty and convicted of felony murder predicated on their unlawful participation in criminal gang activity through the commission of a simple battery. As with the aggravated assault in *Edge*, the simple battery in this case was integral to the homicide. And the Court acknowledged, most every voluntary manslaughter will involve a simple battery, and culpability for a simple battery ordinarily is susceptible of mitigation by proof of provocation and passion. But, the Court found, unlawful participation in criminal gang activity through the commission of a simple battery is not just a simple battery. It also involves association with a criminal street gang and a nexus between the simple battery and the activities of the criminal street gang. Unlawful participation in criminal gang activity through a crime of violence involves much more than the mere act of violence that may be integral to a homicide. Not all (or even most) voluntary manslaughters involve criminal gang activity, so there is no danger that felony murder premised on criminal gang activity would effectively eliminate voluntary manslaughter. And the culpability for unlawful participation in criminal gang activity is generally not susceptible of mitigation by the sort of provocation and passion that voluntary manslaughter involves. Thus, the Court determined, *Edge* has no application in this case, and the trial court properly convicted appellants of felony murder predicated upon unlawful participation in criminal gang activity through the commission of a simple battery.

The Court then considered whether the trial court erred when it failed to merge the crimes of unlawful participation in criminal gang activity through an aggravated assault and an aggravated battery into the offense of felony murder predicated on unlawful participation in criminal gang activity through a simple battery. The Street Gang Act provides that "[a]ny crime committed in violation of [the Act] shall be considered a separate offense," OCGA § 16-15-4 (m), and the Court previously rejected the idea that all gang-related offenses must be gathered into a single gang activity charge. Accordingly, unlawful participation in criminal gang activity through the commission of predicate crimes of violence at different locations and different times against different victims may form the basis for separate convictions under the Street Gang Act. Here, however, all of the unlawful participation in criminal gang activity of which appellants were found guilty occurred at the same location, occurred at the same time of day, and was directed against the same victim (Chellew).

The State argued that the Street Gang Act permits multiple convictions for violations of OCGA § 16-15-4 (a) when a person associated with a criminal street gang participates in criminal gang activity by committing multiple predicate crimes, even when those predicate crimes are committed in one place, at one time, and against one victim. But, the Court stated, even if the State were right, that only raises a question about whether this case actually involves multiple predicate crimes. That a criminal act might be charged in a variety of ways does not mean invariably that it will support multiple convictions and sentences. Here, all of the predicate crimes through which the appellants participated in criminal gang activity involved precisely the same conduct — the appellants striking Chellew with their hands and feet (without any indication of an intervening interval in the strikes). Standing alone, those predicate crimes would merge together, leaving only one predicate crime to form the basis for unlawful participation in criminal gang activity in violation of OCGA § 16-15-4 (a).

Thus, the Court found, on the facts presented in this case, the offenses of unlawful participation in criminal gang activity through the commission of an aggravated assault and unlawful participation in criminal gang activity through the commission of an aggravated battery merge with the offense of unlawful participation in criminal gang activity through the commission of a simple battery, which formed the basis for - and properly was merged into - the felony murder of which the appellants were convicted and sentenced. Accordingly, appellants' separate convictions for criminal gang activity involving aggravated assault and aggravated battery were vacated.

Recidivist Sentencing; Jurisdiction to Re-sentence

Loveless v. State, A17A1728 (2/26/18)

Appellant was convicted trafficking in methamphetamine and other offenses. He was sentenced on the trafficking offense under OCGA § 16-13-30 (d) and sentenced as a recidivist under only OCGA § 17-10-7 (a) even though he had three prior felony convictions. After his conviction was affirmed, *Loveless v. State*, 337 Ga. App. 894 (2016), the trial court sua sponte found that its original sentence was void and resentenced him to a new sentence of 30 years, to serve 25 years under OCGA § 16-13-3(e) and under both subsection (a) and (c) of OCGA § 17-10-7.

Appellant first argued that the trial court lacked jurisdiction to resentence him because he had already begun serving his sentence. The Court disagreed. In reviewing OCGA § 16-13-30 (d) and OCGA § 16-13-3(e), the Court found that because appellant was convicted of a trafficking offense, it was clear that the trial court initially erroneously sentenced appellant under OCGA § 16-13-30 (d) and not OCGA § 16-13-31 (e). Accordingly, the Court held, appellant's initial sentence was void, and the trial court retained jurisdiction to resentence appellant to a maximum of 30 years (as opposed to his prior sentence of life), to serve 25 years.

Next, appellant contended that the trial court erred in sentencing him under subsection (a) *and (c)* of OCGA § 17-10-7 and that because imposition of OCGA § 17-10-7 (c) makes him ineligible for parole, the trial court impermissibly increased his sentence. The Court again disagreed. The Court found that OCGA § 17-10-7 (c) applies to appellant because he was convicted of three prior felonies. And, although appellant's new sentence does not offer the possibility of parole due to the application of OCGA § 17-10-7 (c), no presumption of vindictiveness applies to this situation because appellant unsuccessfully challenged his conviction on direct appeal and, upon the issuance of the remittitur, the trial court sua sponte determined that the original sentence was void and resentenced him. Accordingly, the trial court did not err by resentencing him and, upon doing so, sentencing him as a recidivist under OCGA § 17-10-7 (c) when it had not done so previously.

Nevertheless, appellant argued, the trial court erred in sentencing him as a recidivist under OCGA § 17-10-7 (c) when one of his three prior offenses was the crime of simple possession of a controlled substance under OCGA § 16-13-30 (a). But, the Court stated, OCGA § 17-10-7 (b.1) specifies that "[s]ubsections (a) and (c) of this Code section shall not apply to a second or any subsequent conviction for any violation of subsection (a), paragraph (1) of subsection (i), or subsection (j) of Code Section 16-13-30." Here, the conviction for which appellant was being sentenced was for a violation of OCGA § 16-13-31 (e), not a violation of OCGA § 16-13-30 (a), OCGA § 16-13-30 (i) (1), or OCGA § 16-13-30 (j). Thus, OCGA § 17-10-7 (b.1) was not implicated, and the trial court did not err by applying both OCGA § 17-10-7 (a) and (c) when resentencing him under the proper Code section.

Finally, appellant contended that the trial court erred in sentencing him as a recidivist under OCGA § 17-10-7 (c) when one of his three prior offenses was a federal charge of counterfeiting, which has no precise counterpart in Georgia law. The Court disagreed again. The Court noted that at the resentencing hearing, appellant admitted that federal counterfeiting can constitute the crime of forgery in Georgia. In fact, the Court noted, it has held in a number of cases that a defendant who possesses counterfeit dollar bills commits the offense of forgery. And the provisions of both 18 USC § 472 and Georgia's statute criminalizing forgery in the second degree would criminalize the conduct to which appellant pleaded guilty in federal court, i.e., aided and abetted by others, he possessed fraudulent "analog, digital, and electronic images of obligations of the United States, that is, Federal Reserve Notes," with an intent to defraud. Accordingly, the Court concluded, the trial court did not err by considering appellant's federal conviction for counterfeiting when it resentenced him as a recidivist under OCGA § 17-10-7.

Recidivist Sentencing; Burglary convictions

Nordahl v. State, A17A1360 (2/26/18)

Appellant pled guilty to multiple burglary counts. The trial court sentenced him as a recidivist under OCGA § 17-10-7 (a) and (c) based on a prior New York burglary conviction, a New Jersey burglary conviction, and a federal conviction for conspiracy to transport stolen goods. Citing *Mathis v. United States*, ___ U. S. ___ (136 SCt 2243, 195 LE2d 604) (2016), appellant contended that the trial court erred in finding that his prior federal conviction for conspiracy to transport stolen goods was a crime, which, if committed in Georgia, would be considered a felony under OCGA § 17-10-7. In *Mathis*, the U. S. Supreme Court interpreted the Armed Career Criminals Act (ACCA) and used an "elements of the crime" test to determine if a prior conviction would be applicable to enhance a sentence under the ACCA. Appellant, employing this "elements only" test, argued that his prior conviction for the offense of conspiracy to transport stolen goods could not be considered a felony in Georgia because its elements are not the same as any Georgia felony offense, including conspiracy to commit theft by receiving, as the State argued. But, the Court found, in *Mathis*, the Supreme Court was specifically directing federal courts as to the manner in which to apply a federal law - the ACCA. And nothing in the opinion can be construed as the Supreme Court of the United States mandating that state courts similarly employ an "elements only" test when interpreting and applying state-specific sentence-enhancing statutes.

As the State argued, the offense under Georgia law that is most closely related to the aforementioned federal offense is theft by receiving. And in 2000, when appellant committed the federal offense, if the value of the property that was the subject of the theft exceeded $500, the defendant was subject to imprisonment for up to ten years. Thus, such an offense was certainly punishable as a felony. Given these particular circumstances, in pleading guilty to the federal offense, appellant admitted to conspiring to possess and transport property, which he knew to be stolen and which was worth well in excess of $500. Consequently, the Court found, in submitting evidence of appellant's guilty plea to the federal charge of conspiracy to transport stolen goods, as well as the other two burglary charges, the State met its statutory burden of proving that appellant was convicted of conduct which would be considered felonious under the laws of this state. Accordingly, the trial court did not err in sentencing appellant as a recidivist under OCGA § 17-10-7 (a) and (c).

Nevertheless, appellant argued, the

trial court erred in sentencing him under OCGA § 17-10-7 (a) and (c) rather than the recidivist provisions of OCGA § 16-7-1 (b), which specifically pertain to repeated burglary convictions and, unlike OCGA § 17-10-7 (c), would not have mandated that he serve the maximum time provided in the sentence. The Court disagreed.

It is well established that when any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of the two penalties administered. But that principle does not control here unless OCGA § 16-7-1 (b) and OCGA § 17-10-7 (a) are "conflicting provisions." And although any ambiguities in criminal statutes must be construed most favorably to the defendant, OCGA § 16-7-1 (b) and OCGA § 17-10-7 can be read in harmony. Specifically, the former specific recidivist statute applies when the defendant is a habitual burglar having only prior convictions for burglary, whereas the latter general recidivist statute applies when the defendant is a habitual felon with prior convictions for other crimes. Thus, construing the two provisions together, the General Assembly intended that a habitual burglar be given the benefit of the trial court's sentencing discretion, but it further intended, that a habitual burglar who is also a habitual felon be subject to the imposition of the longest sentence prescribed for the subsequent offense for which he or she was convicted. And here, because appellant's federal conviction did, in fact, constitute conduct which would be considered felonious under the laws of this state, his conviction represented not only his third burglary conviction but also his fourth felony conviction. Thus, he fell squarely within the ambit of OCGA § 17-10-7 (c). Accordingly, the Court concluded, the trial court properly sentenced appellant as a recidivist under the general recidivist provisions contained that statute rather than under OCGA § 16-7-1 (b).

Rule 404 (b); Certified Copies of Convictions

Harvey v. State, A17A1789 (2/27/2018)

Appellant was convicted of first degree burglary and felony theft by taking. The evidence showed that the offenses were committed in 2014. At trial, the judge permitted the State, pursuant to OCGA § 24-4-404 (b) to present "other acts" evidence. Specifically, appellant's guilty plea to a 1990 accusation charging him with committing six separate residential burglaries (i.e., illegally entering a person's "dwelling house" without authority and with the intent to commit a theft) over a two-month period. In the same accusation, appellant pled guilty to two felony and three misdemeanor charges of theft by receiving involving the illegal "disposal" of items he knew to be stolen, which included a diamond cluster ring, a 14K diamond ring, and similar items. In addition, the State showed that appellant pled guilty to a 1996 indictment that charged him with committing six counts of residential burglary in a single month and one count of burglarizing the office of an apartment building.

Appellant contended that the trial court erred in admitting this evidence. Specifically, he argued that the prior crimes occurred too long ago to be probative in this case. However, the Court noted, appellant failed to cite to any authority that stands for the proposition that temporal remoteness, standing alone, is a basis for automatically excluding otherwise relevant and admissible evidence. It is true that temporal remoteness is an important factor to be considered when determining whether other acts evidence should be admitted, because it depreciates the probative value of the evidence. However, the Court stated, the Eleventh Circuit has refrained from adopting a bright-line rule with respect to temporal proximity because decisions as to impermissible remoteness are so fact-specific that a generally applicable litmus test would be of dubious value. Accordingly, appellant bears a heavy burden in demonstrating an abuse of the court's broad discretion in determining if an extrinsic offense is too remote to be probative. And, here, the Court found, given the facts of this case and the patent similarity between the prior crimes and the instant burglary, the trial court was authorized to find that the appellant failed to meet his burden of showing that the prior crimes occurred so long ago that their probative value was outweighed by their prejudicial value.

Appellant also contended that the trial court erred in admitting the other acts evidence when the State presented only certified copies of his guilty pleas and did not call any living witnesses to testify about the crimes. He argued that without testimony to establish the facts surrounding the prior acts, the State failed to show that those acts were sufficiently similar to the crimes charged in the instant case. However, the Court found, the cases relied upon by appellant were decided before the General Assembly's adoption of the new Evidence Code. Thus, the Court concluded, having found that the evidence of appellant's prior crimes met the requirements for admissibility under Rule 404 (b), and considering the patent similarities between the prior crimes and those at issue, this argument presented no reversible error.