Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 11, 2018

THIS WEEK:

Shoplifting; Nolo Contendere Pleas

Beasley v. State, A17A1809 (3/15/18)

Appellant was charged with theft by shoplifting and giving a false name and date of birth. The indictment informed him that he was being charged with felony theft by shoplifting under OCGA § 16-8-14 (b) (1) (c) because he had three prior convictions of theft by shoplifting. Appellant filed a motion to quash and special demurrer, arguing that he could not be charged with felony theft by shoplifting because one of his prior charges was resolved by a plea of nolo contendere. The trial court denied appellant's motion. The Court granted appellant's application for interlocutory appeal.

The Court noted that the nolo contendere statute directs, "Except as otherwise provided by law, a plea of nolo contendere shall not be used against the defendant in any other court or proceedings as an admission of guilt or otherwise or for any purpose. …" OCGA § 17-7-95 (c). The sentencing provision in the theft by shoplifting statute provides: "Upon conviction of a fourth or subsequent offense for shoplifting, where the prior convictions are either felonies or misdemeanors, or any combination of felonies and misdemeanors, as defined by this Code section, the defendant commits a felony . …" OCGA § 16-8-14 (b) (1) (C). Moreover, "conviction" does not appear in the definitions provision of the statutes regarding theft, OCGA §§ 16-8-1 through 16-8-23. Thus, the Court found, under the plain language of the applicable statutes, a nolo contendere plea does not count as a prior conviction for sentencing purposes under the theft by shoplifting statute.

Moreover, the Court found, the prior shoplifting convictions that would elevate appellant's mandatory minimum sentence are not merely sentencing factors, but are an *element of the shoplifting offense*. Thus, the Court held, because it has not approved the use of nolo contendere pleas when proof of the prior conviction is an element of the crime, the State may not use appellant's nolo contendere plea to shoplifting to elevate the current case to a felony. In so holding, the Court overruled *Spinner v. State*, 263 Ga. App. 802 (2003) and *James v. State*, 209 Ga. App. 389, 390 (2) (1993). Furthermore, the Court cast doubt on the continued validity of *Miller v. State*, 162 Ga. App. 730, 732-734 (4) (b) (1982), overruled in part on other grounds in *Matthews v. State*, 268 Ga. 798, 803 (4) (493 SE2d 136) (1997). *Miller* cannot support the conclusion in *James* that a trial court may consider a plea of nolo contendere to enhance a sentence simply because "this court previously has sanctioned the use of convictions resulting from pleas of nolo contendere in sentencing under recidivist statutes." *James*, 209 Ga. App. at 390 (2) (citations omitted). Thus, the Court overruled *James* to the extent it so holds and overruled *Spinner* to the extent it relies on *James*.

Consequently, in accordance with the plain language of the relevant statutes and because any fact that serves to enhance a mandatory minimum sentence is an element of the crime, and nolo contendere pleas cannot be used when proof of a prior conviction is an element of the crime, the Court held that the trial court erred in finding that the State may use appellant's nolo contendere plea to shoplifting to enhance the current shoplifting charge to felony status.

Rule 404 (b); Modus Operandi

State v. Plaines, A17A1433 (3/15/18)

After Andre Plaines was charged with second-degree burglary, second-degree criminal damage to property, possession of tools for the commission of a crime, and smash-and-grab burglary, the State filed a motion of its intention to introduce other-act evidence of a different second-degree burglary in the same county to which Plaines had pled guilty. The evidence showed that Plaines was charged with a burglary of a Red and White grocery store in which an orange circular saw was used to cut around the cash box of an ATM. The other act evidence was a burglary of a Food Lion grocery store in which an orange circular saw was also used to cut into an ATM. The trial court found that there were similarities between the two burglaries: the fronts of both stores were entered with crowbars; the ATMs were cut into with orange circular concrete saws; and the saws appeared to be identical. But the trial court also found differences in that there were three individuals involved in the Red and White burglary and only two involved in the Food Lion burglary (although only one was apprehended); only one individual, Plaines, entered the Food Lion, while the surveillance video of the Red and White burglary showed three individuals inside the store; and a stolen F-250 was only present at the Red and White burglary. The court also noted the detective at first stated that he had never seen a circular saw used in this manner, but later testified that he was aware of a third burglary where a circular saw was used to cut into an ATM, and one at which a different law enforcement officer testified about the third burglary. The trial court concluded that "nothing" linked Plaines to the use of an orange concrete saw in the Red and White burglary and that the use of this implement was not "so unique [as] to demonstrate a modus operandi or signature crime." The trial thus held that the evidence of the Food Lion incident was irrelevant such that it need not consider whether the probative value of that evidence outweighed its prejudicial effect.

The State argued that because Plaines's identity was established as the perpetrator of the Food Lion burglary, and because the Red and White burglary showed a modus operandi in common with the Food Lion burglary, the trial court abused its discretion when it concluded that evidence of the Food Lion burglary was irrelevant as to the Red and White burglary. The Court agreed.

Here, the Court found, the two burglaries at issue both occurred in the same county within three weeks of each other and used virtually identical tools (crowbars and an orange concrete saw) as well as methods (prying doors and breaking windows) to accomplish the objective of obtaining cash from an ATM after business hours. The trial court thus committed clear error when, in the face of its own finding that crowbars and an orange concrete saw were used in both crimes, including the one to which Plaines pled guilty, it concluded that there was "nothing" connecting Plaines to the use of these tools in the Red and White burglary such that his guilty plea in the Food Lion case was irrelevant. On the contrary, the State established a "logical connection" between the two burglaries on the issue of Plaines's identity, based on more than a mere inference of Plaines's propensity to commit burglary, sufficient to satisfy the first test of relevance for admissibility of that other-acts evidence under Rule 404 (b). Further, this logical connection between the modus operandi of the two incidents was sufficient to outweigh those dissimilarities found by the trial court, such as the presence of three rather than two individuals or the use of a stolen F-250 in the Red and White burglary. The Court also noted that Plaines's guilty plea to the Food Lion charges satisfies Rule 404 (b)'s third requirement of "sufficient proof to enable the jury to find that the accused committed" those other acts as a matter of law.

Consequently, because the trial court clearly erred when it concluded that Plaines's involvement in the Food Lion burglary had no relevance as to the issue of his identity and participation in the Red and White burglary, the Court vacated its judgment and remanded with direction that the trial court perform a discretionary balancing test as to whether the similarities between the Red and White burglary and the Food Lion burglary make the latter "highly probative" as to Plaines's identity and participation in the Red and White burglary.

Hearsay; Effect on Hearer

Lynn v. State, A17A2117 (3/15/18)

Appellant was convicted of one count of burglary and one count of theft by taking. The evidence, briefly stated, showed that the victim owned a retail garden center. The bank foreclosed and the foreclosure sale was to be on Tuesday. The victims held a liquidation sale and then began removing to their residence the several hundred items that had not sold. They worked through the week but did not finish, then locked the property and barricaded the driveways for the weekend. When they returned on Monday, almost all the property was gone. A neighbor said that he had seen appellant on the property Sunday removing items.

Appellant came to the garden center while law enforcement was there. He told an investigator that he had taken some of the property, which was on a trailer at his house. Appellant returned to the nursery within the hour with his truck and trailer. Several missing items, including four or five metal tables, a tree boom, some broken brooms, and bales of pine straw, were on the trailer. Lynn said that was all the property he had taken. However, later that night, the victim accompanied law enforcement officers to appellant's residence to identify property that had been taken from the nursery but not returned by appellant. The victim removed 15 to 20 truckloads of items from appellant's property.

Appellant testified on his own behalf. He testified that he was interested in buying the real estate at the foreclosure sale, so that Sunday he went to the garden center to assess it. While he was there, he met a woman named Sheila Lanier. The trial court refused to allow appellant to testify about the content of his conversation with Lanier on the ground that the testimony would be hearsay. But he did allow appellant to testify that after meeting Lanier, appellant believed that the property at the garden center had been abandoned and that he had permission to take it. Appellant

testified that he returned to his house, then he, his wife, and his children drove two trucks, one with a trailer, to the garden center and spent 20 minutes loading some of the property onto the trailer. At the motion for new trial, appellant made a detailed proffer of his testimony about Sheila Lanier.

Appellant argued that the trial court erred by preventing him from testifying about the details of his conversation with Sheila Lanier. The Court agreed. The Court found that appellant's proffered testimony about what Lanier told him was not hearsay because he did not offer it to prove the truth of the matter asserted. That is, it was offered to prove what Lanier said to appellant, not what the victim said to Lanier; it rested on appellant's credibility, not Lanier's. Appellant sought to introduce this evidence to demonstrate that he reasonably believed he could take the property because it had been abandoned. An out of court statement that is offered to show its effect on the hearer's state of mind is not hearsay.

The State conceded that appellant's proffered testimony about what Lanier told him was not hearsay. But, it argued, the exclusion of the testimony was harmless because appellant's belief that he could take the property was not relevant. Specifically, appellant sought to introduce the testimony to demonstrate that he only took property that he reasonably believed he could take. However, the only property for which appellant was indicted was property that appellant denied taking at all: he was not indicted for the property he admitted taking and returned to the garden center; he was only indicted for the property that he denied taking and claimed that he had purchased earlier. Since he was not indicted for taking the property he admitted taking, the State argued, whether he reasonably believed he could take that property was not relevant.

The Court disagreed. Regardless of whether appellant's belief was relevant to the theft charge, it was relevant to the burglary charge. The State conceded that at least some of the items that were allegedly removed from garden center buildings were items that appellant later returned because he took them under the belief that they were abandoned. To convict of the crime of burglary it is not sufficient merely to prove an illegal entry, but there must also be evidence from which the jury may conclude that there was an intent to commit a theft or felony. So whether appellant had the intent to commit theft or instead believed the property to have been abandoned when he allegedly removed property from buildings was relevant to the burglary charge.

The State also argued that appellant's proffered testimony was cumulative of the investigator's testimony and an audio recording played for the jury of the conversation with appellant when appellant returned to the garden center. The Court again disagreed. The Court noted that when the victim testified, he adamantly denied that he knew Sheila Lanier other than as a customer who had come into the garden center a handful of times. He testified that there was no reason for anyone to believe that they were good friends. Thus, the Court found, the erroneously excluded testimony would have allowed the jury to conclude that appellant reasonably believed that Lanier, a school teacher married to a pastor, was credible; that Lanier, who referred to the victim's family and their children by their first names and said they attended church events together, knew the victim's family very well, contrary to the victim's testimony adamantly denying that he knew Lanier; and that the victim and his wife had communicated to her the business's financial situation down to the exact amount they owed on the property. In other words, the testimony might have persuaded a juror that appellant reasonably believed Lanier's representation that the property at the garden center was there for the taking and so raised a reasonable doubt — in spite of the victim's testimony that he did not know Lanier. The audio recording and the investigator's testimony included none of the details that strengthened appellant's defense.

Accordingly, the Court held that it is highly probable that the trial court's error in excluding this testimony contributed to the judgment, and therefore, appellant's convictions were reversed.

Search & Seizure; Standing

Bourassa v. State, A17A1602 (3/15/18)

Appellant was convicted of one count of possessing more than one ounce of marijuana, one count of conspiracy, and one count of violating the Georgia Racketeer Influenced and Corrupt Organizations Act ("RICO") by using a telephone to arrange for the purchase of more than one ounce of marijuana. The record showed that officers obtained investigative warrants for the interception of electronic communications for several phone numbers connected to certain individuals who the officers had learned, through confidential informants and a series of planned drug buys by undercover agents, were part of an organization that was selling marijuana. Calls placed to and from those numbers were recorded pursuant to the warrants. None of the targeted phone numbers belonged to or were associated with appellant. Appellant moved to suppress the recordings, but the trial court found he lacked standing.

Appellant argued that the trial court erred when it ruled that he did not have standing to challenge the introduction of certain surreptitiously recorded telephone calls against him at trial. The Court stated that standing to suppress recordings of surreptitiously recorded phone calls arises when the person seeking suppression was a party to any intercepted communication or a person against whom the interception was directed. Here, the Court found, nothing in the record established that the targeted phone numbers belonged to appellant and in fact, the record reflected otherwise. Appellant also did not offer or point to any testimony or other evidence that established that his voice could be heard in the recordings the State sought to introduce. Instead, appellant relied exclusively on testimony elicited in cross-examination from the officer who obtained the warrants. However, the Court stated, it agreed with the trial court that the statements elicited in this line of questioning, including those posed by defense counsel, were insufficient to establish appellant's standing to suppress the recordings. The questions asked by appellant's counsel on cross-examination were not an offer of evidence, nor did they provide proof that it was in fact appellant's voice that could be heard. Those questions, and the responses of the officer, merely confirmed the State's theory that it was appellant's voice that could be heard on the recorded calls.

The Court noted that the Eleventh Circuit and the U.S. district courts in Georgia have repeatedly ruled that reliance on the government's position, contention, or theory to establish standing to suppress a search is insufficient, specifically noting the burden is placed on the movant to stipulate as to standing or to bring forward evidence establishing standing that is independent of the government's evidence. And, the Court held, in light of the apparent

absence of decisional law from our state appellate courts on this issue, it would adopt the federal case law reasoning since these federal cases properly express the burden a defendant must carry in establishing his standing to challenge the State's use of intercepted communications under the Fourth Amendment.

In this case, appellant did not stipulate or admit that his voice could be heard on the calls at issue. Although the State's witness believed that appellant's voice could be heard on the recordings, this was merely a conclusion based on other circumstantial evidence. Thus, because no evidence presented by the State or adduced through cross-examination established that appellant was a party to the calls, the trial court was authorized to find that appellant did not satisfy his burden of establishing standing.

Ineffective Assistance of Counsel; Reputation for Truthfulness

Gonzales v. State, A17A1857 (3/16/18)

Appellant was convicted of aggravated sexual battery and child molestation. Appellant argued that the trial court erred when it refused his request to ask the victim whether she always told the truth, thus allegedly revealing a character trait for untruthfulness. Appellant also argued that his trial counsel was ineffective for failing to elicit testimony on the subject by the victim. The Court disagreed.

OCGA § 24-6-608 (b) provides in relevant part: "Specific instances of the conduct of a witness[ ] *for the purpose of attacking or supporting the witness's character for truthfulness … may not be proved by extrinsic evidence*. Such instances may however*, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination* of the witness: (1) [c]oncerning the witness's character for truthfulness or untruthfulness; or (2) [c] oncerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." OCGA § 24-6-608 authorizes only the use of specific instances of conduct in order to attack (or support) a witness's character for truthfulness.

Here, the Court noted, the victim's therapy records, which the trial court reviewed but excluded from evidence, included a therapist's notes that the victim had "a history of lying to her mother" and that the mother had told the therapist that she could not trust the victim because the victim "constantly lies to her and does things to be vindictive." When appellant sought to ask the victim, "Do you always tell the truth?" the trial court sustained the State's objection to the question. Later in the trial, appellant asked the court to reconsider its ruling and sought to ask whether the victim "tell[s] the truth to figures of authority?" The trial court disallowed this question as well on the ground that it was impermissible character evidence.

The Court found that both of the questions appellant sought to ask of the victim were so broadly phrased as to have no other effect than to prove a general character trait for untruthfulness. Because these questions did not seek to investigate any specific "act probative of untruthfulness," there was no abuse of discretion in barring these questions, which were designed to attack the victim's character. Thus, given that the victim's general propensity for untruthfulness was a subject not properly for cross-examination, appellant's trial counsel could not have been ineffective for failing to convince the trial court that its ruling on the subject was incorrect.

Nevertheless, appellant also contended that trial counsel was ineffective for failing to ask the victim's mother her opinion about the victim's untruthfulness. The Court agreed.

The record showed that the State stipulated that, had the mother been asked, she would have testified on cross-examination consistently with what she had said to a counselor: that in her opinion, the victim was untruthful. At the motion for new trial hearing, trial counsel explained her rationale for not asking the mother her opinion of the victim's untruthfulness. Trial counsel believed that since the trial court did not allow her to ask the victim whether the victim was always truthful, she did not believe that she could ask the question of the mother because of a lack of foundation evidence.

The Court found that trial counsel was mistaken. The mother's opinion about the victim's untruthfulness was admissible, regardless of whether the victim testified about her own truthfulness, under OCGA § 24-6-608 (a) (1). Since counsel's decision not to question the mother was based on a misapprehension of the law, it cannot be deemed effective assistance on the basis that it was a strategic choice. And, the Court found, the failure to ask this question was deficient performance.

Thus, the Court turned to whether the appellant suffered prejudice as a result of this deficient performance. The Court found that the evidence was not overwhelming. Also, the victim's credibility was critical to the State's case. The mother's opinion that the victim was untruthful would certainly be essential to a jury's decision whether to believe the victim's testimony, without which the State would have no case. In other words, there was reasonable probability that the outcome would have been different had counsel correctly understood the law and asked the mother her opinion of the victim's untruthfulness. Accordingly, counsel was ineffective and appellant's convictions were reversed.

Sentencing; Merger

Mobley v. State, A18A0695 (3/22/18)

Appellant pled guilty to several crimes arising out of his attempt to evade police officers while driving a stolen vehicle. The record showed that in his attempt to evade the officers, appellant hit one of the police cars, causing his car to flip on its side. When the officers approached, appellant shot at two officers. Citing *Lidy v. State*, 335 Ga. App. 517 (2016), appellant argued that the two felony counts for obstruction of an officer should have merged for sentencing purposes. The Court disagreed.

Here, the Court found, unlike the defendant in *Lidy*, appellant committed two distinctly different acts, at two different times, and against two different officers. Appellant shot at the first officer through the roof of his overturned vehicle. He then fired a second shot through the back window of the car towards the second officer, who was running in the middle of the street towards the overturned vehicle. Appellant's decision to shoot his gun at two different officers, in two different moments in time, and from two different vantage points, did not amount to a single act. Thus, the Court concluded, as the evidence showed that each charge of obstruction was separate and distinct with independently supporting facts, there was no merger.