Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 24, 2018

THIS WEEK:

Motions for New Trial; Notices of Appeal

Williams v. State, A18A1650 (6/26/18)

After appellant was convicted in 2011, he filed a timely motion for new trial. In 2018, he withdrew his motion and on the same day, filed a notice of appeal. The Court found that it lacked jurisdiction.

A notice of appeal must be filed within 30 days of the judgment being appealed. The timely filing of a motion for new trial extends the running of this 30-day clock until the trial court disposes of the motion. Absent a court order resolving the motion, however, the appeal time is not extended. OCGA § 5-6-38 requires a *trial court order* granting, denying, or otherwise finally disposing of a party's motion for new trial in order to extend the time for filing a notice of appeal. Thus, a unilaterally withdrawn motion for new trial, standing alone, does not toll the appeal time.

Accordingly, since appellant voluntarily withdrew his motion for new trial, and the trial court neither ruled on the motion nor granted him permission to withdraw it, the time for filing his direct appeal, was not extended, and his notice of appeal was untimely because it was filed more than 30 days after his conviction. Nevertheless, the Court stated, appellant may be entitled to pursue an out-of-time appeal.

Right to Counsel; Waivers

Saunders v. State, A18A0512 (6/27/18)

Appellant was convicted of criminal trespass in which she acted pro se. She contended that she did not knowingly and intelligently waive her right to counsel. The Court agreed and reversed.

The record showed that at an initial arraignment hearing, the trial court informed appellant and the other persons appearing for arraignment of their right to an attorney and the perils of proceeding without an attorney. The trial court instructed those present that when he called their names they should enter a plea and state whether they planned to hire a private attorney or wanted to apply for representation by the public defender. But when the trial court called appellant's name, she did not enter a plea or make any statement regarding counsel; instead, she argued that the trial court lacked jurisdiction. After failing to get a response from appellant to his questions, the trial court entered a plea of not guilty on her behalf but did not further address the issue of counsel.

At the start of another calendar call, the trial court mentioned that the public defender, who had momentarily stepped out of the courtroom, would be present. Later in the calendar call, the trial court gave appellant what the trial court described as a "Faretta warning," see *Faretta v. California*, 422 U. S. 806, 835 (V) (95 SCt 2525, 45 LE2d 562) (1975), reminding her that she had a right to counsel and telling

her that if she chose to disregard the warning she did so "at [her] own peril[.]" Appellant refused to sign an acknowledgment that she had received the warning, which she claimed not to understand. The trial court, however, found that appellant had heard and understood the warning. During the calendar call, appellant made no specific comment regarding counsel. Instead, she reiterated her challenge to the trial court's jurisdiction over her.

At a final plea calendar, the trial court made comments indicating that the public defender was present in the courtroom. When the trial court asked appellant for her plea, she again refused to enter a plea and instead challenged the trial court's jurisdiction and asked that the case be dismissed. Over her objection, the trial court set the case for trial. Appellant made no comment regarding counsel at this calendar.

Finally, on the day of appellant's trial, after more argument regarding the trial court's jurisdiction, she argued that the trial should not go forward because she had not been offered a pro bono attorney. The trial court responded that she had been given the opportunity to speak with a public defender at every calendar appearance but had failed to do so. Appellant again objected, stating that she did not waive any of her rights. Over this objection, the case proceeded to trial, with appellant acting pro se.

The Court found that the facts found by the trial court did not show that appellant elected to represent herself. They merely showed that she did not request or obtain counsel despite being told of her right to counsel and the perils of not having counsel. This was not enough to show waiver. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. A showing of the accused's knowledge of the right to counsel is not enough; there must also be evidence of relinquishment of that right. Merely finding that a request for counsel was not made is insufficient to establish waiver. Where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.

In so holding, the Court stated that it was sympathetic to the plight of the trial court, who was faced with a pro se defendant who would not engage on the issue of counsel. But given the presumption against waiver, the facts — which amounted to no more than appellant's failure to request or obtain counsel despite knowing of her right to counsel and the perils of self-representation — did not show that appellant intentionally relinquished her constitutional right to counsel.

Search & Seizure; Independent Source Doctrine

Stephens v. State, A18A0714 (6/27/18)

Appellant was convicted of armed robbery, hijacking a motor vehicle, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony. He contended that the trial court erred in denying his motion to suppress the search of his cell phone based on exigent circumstances.

The record showed that during a custodial interview, appellant requested his cell phone, which had been seized during his arrest, from police so that he could retrieve a telephone number. After appellant got the information he needed, the detective took the unlocked cell phone to a tech savvy officer to download the contents of the phone before it locked and needed a passcode to unlock. The detective testified that from past experience "if you don't have the passcode, you are probably not going to get into the phone. I saw an opportunity with the phone unlocked." After the data was downloaded, the detective obtained a search warrant permitting the search of the cell phone's contents. Photographs obtained from the phone were later used by the State to impeach appellant's statements.

Citing *Riley v. California*, ___ U. S. ___ (134 SCt 2473, 189 LE2d 430) (2014), appellant contended that the download of contents of his phone without a warrant was an illegal search. But, the Court found, pretermitting whether the warrantless downloading of the contents of appellant's cell phone was permissible under the exigencies exception to the Fourth Amendment, even if an unlawful search occurred, the evidence acquired from the downloading was admissible under the independent source doctrine. The independent source doctrine allows admission of evidence that was discovered by means wholly independent of any constitutional violation. When properly applied, the "independent source" exception allows the prosecution to use evidence only if it was, in fact, obtained by fully lawful means.

And here, the Court found, the evidence that appellant sought to suppress was not obtained through an unconstitutional search of the contents of his cell phone, but was obtained pursuant to the later-issued search warrant. Thus, even assuming that the initial downloading was an unconstitutional search, the information subject to the motion to suppress was obtained through the execution of a valid search warrant. Moreover, the search warrant was not based upon any information derived from the download. Accordingly, the trial court did not err in denying the motion to suppress.

OCGA § 16-12-100; Subpoenas to ISP providers

Maddox v. State, A18A0659 (6/27/18)

Appellant was convicted of two counts of distributing child pornography and two counts of possessing child pornography. The evidence, very briefly stated, showed that law enforcement was investigating the ARES peer-to-peer file sharing program to determine if anyone in the county was distributing child pornography using the ARES network. ARES users are able to access, view, and download any document or digital media stored in the shared folder of another ARES user. If a user wants to prevent downloaded items from being accessed and downloaded by others, he or she can move those files out of the shared folder, delete the files, disconnect his or her computer from the Internet, or uninstall the peer-to-peer file sharing program. Using sophisticated programming, the police identified an IP address in the county as having six shared files that contained possible child pornography. The police downloaded the files from that IP address and determined that each of them contained what appeared to be child pornography. The police learned that the ISP for the IP address in question was Comcast. A grand jury subpoena for Comcast was prepared. It asked them to produce the subscriber name, physical address, and other identifying information for the IP address in question. Based on this information, the police obtained a search warrant for appellant's residence.

Appellant first contended the evidence was insufficient to support his conviction because the term "distribute" did not encompass his conduct in making pornographic material

available for others to download. The Court disagreed. The Court noted that appellant was convicted under Georgia's Child Exploitation Statute, OCGA § 16-12-100, which makes it "unlawful for any person knowingly to create, reproduce, publish, promote, sell, distribute, give, exhibit, or possess with intent to sell or distribute any visual medium which depicts a minor or a portion of the minor's body engaged in any sexually explicit conduct." OCGA § 16-12-100 (b) (5). Although OCGA § 16-12-100 (a) defines a number of terms, "distribute" is not one of them. Thus, the Court stated, the case appeared to represent the first time it has been called on to interpret the language of the Child Exploitation Statute.

The Court found that given the commonly understood meaning of "distribute," where, as here, an individual knowingly makes materials available for others to take and those materials are in fact taken, distribution has occurred. And here, appellant admitted that he downloaded the ARES program onto his computer and that he understood that file sharing was the purpose of that program. He also admitted that he had child pornography stored in his computer's shared folder. Additionally, appellant could have, but did not, move his downloaded images and videos into a computer folder that was not subject to file sharing. And the police were able to download images and videos from the child pornography collection in appellant's shared folder. Under these facts, the Court concluded, the evidence supported the factfinder's conclusion that appellant had distributed child pornography.

Nevertheless, appellant contended, subsection (d) of the Child Exploitation Statute immunized him from criminal liability for any conduct that might otherwise be considered the distribution of child pornography. That statutory subsection provides that OCGA § 16-12-100 (b) (which criminalizes, among other things, the reproduction, publishing, exhibition, and distribution of child pornography) "shall not apply to … [t]he activities of law enforcement and prosecution agencies in the investigation and prosecution of criminal offenses[.]" OCGA § 16-12-100 (d) (1). Appellant argued that because the distribution in this case took place in the context of a police investigation, that distribution was not subject to prosecution under OCGA § 16-12-100 (b). The Court disagreed.

Reading subsection (d) in the most natural and reasonable way, as an ordinary speaker of the English language would, its language provides immunity from criminal prosecution for any law enforcement officer or prosecutor who, in the course of fulfilling his or her duties, engages in conduct that might otherwise constitute a violation of the Child Exploitation Statute. To be entitled to this immunity, however, two requirements must be satisfied. First, the person asserting immunity must be a member of a law enforcement or prosecution agency. Second, the otherwise illegal conduct must have occurred when that person was acting in their official capacity to investigate and/or prosecute a violation of OCGA § 16-12-100. Here, given that appellant can satisfy neither of these requirements, he was not entitled to the immunity offered under OCGA § 16-12-100 (d).

Finally, appellant contended that the trial court erred in denying his motion to suppress. Specifically, the subpoena served on Comcast seeking his subscriber information was issued pursuant to OCGA § 24-13-21 (e), which allows a district attorney to issue a subpoena in grand jury proceedings. Appellant argued that such subpoenas are not a valid method for obtaining subscriber information from an ISP. Instead, appellant contended that such information can be obtained only where a law enforcement agency or district attorney's office complies with the requirements of OCGA § 16-9-109. And here, the subpoena at issue did not comply with this statute.

The Court, however, found that it need not decide in this case whether OCGA § 16-9-109 provides the exclusive mechanism through which law enforcement and prosecutorial agencies may obtain subscriber information from an ISP because a party seeking to suppress evidence must demonstrate that he has standing to do so. And here, appellant lacked standing to object to the legality of a search of Comcast's records because the customer of an ISP has no reasonable expectation of privacy in the subscriber information the customer voluntarily conveys to the ISP.

But, appellant argued, even though he lacked standing, he argued that OCGA § 16-9-109 (d) (4) provides him with such standing. The Court again disagreed. While subsection (d) might provide a party with a basis for objecting to the *admissibility* of certain evidence, it does not provide a party with standing to object to a subpoena served on his or her ISP. Accordingly, the trial court did not err in denying appellant's motion to suppress the subscriber information obtained from Comcast.

Sufficiency of the Evidence; Venue

Awtrey v. State, A18A0116, A18A0117 (6/27/18)

Appellants were convicted of multiple counts of violating the Georgia Controlled Substances Act by selling products containing indazole amide, a Schedule I controlled substance. The evidence, very briefly stated, showed that in late December 2012, Douglas County law enforcement began receiving complaints that led them to believe that synthetic marijuana was being sold at Elite Adult, an adult novelty store owned and operated by appellant Ricky Awtrey. His sister, appellant Barbara Awtrey, sometimes worked at the store, trained employees, and performed various managerial tasks. In addition to adult novelty products, Elite Adult's product line included tobacco and related products, rolling papers, bongs, e-cigarettes, air fresheners and potpourri, and similar products. Some of the air fresheners and potpourri were marked with warnings against human consumption, and law enforcement suspected it was these type of products that were being sold and used as synthetic marijuana.

Appellants contended that the evidence presented at trial was insufficient to show that they knew the products they were selling contained an illegal substance. The Court noted that under OCGA § 16-13-30 (b), it is unlawful in this state "for any person to manufacture, deliver, distribute, dispense, administer, sell, or possess with intent to distribute any controlled substance." As charged in the pertinent counts of the indictment, appellants were charged with violating that section by selling products known as Roses, B2 Da Bomb, and Street Legal containing the controlled substance indazole amide. Although OCGA § 16-13-30 (b) does not include an express mens rea requirement, the crimes listed in OCGA § 16-13-30 are not strict liability crimes, and the criminal intent required by that section is the intent to possess, sell, or distribute a drug with knowledge of the chemical identity of that drug.

Here, the Court found, the evidence, albeit circumstantial, was sufficient to sup-

port that appellants knew they were selling products containing a controlled substance, and not air fresheners and potpourri. The products were pre-packaged in small quantities, yet sold for unusually large amounts per package. The packages also warned that the product was not for human consumption even though they purported to be air fresheners and potpourri. And even though the Elite Adult clerks were trained not to refer to or market these products as "legal weed," they observed customers coming in multiple times a day to purchase them, along with smoking papers, and these customers often returned in an altered state. Moreover, Ricky Awtrey himself referred to these products as "legal weed" or "herbal highs," thus showing that he knew that customers were purchasing these products to smoke and the effect of the products.

The evidence also supported that appellants were knowledgeable and experienced retailers in the synthetic drug market. Ricky had made a number of purchases of banned substances from China, and materials and equipment were found in his home consistent with the manufacture of synthetic drug products, although no banned or illegal substances were found in his home other than pre-packaged items that he had purchased from B&B. Ricky had also obtained reports from allegedly independent labs confirming the legality of the potpourri and air fresheners that he and his sister sold, and evidence was presented that the lab reports were unnecessary if the products were really what they purported to be. Barbara was the bookkeeper for Elite Adult, was listed as the point of contact on invoices found at Elite Adult, trained the clerks on how to sell the products, and sold the products herself. Thus, the Court concluded, based on this and other evidence, the jury was authorized to find that appellants knew that they were selling a controlled substance, even though they claimed that they were unaware of the precise chemical compound in the products, and reversal was not required on this basis.

Appellants also contended that the State failed to present sufficient evidence of venue. The Court noted that no witness affirmatively testified that Elite Adult was located in Douglas County. However, venue may be established by direct or circumstantial evidence. When reviewing the sufficiency of the evidence of venue, the evidence is viewed in the light most favorable to the verdict to determine whether the evidence was sufficient to show beyond a reasonable doubt that the crime was committed in the county where the defendant was indicted and tried. The determination of whether venue has been established is an issue soundly within the province of the jury.

And here, the Court determined, although no witness ever testified directly that Elite Adult was located in Douglas County, ample circumstantial evidence was presented from which a rational trier of fact could have found beyond a reasonable doubt that venue was proper in the county. Numerous law enforcement officers who testified for the State concerning their part in investigating the case, including the officers who made the purchases at Elite Adult, were affiliated with Douglas County, and in the absence of contrary evidence it is presumed that they performed their duties properly and acted within their jurisdiction. Further, the search was conducted by Douglas County law enforcement, and the documentation from the crime lab showed that it received the packages for testing from the search of Elite Adult from the Douglas County Sheriff's Office, the testing was requested by that office, and the results of the testing were directed to that office and other Douglas County officials. Thus, the Court concluded, the evidence, although circumstantial, was sufficient to establish venue beyond a reasonable doubt.

Special Demurrers; Vehicular Homicide

State v. Mondor, A18A0268 (6/27/18)

Mondor was charged with vehicular homicide. The indictment, in relevant part, alleged that Mondor was "the driver of a vehicle on Interstate 75 which was involved in an accident [on October 26, 2013] … [in which the] accused's vehicle struck a vehicle being driven by William Stone, causing William Stone's vehicle to strike a vehicle in which Bradley Braland was a passenger, and which was the proximate cause of the death of Bradley Braland … [and the accused] *did knowingly fail to stop and comply with the requirements of OCGA § 40-6-270 (a)*[…]. (Emphasis supplied). The trial court granted Mondor's special demurrer and dismissed the indictment, finding that the indictment was "not perfect in form and substance" because it "makes no mention of any knowledge by [Mondor] of any death, damage, or injury." The State appealed.

The State argued that the trial court erred in concluding that the indictment did not sufficiently allege all of the elements of the hit-and-run offense. In a 2-1 decision, the Court agreed with the State. The crime that OCGA § 40-6-270 (a) (1)-(4) addresses is the failure to stop and perform certain specified actions. OCGA § 40-6-270 (b) then mandates punishment based upon the circumstances of the accident and the defendant's "knowingly failing to stop and comply" with the statute. Therefore, the hit-and-run statute does not require the defendant to know that he was involved in an accident causing death, damage, or injury to another. Consequently, the State need not allege Mondor's specific awareness or state of mind, nor his actual knowledge that he was in an accident causing damage, injury or death. The defendant is held, rather, to a knew-or-should-have-known standard, and the indictment need only inform Mondor of the circumstances giving rise to the need for a reasonable person to stop and comply with the statute. Although the indictment must allege that the accused "did knowingly fail to stop" and comply with the requirements to give certain information and render aid after an accident, there is no requirement that the indictment must also allege that the accused knew or should have known he was in an accident. If one knowingly failed to stop and comply with the law, he necessarily would have known he was in an accident from which the obligation to stop springs.

Here, the Court found, the indictment furnished the required notice of the circumstances and Mondor's knowing failure to stop. The indictment alleges the basic facts and circumstances of the accident and clearly alleges that Mondor "did knowingly fail to *stop and comply*" with the statutory requirements. (Emphasis supplied.) OCGA § 40-6-270 (b). Thus, because the indictment, as written, contained the elements of the hit-and-run offense and sufficiently notified Mondor of the accusations against him, the Court reversed the trial court's order granting Mondor's special demurrer.