

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 14, 2016

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THIS WEEK:

- **Motions for Continuance**
- **Habeas Corpus; Guilty Pleas**
- **Cruelty to a Person 65 Years of Age or Older; Jury Charges**
- **Jurors; Voir Dire**
- **Possession of Tools for the Commission of a Crime; Jury Charges**
- **Miranda; Search & Seizure**

Motions for Continuance

Brittain v. State, S16A0950 (10/3/16)

Appellant was convicted of malice murder and other offenses. He contended that the trial court erred by denying his motion for a continuance. The record showed that jury selection was scheduled to begin on October 24, 2005, and on October 14, 2005, the State added sixteen additional witnesses to its witness list. That day, appellant filed a motion for a continuance, arguing that he needed additional time to investigate the new witnesses and that he was anticipating a psychiatric report on his mental health that would not be ready until October 21, 2005. The trial court denied this request.

The Court stated that it will not reverse a trial court's decision to deny a motion for a continuance absent a showing of a clear abuse of discretion. Here, the Court found, although the trial court denied the motion for a continuance, it did act to accommodate appellant's needs for trial preparation. For example, although jury selection would begin on October 24, 2005, the trial court ordered that the jury would not be sworn in until two days later in order to allow appellant to fully review his psychiatrist's

report. In addition, the trial court ensured that, during the course of the trial, appellant would be provided with an opportunity to interview the State's additional witnesses prior to their testimony being given. Under these circumstances, the Court concluded, the trial court did not abuse its discretion in denying the motion for a continuance.

Habeas Corpus; Guilty Pleas

Kennedy v. Primack, S16A0821 (10/3/16)

On November 20, 2012, Primack entered a non-negotiated guilty plea to second degree cruelty to children based on her failure to seek medical treatment for her four-year-old daughter after Primack's boyfriend had broken the child's leg. A habeas court granted relief to Primack on her claim that she had not entered her guilty plea knowingly and voluntarily. Specifically, the habeas court found that Primack did not possess a sufficient understanding of the law in relation to the factual basis for the plea in order to render her plea voluntary. The Warden appealed.

Primack was charged with cruelty to children in the second degree, which is defined under O.C.G.A. § 16-5-70(c): "Any person commits the offense of cruelty to children in the second degree when such person *with criminal negligence* causes a child under the age of 18 cruel or excessive physical or mental pain." (Emphasis supplied.) The record showed the following exchange during the plea colloquy. Primack: Your Honor. What is criminal negligence? The Court: What is criminal negligence? It is negligence that goes beyond gross negligence and rises to the level of criminal negligence. That's a law school answer, I suppose, isn't it, Mr.

..... [Defense Counsel]? It's a gross deviation from the standard. You have a duty to that child to seek medical care. Okay? You did not seek medical care. There's negligence. There's simple negligence. There's gross negligence and when you go beyond gross negligence, you get into the area of criminal negligence. Have I stated that correctly? State: I believe so, Your Honor. Defense Counsel: That's basically what it boils down to is that the legislature has said something of this magnitude is a crime, as opposed to just being a [sic] simple negligence. The Court: That is absolutely correct. That's what it amounts to. This is beyond gross negligence. This is something that's just practically inexcusable.

The Court noted that no one asked Primack if she understood the "law school answer" and explanation of the term "criminal negligence" given by the trial court and defense counsel. Nor were the answers given by the trial court and defense counsel, which compared legal terms of art such as "simple negligence" and "gross negligence" without further context, and which referenced the "legislature [saying] something of this magnitude is a crime," sufficient to allow Primack to possess an understanding of the law in relation to the facts of her case. Instead, the Court found, the definitions offered by the trial court and defense counsel contained none of the straightforward language that the Georgia legislature has used to actually define the term "criminal negligence." Pursuant to O.C.G.A. § 16-2-1(b), "criminal negligence" is "an act or failure to act which demonstrates a willful, wanton, or reckless disregard for the safety of others who might reasonably be expected to be injured thereby." The definitions offered by the trial court and defense counsel simply did not convey any of the concepts that define "criminal negligence" in any straightforward or readily discernible way to a defendant who specifically asked what the term meant. And, the Court noted, Primack testified at the habeas hearing that she did not, in fact, understand the explanation given by the trial court and her defense counsel.

Accordingly, the Court concluded that the record supported the habeas court's finding that Primack was not adequately informed that her failure to seek medical care for her child had to rise to a level of "willful, wanton, or reckless disregard for the safety" of her daughter in order for Primack to have

acted with the necessary "criminal negligence" to be found guilty of second degree cruelty to children. Therefore, the Court upheld the habeas court's decision to grant relief to Primack based on her argument that she did not enter her guilty plea knowingly, voluntarily, and intelligently.

Cruelty to a Person 65 Years of Age or Older; Jury Charges

Pippen v. State, S16A1126 (10/3/16)

Appellant was convicted of felony murder and cruelty to a person 65 years of age or older. Appellant raised three issues regarding the jury charges given by the court. However, since she did not object to any these charges, the Court found that its review was limited to whether the charges amounted to plain error.

Appellant first contended that the trial court erred by instructing the jury that she could be found guilty if she had "immediate charge or custody" of the victim, because she was charged as a party to the crime. The Court noted that in addition to reading appellant's indictment to the jury, the trial court charged the jury on parties to a crime, intent, mere presence, mere association, grave suspicion, and cruelty to a person 65 years of age or older. Reading the jury charge as a whole, the Court found that appellant's claim that the trial court erred in instructing the jury that she could be found guilty if she had "immediate charge or custody" of the victim failed because she did not demonstrate that the alleged error was obvious beyond reasonable dispute, let alone that it likely affected the outcome of the proceedings. The trial court's instruction concerning the State's burden of proof regarding whether appellant had "immediate charge or custody" of the victim was properly tailored to the indictment and was part of a pattern charge that correctly tracked Georgia law. Accordingly, there was no error.

Next, appellant argued that the trial court erred by instructing the jury that she could be convicted for willfully depriving "necessary sustenance" from the victim when appellant was not indicted for that act. The trial court charged the jury as follows: "A guardian or other person supervising the welfare of or having immediate charge or custody of a person who is sixty-five years of age or older commits the offense of cruelty to a person

who is sixty-five years of age or older when that person willfully deprives a person who is sixty-five years of age or older of healthcare, shelter, or necessary sustenance, to the extent that the health or well-being of a person who is sixty-five years of age or older is jeopardized. The Georgia Legislature enacted this statute to protect susceptible elderly persons from abusive and physical exploitation. The statute, it [sic] holds responsible a person having supervision or immediate charge or custody of an elderly person who willfully fails to provide necessary healthcare and sustenance to that person under their care."

The Court noted that after this instruction, the trial court again charged the jury that, in order to convict appellant of cruelty to a person 65 years of age or older, they must find that she committed the offense as alleged in the indictment. The giving of a jury instruction which deviates from the indictment violates due process where there is evidence to support a conviction on the unalleged manner of committing the crime and the jury is not instructed to limit its consideration to the manner specified in the indictment. Here, although the trial court charged the jury that a person commits the offense of cruelty to a person 65 years of age or older by willfully depriving that person "of healthcare, shelter, or necessary sustenance," the trial court clearly limited the jury's consideration of guilt beyond a reasonable doubt to the manner specified in the indictment. Indeed, the trial court read the indictment to the jury during the court's charge and instructed the jury that they could only find appellant guilty of cruelty to a person 65 years of age or older if they found beyond a reasonable doubt she had committed the offense as alleged in the indictment. Therefore, the Court concluded, reading the charge as a whole, appellant failed to establish that the trial court's instruction likely affected the outcome of the proceedings.

Finally, appellant contended that the trial court erred by failing to, sua sponte, further define "willfully deprives" within the elder cruelty statute for the jury and by failing to instruct the jury that "acting under a physician's direction" is an exception to the elder cruelty statute. The Court found that the trial court is not required to instruct on the meaning of all words used in the charge, particularly words of common understanding.

Thus, appellant failed to show that not further defining “willfully deprives” was an obvious error or likely affected the outcome of the proceedings. Appellant was also not entitled to an instruction that “acting under a physician’s direction” was a defense to her criminal charges. Though only “slight evidence” is required to support a jury charge, here there was only evidence that appellant was acting under the direction of the personal care home owner who was not a doctor. Accordingly, appellant did not establish that the failure of the trial court to charge the jury on these issues likely affected the outcome of the proceedings as the claim was entirely without merit.

Jurors; Voir Dire

Turner v. State, S16A1349 (10/3/16)

Appellant was convicted of malice murder. He contended that the trial court erred in allowing the State to ask potential jurors during voir dire whether “anyone here believe[s] they could never return a verdict of guilty based solely on the word of another person?” Appellant objected to the question, asserting it essentially asked the jury to prejudge the case. The Court found that the question did not invite the jurors to prejudge the case. Rather, the question related not to hypothetical facts but to the potential jurors’ willingness to adhere to the trial court’s instructions concerning the State’s burden of proof. Therefore, the trial court did not abuse its discretion in permitting the question posed by the State.

Appellant also contended that the trial court erred in not excusing a juror for cause. The juror answered affirmatively when the panel was asked if anyone believed (1) appellant must have done something wrong in order to be on trial and (2) it was up to appellant to prove his innocence. However, the Court noted, after he initially expressed his concerns, the juror stated he would be able to lay aside any biases he might have, would presume appellant to be innocent, and would decide the case based on the law and evidence. Therefore, the Court concluded, inasmuch as the juror did not hold to a fixed and definite opinion with respect to appellant’s guilt or innocence, it could not be said the trial court abused its broad discretion in refusing to strike this juror for cause.

Possession of Tools for the Commission of a Crime; Jury Charges

Sutton v. State, A16A1176 (9/28/16)

Appellant was convicted for possession of tools for the commission of a crime. The indictment charged appellant “with the offense of POSSESSION OF TOOLS FOR THE COMMISSION OF [A] CRIME (O.C.G.A. [§] 16-7-20) for that the said accused . . . on September 24, 2012, in [Candler County,] did then and there unlawfully have in his possession tools, to wit: pry bars, saws, grinder, sledge hammer, along with gloves and dark knit hat, which [are] commonly used in the commission of burglary, with the intent to use said items in the commission of a crime, contrary to the laws of the state of Georgia, the good order, peace and dignity thereof.” Appellant argued that his conviction was unsupported because (1) although pictures of the tools in his possession were shown to the jury, the tools themselves were not submitted as evidence such that the jury could evaluate whether they showed signs of recent use and whether they had actually been used in the commission of a crime; and (2) the State presented no evidence that he committed a burglary prior to his encounter with the patrol officer.

The Court noted that appellant was correct that in the majority of cases in which the Court has upheld convictions for possession of tools for the commission of a crime, there was at least some evidence that the tools were actually used in some specific crime or attempted crime. But, although such evidence *may* support a conviction for possession of tools for the commission of a crime, appellant provided the Court with no legal authority—and there was none that that the Court could find—suggesting that evidence of recent use of the tools in a particular crime or attempted crime is *necessary* to support a conviction under O.C.G.A. § 16-7-20(a). This is because the plain language of the statute itself requires only that the defendant possess the relevant tools with *the intent to use them* in the commission of a crime, not that the tools must have already been used to commit a particular crime.

Here, the Court found, the circumstantial evidence—including appellant’s suspicious and unusual behavior prior to the traffic stop, the fact that he was wearing socks over his

shoes and inexplicably removed his shoes and the extra socks while handcuffed during his transport to jail, his contradictory statements to police as to why he was in the area, his 2003 conviction for a burglary that occurred in the exact same area of the traffic stop, and his 2010 conviction for the same offense charged here in which he possessed some of the same alleged burglary tools he possessed in this case—was sufficient, along with the tools found in his possession, to support his conviction.

Appellant also argued that the trial court plainly erred by failing to charge the jury on the elements of burglary when the indictment specifically charged him with possession of tools commonly used in the commission of burglary. The Court disagreed. The Court noted that because appellant did not object to the jury charge, its review was limited to whether the fail to so charge was plain error.

As to the first prong of the plain-error analysis, appellant argued that the trial court was required to “explain the elements of each offense at issue” to the jury, and its failure to do so was reversible error. He further contended that when “certain legal offenses” are elements of the charged crime, a trial court errs in failing to provide the jury with legal definitions of the “elemental crimes.” In support of this argument, he cited to cases in which the trial court failed to charge the jury on the legal definition of a crime that was a “material element” of the charged offense. But, the Court stated, his reliance on those cases was misplaced because possession of burglary tools and burglary are separate and distinct offenses and conviction of one is not an essential part of conviction of the other. In fact, a conviction for possession of tools for the commission of a crime—in this case burglary—requires only the possession of tools with the intent to use them to commit burglary, not that a burglary must actually occur. Moreover, in the vast majority of cases construing O.C.G.A. § 16-7-20, whether a tool is commonly used in the commission of burglary, theft, or another crime is within the ken of the average juror, and therefore, jurors may make such a determination based on their own personal knowledge and experience. Thus, because the trial court’s failure to instruct the jury on the elements of burglary was not error, much less a “clear and obvious” one, appellant failed to meet his burden of satisfying the first and second prongs of the plain-error analysis.

Miranda; Search & Seizure

Jacobs v. State, A16A1115 (9/29/16)

Appellant was convicted of DUI (per se). The evidence, briefly stated, showed that a vehicle crashed into a gate leading into an apartment complex. The responding officer located the vehicle that he believed to be responsible, but no driver could be found. However, the officer soon located appellant, the driver, after appellant's girlfriend approached the officer to inquire as to as appellant's well-being. The officer spoke to appellant on the phone and appellant agreed to come down from his girlfriend's apartment and speak to the officer but only after the officer threatened to get a warrant. Thereafter, the officer's investigation led to appellant's arrest for DUI. Appellant agreed to a blood test which showed a BAC of .202.

Appellant first contended that his statements should have been suppressed because the officer never read him his *Miranda* rights. Specifically, appellant contended that he was in custody based on the officer's "command" for him to leave the apartment under threat of the officer securing an arrest warrant. But, the Court stated, a threat to obtain a search warrant does not amount to such coercion and duress so as to invalidate a suspect's consent to the search. Here, the officer's reference to obtaining a warrant could be seen by appellant as a signal that the officer was not authorized or prepared to arrest him absent the further steps of obtaining a warrant, at least as long as he stayed in the apartment. Therefore, the Court held, there was no error with the trial court's conclusion that, in the light of the totality of the circumstances, appellant was not in custody when he made the statements in question.

Appellant also contended his consent to the search of his blood was invalid under the Fourth Amendment, citing *Williams*. The Court disagreed. The Court found that the trial court correctly determined under the totality of the circumstances that appellant freely and voluntarily consented to the blood test. Appellant gave an affirmative response to the responding officer's question pursuant to the implied consent notice. Appellant had been injured, but there was no evidence that his injury impaired his understanding of the situation he faced. Although appellant was handcuffed when he voiced his assent to the blood draw, there was no evidence that

the officer had unholstered his weapon or employed other shows of force. Also, there was no evidence of a lengthy detention: The evidence showed that appellant and the officer spoke for 10 to 15 minutes before the officer arrested him and read him the implied consent warning, then approximately 15 more minutes passed before they arrived at the fire station. At the fire station, appellant reaffirmed his assent before the medic drew his blood.

Nevertheless, appellant argued, he was too intoxicated to give his consent. But, the Court stated, while true that appellant's BAC was twice the legal limit, there was no evidence that he was so intoxicated that he was unable to respond appropriately to the officer's questions or appreciate the nature of their interaction. Rather, the officer testified that appellant, with some reluctance, walked down a set of stairs, then gave some explanation for the night's events. The officer testified that he concluded that appellant was intoxicated based on the gate accident, the odor of alcohol, and statements by appellant and his girlfriend to the effect that he had been drinking. Accordingly, the Court affirmed the trial judge's denial of the motion to suppress evidence obtained as a result of the blood draw.