Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
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OCGA § 16-11-131 (b); Units of Prosecution

Choates v. State, S17G1949 (8/27/18)

Pursuant to OCGA § 16-11-131 (b) (2014), appellant was convicted of four counts of possession of a firearm by a convicted felon and sentenced on each count. The evidence showed that a search of appellant's residence revealed four firearms. The Court of Appeals affirmed, finding that OCGA § 16-11-131 (b) (2014)2 permits a defendant to be separately convicted and sentenced for each of the multiple firearms in his possession. *Coates v. State*, 342 Ga. App. 148 (2017). The Court granted certiorari.

The Court noted that OCGA § 16-11-131 (b) (2014) states, in relevant part, as follows: "Any person . . . who has been convicted of a felony by a court of this state . . . and who receives, possesses, or transports *any* firearm commits a felony, and upon conviction thereof, shall be imprisoned for not less than one nor more than five years[.]" (Emphasis supplied). The Court found that "any" as used in subsection (b), does not refer to the *kind* of firearm. Rather, "any," as used in the subsection, must be understood in the quantitative sense; in this context, the word "does not imply a specific quantity; the quantity is *without limit*." Thus, the Court determined, the phase "any firearm," as used in the statute indicates that the *quantity* of firearms; whether one or many, is inconsequential. Accordingly, the Court concluded, OCGA § 16-11-131 (b) is unambiguous and permits only one prosecution and conviction for the simultaneous possession of multiple firearms.

Consequently, the Court reversed the Court of Appeals' decision, vacated appellant's convictions and sentences for the four counts of possession of a firearm by a convicted felon, and remanded the case for the trial court to convict and resentence appellant on only one of those counts.

Ineffective Assistance of Counsel; Defense of Habitation

Williams v. State, S18A0797 (8/27/18)

Appellant was convicted of felony murder and possession of a firearm during the commission of a crime. The evidence, briefly stated, showed that the victim and his two brothers were walking past a Mustang and a Charger that were both

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waiting at a red light. Words were exchanged between the brothers and the vehicle occupants. A fight broke out when passengers of the Mustang got out to confront the brothers. Shots were fired from the Challenger in which appellant was the driver. The victim was killed by a .380 bullet.

Appellant contended that his trial counsel rendered ineffective assistance by failing to request a jury charge on the defense of habitation. The Court noted that appellant's counsel requested (and the trial court gave) jury charges on several justification-related defenses (including self-defense and defense of others), which the jury apparently rejected. Nevertheless, appellant contended, he would have been entitled to such a charge on defense of habitation in light of his own testimony that the brothers initially attacked
a third person who was inside his Mustang. The Court disagreed.

The Court noted that appellant was correct that a motor vehicle can be a "habitation." See OCGA § 16-3-24.1. For the most part, however, the evidence presented at trial showed that the shots were fired after any attack upon the Mustang had ended. And even if some evidence would support a claim that one of the shots was fired while the brothers were attempting to enter the Mustang, the Court's precedents do not clearly establish that a person can claim the defense of habitation to protect the habitation of another. Accordingly, appellant's trial counsel did not perform deficiently when he failed to pursue a jury charge that would have required an extension of existing precedents and the adoption of an unproven theory of law.

Search & Seizure; Georgia's Death Investigation Act

State v. Turner, S18A0957 (8/27/18)

Turner was indicted for the death of her 10-week old baby. The evidence, briefly stated, showed that EMT's came to the residence of Turner and her mother, Terry, after they called 911 concerning the baby. At some point, Turner and the baby left for the hospital; Terry remained at home. A short time later, Officer Wells arrived at the residence to find Terry on the porch and quite upset. Terry requested they go inside and sit. A short time later, Det. Bender arrived. She entered the home through an already open door and sat with Terry and Wells at the kitchen table. The baby died at the hospital and at the time, investigators believed the death to be accidental.

Back at the residence, Det. Bender was notified of the death and told Terry the home was a crime scene and no one was to leave or enter. Bender then began questioning Terry and other officers arrived, including a crime scene investigator who started taking pictures. Soon thereafter, other officers and Turner arrived back at the residence. The coroner also arrived and because a "SUIDI" (Sudden Unexplained Infant Death Investigation) was needed. Turner also answered Bender's questions and the police searched the house.

Turner filed a motion to suppress. The trial court the trial court found the following: law enforcement conducted a warrantless search of Turner's home; no exigent circumstances existed at the time of the search; while Officer Wells' initial entry into the residence was the result of Terry's voluntary consent, the consent was limited and did not grant other officers consent to search the home; Turner and Terry did not consent to the search of their home but merely acquiesced to the presence and authority of law enforcement; and the video and photographs of Turner's re-enactment were tainted by the unreasonable
search. The State appealed.

The State argued that because the trial court found that Terry voluntarily consented to Officer Wells' initial entry into her home, the trial court erred in failing to extend that permission to all members of law enforcement who subsequently entered the residence. The Court disagreed. Here, a reasonable officer would have understood that Terry's invitation for Wells to enter her kitchen was not consent for additional officers to conduct a search of the home. The Court also found that the record supported the trial court's finding that Terry merely acquiesced to the authority of the officers. The officers admitted at the hearing that they did not ask Terry for consent to search the home, to take photographs or video, or to remove any items from the residence. Despite this, at least four members of law enforcement, including a crime scene investigator (whose presence no one could explain) participated in the search.

The State next argued that Turner voluntarily consented to the coroner's entry into her home so he could continue his child death investigation, and that this permission extended to members of law enforcement. But, the Court noted, the trial court did not credit the coroner's testimony concerning the SUIDI and the record supported the trial court's findings that Turner did not voluntarily consent to the search of her home. Thus, the Court found, the record supported the trial court's finding that Turner did not voluntarily consent to the search of her home but merely acquiesced to the authority of law enforcement.

Nevertheless, the State argued, because the coroner led the investigation at the Turner residence under Georgia's Death Investigation Act (OCGA § 45-16-20 et seq.), and law enforcement merely assisted, the investigation could rightly occur without a warrant or other exception to the Fourth Amendment's warrant requirement for law enforcement. But, the Court stated, pretermitting whether Georgia's Death Investigation Act conveys such authority to a coroner, as the trial court concluded, and the record supported, the investigation at issue here was plainly led by law enforcement, not the coroner. Accordingly, the Court affirmed the trial court's order granting Turner's motion to suppress.

Appeal Bonds; OCGA § 5-7-51

Johnson v. State, S18A1277 (8/27/18)

Appellant was convicted of murder, but granted a new trial. The State appealed, and appellant moved for an appeal bond. The trial court considered his motion as one for a pretrial bond since he was awaiting retrial. However, the trial court entered an order denying his motion. Appellant appealed from that order, contending that it is directly appealable pursuant to OCGA § 5-7-5 and that the denial of bond violates the same statute.

The Court noted that OCGA § 5-7-5 provides: "In the event the state files an appeal as authorized in this chapter, the accused shall be entitled to be released on reasonable bail pending the disposition of the appeal, except in those cases punishable by death. The amount of the bail, to be set by the court, shall be reviewable on direct application by the court to which the appeal is taken."

The Court first addressed whether the denial of appellant's appeal bond is directly appealable. Appellant contended that OCGA § 5-7-5 provides that it is. The Court assumed for purposes of this appeal that it was not directly appealable under this Code section. However, citing *Humphrey v. Wilson*, 282 Ga. 520, 524 (1) (2007), the Court found that the denial of a motion for an appeal bond is considered a final judgment. Also, the trial court erred in characterizing that motion as one for pretrial bond because, as the trial court opined, it was filed before appellant's retrial. The Court found

that appellant's case is currently at an *appellate stage* and will not return to a pretrial stage unless and until it affirms the grant of a new trial when it considers the State's appeal. Therefore, the Court concluded, appellant's motion for an appeal bond is directly appealable.

Appellant contended that he was "entitled to be released" under OCGA § 5-7-5 because the State has not sought the death penalty and as a result, his case does not come within the exception for "those cases punishable by death." The Court disagreed. Citing *Weatherbed v. State*, 271 Ga. 736, 737-738 (1999) and OCGA § 17-7-70, the Court stated that murder belongs to a class of cases in which the death penalty can, under certain circumstances, be imposed. The fact that the State has chosen not to pursue the death penalty does not change the class of case to which it belongs. Therefore, the Court found, appellant's case falls within the exception to OCGA § 5-7-5.

But, the Court queried, while appellant is not automatically entitled to bail pending the State's appeal because his case falls within the punishable by death exception, can appellant nevertheless be considered for an appeal bond? The Court found no authority that, in the absence of a statutory provision, bail pending appeal should be absolutely prohibited in any case. To the contrary, the Court's precedent requires that, if there is no statutory direction, whether to grant bail pending appeal must be left in the sound discretion of the trial court. But, this discretion is not absolute. Thus, the Court concluded, the discretion of trial courts in these cases should be governed by the standards for deciding whether to grant pretrial bail, which are the standards ordinarily used in other jurisdictions for appeals by the State if the prosecution is not terminated by dismissal, including appeals in federal courts from the grant of a new trial.

Nevertheless, the Court stated, by its holding, it did not mean that the trial court was correct that appellant was seeking a pretrial bond rather than an appeal bond. Again, his case is currently at an appellate stage until the Court considers the State's appeal. In the meantime, however, it is appropriate to evaluate appellant's request for an appeal bond by the standards for pretrial bail in OCGA § 17-6-1 (e). Because the trial court undertook such an evaluation and explained its reasons, and nothing in its order or in the record showed that it manifestly or flagrantly abused its discretion, the Court held that the denial of appellant's motion for appeal bond was affirmed.

Search & Seizure; Length of Traffic Stop

Flores v. State, A18A1331, A18A1332 (8/8/18)

Appellants, Flores and Vazquez, were convicted of trafficking in methamphetamine. They contended that the trial court erred in denying their motion to suppress. The evidence, briefly stated, showed that a law enforcement officer stopped a car for a window tint violation. Vazquez was driving the car and Flores — the car's owner — was a passenger. The officer first explained to Vazquez the reason for the stop and then tried to explain it to Flores. However, the officer was unsure if she understood him, because her primary language is Spanish. For that reason, the officer asked for a Spanish-speaking officer to come to the scene. Approximately 19 minutes into the traffic stop, the Spanish-speaking officer arrived and began speaking with Flores about the nature of the citation. During their conversation, Flores volunteered — without being asked — that the officers could search her vehicle. Approximately 25 minutes into the traffic stop, the first officer handed Vazquez the citation and his driver's license and Flores got out of the vehicle. Around that time, the first officer asked Vazquez for consent to search the vehicle, and Vazquez agreed. Another officer with a narcotics dog had arrived, and approximately 27 minutes into the traffic stop the dog indicated the presence of drugs in the vehicle. At that point, the officers searched the vehicle and discovered methamphetamine.

Appellants contended that their consent was invalid because the stop was unduly prolonged. The Court disagreed. Officers may, without unreasonably prolonging a stop, ask the driver to step out of the vehicle; verify the driver's license, insurance, and registration; complete any paperwork connected with the citation or written warning; and determine if there are any outstanding warrants for the driver or the passengers. Moreover, officers may ask questions unrelated to the purpose of the stop, so long as they do not prolong the stop beyond the time reasonably required to fulfill the stop's purpose. An officer's mission in a traffic stop ordinarily includes activities that serve the objective of ensuring that vehicles on the road are operated safely and responsibly. The act of explaining to a vehicle owner, who was present at a traffic stop, that her vehicle did not comply with legal requirements falls within this objective.

Thus, the Court found, the evidence supported the trial court's finding that the officer who initiated the stop was unable to explain the nature of the violation to the vehicle's owner, Flores, due to a "language barrier." The Spanish-speaking officer arrived less than 20 minutes after the stop began, and shortly thereafter both Flores and Vazquez consented to the search. Therefore, under the circumstances, the duration of the stop was not unreasonable. Consequently, because the evidence supported the conclusion that the traffic stop had not ended when the officers obtained consent to search the car, the trial court did not err in denying the motion to suppress the evidence obtained through that search.

Miranda; Explanation of Rights

Gray v. State, A18A1107 (8/8/18)

Appellant was convicted of one count of family violence aggravated assault, two counts of misdemeanor family violence battery (one count as a lesser-included crime to family violence aggravated assault), one count of false imprisonment, and two counts of cruelty to children in the third degree. He contended that the trial court erred in denying his motion to suppress his statements to law enforcement. The Court agreed.

The record showed that the detectives began the interview of appellant by handing him a printed copy of his *Miranda* rights and reading them aloud. Appellant was instructed that he could "decide at any time to exercise these rights and not answer any questions or make any statements." He was then asked if he understood everything that had been read to him, to which he responded, "Yes." One of the detectives also asked appellant if he was "clear on all that," and appellant responded, "Yes." Appellant was then asked whether he wanted to continue with the interview, and again he responded, "Yes." The detectives then asked appellant to initial by each statement of his rights on the printed copy of the *Miranda* form to indicate that he had read and understood each one, and appellant did so. Appellant then signed a statement confirming "I have read the above statement of my rights and I understand each of those rights." Finally, appellant was asked to sign under the line that read "[h]aving these rights in mind, I am willing to give up these rights at this time and willingly make a statement." At that point, appellant responded, "Hold up. What you mean give my rights up?" One of the detectives answered that he would be giving his rights up "to make a statement," but that he could "stop at any time" and that "[j]ust cause you sign that doesn't mean . . . you have to answer anything. You're not really giving up any rights . . . you know, just – you talk; you feel like you don't want to talk anymore, you just stop talking. That's – that's your – your right." The detectives then proceeded to interview appellant, and he answered their questions, at no point invoking any of his rights.

Appellant argued that his question to the detective demonstrated his lack of understanding of his *Miranda* rights and thus, he did not knowingly and intelligently waive his rights. He also argued that the detective's response undermined the entirety of the warnings read and given to him. The Court agreed because the detective's response that appellant would not be "really giving up any rights" directly contradicted the *Miranda* warnings he had just administered to appellant, and the detective then incompletely paraphrased the right to remain silent. Thus, the Court stated, once appellant expressed that he did not understand that he was giving up his rights, it was incumbent on the interrogating officers to take steps to ensure that he understood what his rights were and that he would be waiving them by proceeding to make a statement. But here, the Court found, not only did the officer incompletely describe the rights that appellant would be waiving, he erroneously told him that he would not be giving up any rights. Looking at the totality of the circumstances, the Court concluded that appellant did not knowingly and intelligently waive his rights under *Miranda*, and the trial court erred in holding otherwise.

Nevertheless, the Court stated, a violation of *Miranda* is not reversible if it was harmless beyond a reasonable doubt. And here, the Court found, the admission of appellant's statement was harmless given the overwhelming evidence of guilt.