Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 27, 2018

THIS WEEK:

Sufficiency of the Evidence; OCGA § 16-5-60 (c)

Propes v. State, A18A0549 (6/1/18)

Appellant was convicted of violating OCGA § 16-5-60 (c), which prohibits certain conduct by HIV infected persons. Specifically, the jury found appellant guilty of, after obtaining knowledge of being infected with HIV, knowingly engaging in sexual intercourse without disclosing to the other person the fact of his being an HIV infected person prior to that intercourse. The evidence, briefly stated, showed that the victim testified that in July 2014 she and appellant had sexual intercourse on three occasions. During their sexual encounters, appellant did not wear a condom. The victim testified that he never told her that he was HIV-positive. The victim testified that she learned appellant was HIV-positive after the relationship, when she found two articles about him in an internet search. A police investigator interviewed appellant. Appellant told the investigator that he was HIV-positive and that he had been for about five years. He also admitted that he had sex with the victim, although he averred that it was only once and that he had worn a condom, that he did not tell her that he was HIV-positive, and that he knew he could get in trouble for failing to disclose his positive status to a sexual partner. Additionally, the State introduced a report from the Indiana Department of Health from 2012 that indicated appellant was HIV positive.

Appellant contended that the evidence was insufficient to support his conviction. Citing *Rodriguez v. State*, 343 Ga. App. 526 (2017), the Court agreed. For purposes of defining the offense of prohibited conduct by an HIV infected person, OCGA § 16-5-60, in subsection (a), incorporates the definitions set out in Georgia's Health Code in OCGA § 31-22-9.1, which defines "HIV infected person" as "a person who has been determined to be infected with HIV, whether or not that person has AIDS, or who has been clinically diagnosed as having AIDS." OCGA § 31-22-9.1 (a) (11). "Determined to be infected with HIV" means "having a confirmed positive HIV test or having been clinically diagnosed as having AIDS." OCGA § 31-22-9.1 (a) (7). "Confirmed positive HIV test" means "the results of at least two separate types of HIV tests, both of which indicate the presence of HIV in the substance tested thereby." OCGA § 31-22-9.1 (a) (5). And "HIV test" is defined as "any antibody, antigen, viral particle, viral culture, or other test to indicate the presence of HIV in the human body, which test has been approved for such purposes by the regulations of the department[,]" that is, the Department of Community Health (DCH). OCGA § 31-22-9.1 (a) (12).

Reading these definitional sections together, the State is required to prove, among the other elements, that a defendant was determined to be infected with HIV by an HIV test approved for such purposes by the regulations of DCH. As in *Rodriguez*, the record here was devoid of any evidence that appellant was determined to be infected with HIV by an HIV test approved for such purposes by the regulations of DCH. Therefore, the Court concluded, the State failed to meet its burden to prove appellant's HIV positive status under OCGA § 16-5-60.

Immunity; Sufficiency of Evidence of Justification

State v. Morgan, A18A0433 (6/1/18)

Morgan was charged with aggravated assault and family-violence battery arising from a chokehold he applied to his pregnant wife. The evidence, briefly stated, showed that Morgan and his wife have two dogs, Bella and Pippin. Morgan considered Bella his dog, but his wife took care of both dogs while he was at work during the day. Morgan and his wife got into an argument and his wife picked up Bella and attempted to put her outside. At this, Morgan exclaimed, "[D]on't touch my f***ing dog," grabbed his wife by the hair, jerked her towards him, and placed her in a headlock with the crook of his arm such that she could not speak. When she struggled, Morgan testified that he "tighten[ed] [his] grip," causing her to see spots in front of her eyes, at which point she lost her hold on the dog and Morgan released her. There was no evidence that the dog was harmed at any time before or during the incident.

Morgan filed a motion for immunity under OCGA § 16-3-24.2. The trial court granted the motion and the State appealed.

The State argued that the court erred in granting Morgan immunity because his use of force against the victim was not reasonable or justified as a matter of law. The Court agreed. Relying on *Barron v. State*, 219 Ga. App. 481(1995), the Court stated that the affirmative defense contained in OCGA § 16-3-24 (a) was not available to Morgan because the victim's conduct in taking personal property from the lawful possession of the defendant was neither tortious nor criminal interference within the meaning of the statute. This was so because the personal property taken by the victim was not the "property of another" within the definition provided by OCGA § 16-8-1 (3) which excludes property of a spouse from the definition of this term. The wife's conduct also was not cognizable as "tortious interference" because she was protected by "the doctrine of interspousal tort immunity," and there were no facts to justify any deviation from a strict application of the doctrine.

And here, it was undisputed that Morgan and the victim were married at the time of the altercation at issue, that they lived in the house where the incident occurred together, and that the victim routinely took care of Bella. Because the victim was entitled to handle the dog, including putting it out of the house, the defense of justification in the use of force for the purpose of resisting the victim's attempt to do so was not available to Morgan. According to Morgan's own testimony, moreover, he reacted to the victim's struggling against the chokehold by "tighten[ing his] grip," which was not justified in the absence of evidence that the victim was committing any crime, let alone a forcible felony, concerning the dog. Thus, because there was no evidence to support the conclusion that Morgan was entitled to use force against his wife in order to protect the couple's dog, the trial court erred when it granted Morgan's motion for immunity.

Furthermore, the Court stated, because Morgan was not entitled to a defense of justification in the use of force in defense of personal property, he would not be entitled to a charge on the subject in any subsequent proceedings on charges arising from these facts.

Search & Seizure; Search Incident to Arrest

Huff v. State, A18A0073 (6/4/18)

Appellant appealed from the denial of his motion to suppress. Appellant was arrested for battery (family violence). The arresting officer was wearing a body camera during the encounter. At the suppression hearing, appellant introduced into evidence a copy of the video recording beginning with appellant's arrest. In the video, appellant can be seen wearing a backpack and sitting on a chair inside the apartment. Officers stood him up and put his hands behind his back to handcuff him, slid the backpack off his back, and told him he was being arrested for domestic violence.

An officer then picked up the backpack from the floor, asking if it belonged to appellant and telling him that he would not be able to return to the apartment. Appellant asked the victim (his girlfriend) to give the backpack to his sister, which she agreed to do. But instead, the officers took appellant and his backpack outside to the patrol car, telling appellant that they were bringing the backpack because "it was on his person when he was arrested." The walk to the patrol car took over one minute as appellant and the officers walked down several steps from the apartment door, crossed through a courtyard, walked through apartment buildings opposite the apartment in question, and walked down a sidewalk before searching appellant. An officer then placed the backpack on the trunk of the car and searched the bag.

The trial court denied appellant's motion to suppress the handgun found in the backpack, finding that the search-incident-to-arrest exception to the warrant requirement applied. The Court granted discretionary review.

The Court agreed with appellant that this case is controlled by the Supreme Court's decision in *Kennebrew v. State*, 299 Ga. 864, 869-870 (2) (a) (1) (2016). In the context of an arrest of a person at a residence, the police may search only the arrestee's person, personal property immediately associated with his person (like a cigarette pack in his pocket), and the area within his reaching distance. Warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the search is remote in time or place from the arrest, or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.

Here, the Court found, the officers removed the backpack from appellant's vicinity immediately prior to appellant's arrest and maintained it in their exclusive possession as they carried it to the patrol car where it was ultimately searched. Contrary to the trial court's finding that the search was justified because appellant was "close enough to potentially grab the backpack," the law enforcement officers had exclusive control of appellant's backpack, and appellant was handcuffed at the time of

the search. Thus, there was no longer any danger that appellant could gain access to the backpack to seize the weapon or destroy evidence. The State did not argue, nor was there any evidence to show, that the officers had any reason to believe that the backpack contained anything related to the crime for which he was arrested. Thus, the Court concluded, based on the facts which are discernible from the video recording, as a matter of law, the State failed to meet its burden under OCGA § 17-5-30 (b) to prove that the warrantless search of appellant's backpack was lawful.

Jury Instructions; Consent

Williams v. State, A18A0279 (6/7/18)

Appellant was convicted of two counts of child molestation and one count of aggravated sexual battery. He argued that the trial court erred by instructing the jury, in regard to the aggravated sexual battery count, that a child under the age of 16 lacks the legal capacity to consent to any sexual act. The Court held that it was constrained to agree.

The trial court charged the jury that, "[a] person commits the offense of aggravate[d] sexual battery when one intentionally penetrates with a foreign object the sexual organ of another person without the consent of that person." See OCGA § 16-6-22.2 (b). The trial court immediately added, "As I previously charged, a child under the age of 16 cannot legally consent to any sexual act."

Although the charge was a correct statement of the law at the time it was given, following the trial, the Supreme Court of Georgia held that the crime of sexual battery requires actual proof of the victim's lack of consent, regardless of the victim's age. *Watson v. State*, 297 Ga. 718, 720-721 (2) (2015). In *Duncan v. State*, 342 Ga. App. 530, 540-541 (6) (2017), which involved a case in the appellate pipeline when *Watson* was decided, the Court found that the State also must prove a victim's lack of consent in cases of aggravated sexual battery.

Williams argued, for the first time on appeal, that the instant case was not yet final and, thus, was in the appellate "pipeline" at the time *Watson* was decided. Thus, the Court found, the *Watson* holding governed its analysis. Although the State argued that plain error review applied, the Court found that the question was settled to the contrary in *Duncan*. And, because the erroneous jury instruction here effectively relieved the State of its burden to prove an essential element of the crime of aggravated sexual battery, the instruction could not be said to have been harmless. Accordingly, appellant's conviction for aggravated sexual battery was reversed.

Miranda; Invocation of Right to Remain Silent

In re R. P., A18A0069 (6/11/18)

R. P., a thirteen-year-old, was charged with the offenses of theft by receiving and obstruction of a law enforcement officer. The juvenile court found that the State violated his *Miranda* rights by questioning him after he invoked his right to remain silent. The State appealed.

The Court stated that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored" by law enforcement authorities. And here, the Court found, the video recording of the police detective's custodial interrogation of R. P. provided uncontradicted proof of the relevant facts. The child clearly invoked the *Miranda* right to remain silent by responding "No" when the detective asked him if he wished to speak. The detective then immediately stated, "No? You said no, right?" to which the child immediately responded, "Yeah, I'll speak to you."

The Court found that when the child responded, "Yeah, I'll speak to you," this was an equally clear statement that he changed his mind, waived the right to remain silent, and was willing to answer the detective's questions. The detective's statement, "No? You said no, right?" cannot be reasonably construed as a failure to "scrupulously honor" the child's initial assertion of the right to remain silent and to "cut off questioning." Rather, "No? You said no, right?" was a leading question by the detective designed to elicit a confirmation from the child that he had asserted the right to remain silent and cut off questioning. The detective's statement was not questioning or interrogation in this context because it was not express questioning or its functional equivalent by any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. Moreover, the detective was not attempting, subtly or otherwise, to coerce or badger the child into changing his mind about his initial assertion of the right to remain silent. There was no constitutional rule requiring the detective to immediately leave the child's presence after he initially asserted the right to remain silent. Accordingly, the Court held, this was not a case where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. Instead, the facts showed that, after the child was advised of his *Miranda* rights, he expressed an initial intention to remain silent and cut off any questioning, then, prior to any questioning or interrogation by the detective, immediately changed his mind and initiated communications by clearly evincing his intent not to remain silent. The totality of the circumstances accordingly showed that the State established by a preponderance of the evidence that the child's statements were made voluntarily after a knowing and voluntary waiver of *Miranda* rights. Consequently, the juvenile court erred by excluding the statements from evidence.

DNA profiles; First Offender Act

Bennett v. State, A17A0181 (6/11/18)

Appellant was convicted of burglary which occurred in 2010. The evidence showed that on August 1, 2013, appellant entered a plea as a first offender to one count of burglary. He was sentenced to five years, the first three years to be served in confinement and the remainder to be served on probation. When appellant came into the custody of the Georgia Department of Corrections, the department obtained a DNA sample from him and submitted it to the GBI crime lab. On November 15, 2013, the Sheriff's Office received notice from the crime lab that appellant's DNA matched the DNA of blood found at the scene of a 2010 burglary. The perpetrator of that burglary had never been identified. A sheriff's investigator compared appellant's fingerprints to fingerprints obtained at the 2010 crime scene and confirmed that they matched.

Appellant argued that the entry of his DNA profile into CODIS was not authorized by OCGA §§ 35-3-160, a provision of the DNA Act, and 42-8-65 (c), a provision of

the First Offender Act. The Court disagreed. Under the plain language of these statutes, during his incarceration as a result of his first offender plea, appellant was deemed to have been convicted of burglary, a felony. So the Department of Corrections was required to take a DNA sample and forward it to the GBI, and the GBI was required to analyze it and maintain and store the profile. Neither the DNA statute nor the First Offender Act indicate that incarcerated persons sentenced under the First Offender Act — who, at the relevant time, were deemed to have been convicted during their incarceration, OCGA § 42-8-65 (c) — are exempt from the requirements of the DNA Act.

Nevertheless, appellant argued, OCGA § 42-8-65 (c) (2013) expressly required the records of incarcerated first offenders to be treated in the same manner as the records of non-incarcerated first offenders and that an incarcerated first offender's DNA profile is a record. Consequently, appellant contended, the DNA profile created though the analysis of a DNA sample of an incarcerated first offender should not be entered in CODIS.

The Court again found this argument unpersuasive, given the plain language of the statutes. The "records" protected by the First Offender Act are the "first offender records," such as sentencing and plea documents.

Finally, appellant argued that his Fourth Amendment waiver, a special condition of his first-offender probation, did not encompass the collection of his DNA sample. But, the Court stated, the statutory requirement that a convicted felon provide a DNA sample does not unconstitutionally violate the privacy rights and search and seizure rights of convicted felons incarcerated in state correctional facilities. Thus, because appellant's Fourth Amendment rights were not violated, whether his Fourth Amendment waiver encompasses the collection of his DNA sample was immaterial.

Ineffective Assistance of Counsel; Expert Witness Testimony

Percell v. State, A18A0205 (6/12/18)

Appellant was convicted of family-violence aggravated battery, two counts of DUI, possession of marijuana, reckless driving, following too closely, failure to maintain lane, and possession of a drug-related object. The evidence showed that after an argument with the victim, the victim left the house with her infant daughter. As she was driving away, she saw appellant rapidly approaching her in another vehicle. Appellant rammed her vehicle, causing it to spin out of control, hit a light pole, and roll over.

Appellant argued that his trial counsel was ineffective for failing to object to several instances of law enforcement witnesses testifying that the evidence of the collision was consistent with it being intentional because the testimony was improper expert opinion on the ultimate issue.

The Court noted that although the law enforcement witnesses were not designated as experts, the parties agreed that they testified as experts. The new Evidence Code eliminates the former ultimate-issue rule "except as to certain expert witness testimony" as set out in OCGA § 24-7-704 (b). As for expert witness testimony, OCGA § 24-7-704 (b) provides, "No expert witness testifying with respect to the mental state or condition of an accused in a criminal proceeding shall 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. Such ultimate issues are matters for the trier of fact alone."

The Court stated that contrary to the State's argument, the statute applies to all criminal proceedings, not just those in which a defendant's competency is at issue. But, it applies only to expert witnesses.

Appellant cited three examples of testimony that he contended violated OCGA § 24-7-704 (b). In one instance, a witness testified that appellant's "views were inconsistent and was not consistent with what the evidence was showing. The evidence was suggesting that there might have been an intentional act." In a second instance, the prosecutor asked a witness if the evidence was "consistent with the intent — specific intent of striking [the victim's] vehicle?" and the witness responded, "Yes, sir." In a third instance, the prosecutor asked a witness, "[T]he reason that you questioned [appellant] about there being an argument is because this was obviously an intentional act based on the evidence?" The witness responded, "That's correct."

The Court found that pretermitting whether counsel should have objected to this testimony for violating OCGA § 24-7-704 (b), any error was harmless in light of other evidence of intent, including the victim's testimony that appellant intended to strike her vehicle, and the court's instructions to the jury. Thus, given these circumstances, appellant failed to demonstrate a substantial likelihood that the result of his trial would have been different had counsel objected to the challenged testimony.