Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 21, 2016

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THIS WEEK:

Forgery; Uttering a Document

Rowan v. State, A16A1004 (10/4/16)

Appellant was convicted of forgery in the first degree. The accusation (based on the version of O.C.G.A. § 16-9-1 in effect in February 2010) alleged that appellant "did knowingly, with intent to defraud, possess a certain writing to wit: a Contractor License Application, in such a manner that the writing as made purports to have been made by Vernon Luken, who did not give such authority, and did utter said writing." The evidence showed that appellant and Luken formed a partnership business, Southern States Sprinkler Company ("SSSC"). Luken discovered that SSSC had been licensed in Maryland based on a license application that had been submitted to that state purportedly bearing his signature. Luken had never given appellant permission to sign his name, and Luken had not signed the application. Appellant brought the Maryland license application to Davis, a notary public in Jackson County, for notarization of Luken's signature and told Davis that the signature was Luken's.

Appellant contended that the State failed to prove venue beyond a reasonable doubt. Specifically, appellant did not argue that the State failed to prove that his presentation of the application to Davis for notarization occurred in Jackson County, Georgia; rather, he argued that the "act of requesting that a notary sign a document cannot meet the definition of uttering," and that the completed offense of forgery did not take place until the license application was submitted to the State of Maryland, precluding venue from lying in Jackson County, Georgia.

The Court agreed with the State that appellant's presentation of the forged application to the notary public constituted an utterance. To utter and publish a document is to offer directly or indirectly, by words or actions, such document as good. Here, the Court found, appellant presented to the notary public the license application with the signature purporting to be Luken's, and in order to obtain her notarization of the signature, offered it to her directly and by his words as good, when he told her that the signature was Luken's. Therefore, the Court stated, while it agreed with appellant that forgery in the first degree is not complete until a document is delivered, it disagreed that the offense is not complete until it is used for a single, ultimate improper purpose. While delivering the application to Maryland in order to obtain the license would also be an utterance, this did not preclude the presentation of the document to another party in furtherance of an improper purpose from constituting an utterance as well. Thus, the Court held, when appellant presented the signed document to the notary, offering it as good in order to elicit her notarization, he uttered the document. Therefore, the jury was authorized to find that the evidence was sufficient to establish venue beyond a reasonable doubt.

Search & Seizure

Gaither v. State, A16A0788 (10/4/16)

Appellant was charged with two counts of DUI. The trial court denied her motion to suppress and the Court granted her an interlocutory appeal. The evidence showed that shortly after 1:00 a.m., an officer saw appellant's truck turn left from a turn lane off Highway 17 into a closed business establishment. He followed appellant up a hill and saw appellant pass a driveway about 50 feet before the top where a gate said that the road is closed. As soon as appellant passed that driveway and reached the gate, the officer activated his patrol vehicle's blue lights. Appellant turned her truck around in front of the patrol car and began to drive back toward Highway 17. As she passed the patrol vehicle, the officer verbally instructed her to stop the car. Appellant proceeded "a few more feet" before stopping her truck behind the patrol vehicle. She was ultimately arrested for DUI.

The officer testified that he did not observe appellant commit any traffic offenses before he activated his vehicle's blue lights. Appellant had turned off Highway 17 by using a turn lane on the highway, and there were no signs indicating that the road onto which she had turned was closed to the public. The officer did not know who owned a building located at the top of the hill, which he believed to be abandoned, and the closed business was located "below" the road onto which appellant had turned. The officer emphasized that he activated his vehicle's blue lights "solely because it was a suspicious vehicle."

Appellant contended that when the officer turned on his vehicle's blue lights, their interaction became a second tier encounter requiring reasonable, articulable suspicion. She also contended that the State did not meet its burden of showing that the officer had a particularized and objective basis for suspecting that she was, or was about to be, engaged in criminal activity when he initiated the stop. The Court agreed and reversed.

In its ruling, the trial court emphasized appellant's failure to stop immediately when the officer activated his blue lights. Thus, the State contended, appellant "was not actually detained until she stopped her car *after* driving past [the officer] and his flashing blue lights" and that her "act of fleeing" gave the officer reasonable suspicion to detain her. But, the Court found, the officer testified that he activated his blue lights because he suspected appellant was "going up there to . . . commit a crime." A reasonable person would not have felt free to leave upon seeing the patrol vehicle's blue lights and hearing the uniformed officer's instruction to stop a few seconds later. And here, appellant merely turned her truck around and stopped a few feet past the officer's vehicle which the Court found, was not fleeing.

Moreover, the Court held, the trial court erred in finding that the officer articulated "specific and articulable facts" sufficient to give rise to "a particularized and objective basis" for suspecting appellant of criminal activity so as to authorize the traffic stop. First, the officer did not see appellant commit a traffic violation. Second, there was no evidence that he had received any report of criminal activity in the vicinity. Even if the officer had testified "that thefts are common at this time of night," as the trial court found, such a statement would have been no more than an unparticularized suspicion or hunch, which is insufficient to justify an investigative stop. Third, the officer testified that there was no indication that the road on which he stopped appellant was closed to the public before the gate at the top of the road. Rather, Highway 17 contained a turn lane leading to the road, which, the officer testified, led to at least one driveway. Similarly, although the trial court found that the location was a "closed state-owned historical site," the record did not support this finding. Accordingly, the Court concluded, the trial court erred in denying appellant's motion to suppress.

Rule 404 (b) Evidence; Motive

Harris v. State, A16A1047 (10/5/16)

Appellant was charged with aggravated sodomy, aggravated sexual battery, and family violence battery under O.C.G.A. § 16-5-23.1(f)(2) against a twenty-year-old female, but the jury only found him guilty of family violence battery and acquitted him of the sex offenses. He contended that the trial court erred in admitting evidence of his prior convictions for family violence battery and simple battery.

The record showed that pursuant to Rule 404(b), the State gave notice that it intended to introduce evidence showing appellant had committed another act of family violence battery and a simple battery in 2009 against his estranged wife and her sister, respectively. The trial court agreed with the State that the evidence was permissible to show motive, specifically that appellant uses physical violence to control women who have denied him something he wants.

The Court stated that evidence of another crime may be admitted to show the defendant's motive for committing the crime with which he is charged, but not to demonstrate a propensity to act in accordance with the character indicated by that other crime or conduct. Motive is defined as the reason that nudges the will and prods the mind to indulge the criminal intent. And here, the Court found, although motive was not an element of the charged offense, the other acts evidence was relevant to shed light on why appellant reacted as he did when the victim did not acquiesce to his sexual advances. The victim testified that appellant hit her after she would not let him force his penis into her mouth and while she was struggling to get up and away from him. Similarly, his wife testified that appellant began hitting her while she was attempting to pack her things and leave after she had refused to accede to his wishes, and her sister testified that he struck out at her physically while she was attempting to enter the premises to retrieve something for her sister. Thus, the other acts evidence showed appellant's willingness to use physical violence against female victims whom he knew in an attempt to intimidate them or bend them to his will when they did not accede to his demands or were otherwise acting against his wishes. Accordingly, the evidence was relevant for the permissible purpose of showing the impetus behind appellant's action of punching the victim in the face when she did not willingly agree to be his sexual partner.

Nevertheless, appellant argued that under Rule 403, the evidence was far more prejudicial than probative. The Court disagreed. Here, the physical evidence left little doubt that the victim had suffered an injury to her face, the only question being how she sustained the injuries. The only direct proof that appellant inflicted the victim's injuries came from her testimony, which appellant sought to discredit by pointing out that no one testified that she did not have these injuries prior to her alleged altercation with appellant and that she could have been injured by other means. Thus, the other acts evidence that appellant resorted to

violence toward other women who did not accede to his demands was needed by the State to counter appellant's defense and to support its case that appellant intentionally hit the victim in the face after she refused his sexual advances. This evidence added significantly to the other proof used to establish that appellant hit the victim. Accordingly, the Court held, the trial court did not abuse its discretion in admitting the other acts evidence.

Statements; Rule 403

King v. State, A16A1144 (10/6/16)

Appellant was convicted of DUI (less safe). The evidence showed that an officer observed appellant's vehicle with its flashers on and its hood up. The officer stopped to render assistance, but eventually arrested appellant for DUI. As the officer was reading the implied consent warning, appellant stated that he was familiar with warning because he had a prior DUI. Appellant consented to a breath test, but after the officer placed him in the back of the police car, he began to complain of back pain and indicated that he wanted an ambulance. Appellant was transported by ambulance to the hospital and no breath test was performed. However, appellant later consented to a blood test.

Appellant contended that the trial court erred in admitting evidence of his statement to police that he had a prior DUI because its probative value was substantially outweighed by its unfair prejudice. Specifically, appellant did not contest that the evidence was admissible under Rule 404 (b), only that it was inadmissible under Rule 403. The Court initially stated that neither party raised an issue whether this type of evidence required the trial court to conduct a Rule 404 (b) analysis, so the Court pretermitted the question and assumed that Rule 404 (b) applied.

The Court found that the prior DUI was relevant to appellant's intent to drive while intoxicated because his defense at trial was that the State had failed to prove that he had driven while intoxicated (as opposed to becoming intoxicated after stopping the vehicle by the side of the road), and "peculiarities about the investigation," including why appellant suddenly developed back pain moments after consenting to a breath test. Likewise, the relevance of the prior DUI was heightened because appellant's defense was that he did not drive the vehicle while intoxicated, making evidence that he had voluntarily driven under the influence of alcohol on a prior occasion all the more relevant because it tended to show that it was more likely that he intentionally did so on this occasion.

As to the probative value of the prior DUI, the Court stated that this case presented facts somewhat unusual for a DUI in that no witness observed appellant actually driving the vehicle, making it even more difficult for the State to prove intent and the fact that appellant had been driving. Appellant's admission to a prior DUI had a strong logical connection to his commission of the DUI charged in this case, and that evidence added significantly to the otherwise circumstantial evidence that he actually had been driving while intoxicated. Thus, the State needed this evidence to support its case and to counter appellant's defense. Accordingly, any prejudice did not outweigh the probative nature of the evidence. Accordingly, the trial court did not abuse its discretion in admitting appellant's statement.

Identity Fraud; Sufficiency of the Evidence

Anderson v. State, A16A2010 (10/7/16)

Appellant was convicted of one count of identity fraud. The evidence showed that appellant told the victim that appellant had a cell phone distribution business and could get appellant a Samsung phone and service through T-Mobile. Since the victim's contract with Verizon was ending the next month, he accepted appellant's offer. Appellant asked for and received the victim's personal information, including his social security and driver's license numbers, so that he could apply for the victim's new phone and service. Appellant also asked for the victim's Verizon PIN number so that he could transfer the victim's phone number to the new carrier. The victim later found out that his Verizon account had been upgraded to a family plan and nine new phone lines had been added. Verizon also informed the victim that he had outstanding charges of $4,281.39 on his account for new phones and services. The victim testified that he had not authorized any of the additions to his Verizon account; in fact, the account was supposed to have been closed.

Appellant contended that the evidence was insufficient to support his conviction. The Court disagreed. O.C.G.A. § 16-9-121(a)(1) provides that "[a] person commits the offense of identity fraud when he or she willfully and fraudulently[,] . . . [w]ithout authorization or consent, uses or possesses with intent to fraudulently use identifying information concerning a person[.]" As used in this statute, the term "identifying information" refers to any numbers (such as driver's license, social security, account, and PIN numbers) or other information which can be used to access a person's "resources." O.C.G.A. § 16-9-120(5). The term "resources," includes, but is not limited to, a person's charge accounts. O.C.G.A. § 16-9-120(6)(B).

Here, the Court found, the evidence showed that appellant willfully and fraudulently used the victim's personal identifying information to obtain goods and services through the victim's Verizon account without the victim's authorization. Although appellant acquired the victim's personal information with the victim's consent, appellant was only authorized to use that information to obtain a new phone and to set up phone service for the victim. The evidence showed that appellant did not comply with the victim's request; instead he used the victim's personal identifying information in an unauthorized manner, that is, to obtain $4,281.39 in goods and services for himself. This evidence was sufficient to support the jury's guilty verdict beyond a reasonable doubt.

Rule of Lenity; Recusal

Marlow v. State, A16A0877, A16A878 (10/11/16)

Appellants were each convicted of two felony counts of making a false statement pursuant to O.C.G.A. § 16-10-20. The evidence, briefly stated, showed that appellants, after leaving a contentious school board meeting, reported to the police that School Superintendent Petruzielo sped towards them as they crossed the road and one appellant had to push the other appellant out of the way to avoid being hit by Petruzielo's vehicle. A video of the incident, however, showed differently. Citing the rule of lenity, appellants contended that their felony convictions for making false statements should be vacated and that they should be resentenced for misdemeanor making a false report of a crime pursuant to O.C.G.A. §6-10-26. The Court agreed.

Relying on *Gordon v. State*, 334 Ga. App. 633 (2015) (whole court), the Court stated

that the rule of lenity applies where there is ambiguity in the two statutes such that both crimes could be proved with the same evidence. And here, quoting from *Gordon*, the Court stated that "although there are many ways that the crime of making a false statement may be committed, [the appellants'] conduct, as charged, subjected [them] to prosecution and sentencing under both O.C.G.A. §§ 16-10-20 and 16-10-26. Indeed, [the appellants] wilfully and knowingly made . . . false statements to [a law enforcement officer] by falsely reporting to [that] officer[] a crime that [they] alleged to have occurred in their jurisdiction. Thus, because these two statutes provide different grades of punishment for the same criminal conduct, [the appellants are] entitled to the rule of lenity." Accordingly, the Court vacated appellants' sentences for the felony offense of making a false statement and remanded for resentencing for the misdemeanor offense of making a false report of a crime.

Appellants also contended that the trial court erred by failing to recuse herself sua sponte. The Court disagreed. The Court stated that a trial judge's failure to sua sponte recuse herself will be reversed only if the conduct of the judge constitutes an egregious violation of a specific ethical standard, and it must support the inescapable conclusion that a reasonable person would consider the judge to harbor a bias that affects her ability to be impartial. To warrant recusal, the alleged bias must be of such a nature and intensity to prevent the complaining party from obtaining a trial uninfluenced by the court's prejudgment. To warrant disqualification of a trial judge the affidavit supporting the recusal motion must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.

Here, the Court found, the basis for the recusal motion was the trial judge's alleged extra-judicial professional contact and involvement with Petruzielo through her position at a local college. Appellants, however, cited to no evidence that the two had any actual contact or involvement, much less of the extent of such a relationship. Similarly, appellants cited to no evidence regarding actual involvement between the trial court and the school board. Thus, the Court held, the allegations in this case were not enough reasonably to call into question the trial judge's impartiality in this case. Accordingly, the trial court did not err by failing to recuse.

Search & Seizure

Taylor v. State, A16A0880 (10/11/16)

Appellant was convicted of 6 counts of aggravated child molestation, 11 counts of child molestation, 11 counts of sexual exploitation of children, 1 count each of aggravated sexual battery, sexual battery, and criminal attempt, involving 15 minor victims. He contended that the trial court erred in denying his motion to suppress. The Court disagreed.

First, appellant argued that the trial court erred by denying his motion to suppress because the affidavit submitted with the application for a search warrant of his home failed to establish that he resided at the address to be searched. The Court noted that the detective in this case submitted a combined "AFFIDAVIT AND APPLICATION FOR A SEARCH WARRANT," the entirety of which was under oath, as well as an "Attachment A," which was also under oath. The detective averred in "Attachment A" that, based on the recited facts, probable cause existed to "believe that a crime has been committed and that there may be evidence to support such crimes at said location." Also page 2 of the affidavit and application provided that "the facts establishing probable cause in searching for and seizing the foregoing specifically described person(s), property, items, articles, instruments connected with the foregoing crime(s) at the location described herein are: SEE ATTACHMENT 'A.'" This express language was immediately followed by the physical address and description of the location.

The Court noted that while no Georgia cases address a similar alleged deficiency in a warrant application, other jurisdictions have applied a common-sense approach to resolving the issue when the affidavit fails to state explicitly that an address to be searched is the residence of the suspect. These courts have concluded that when the affidavit describes only one place connected to the suspect, such as a residence, and lists a specific address to be searched, a connection between the address described where evidence can be found and the probable cause outlined in the affidavit is the only logical conclusion supported by a common-sense reading of the affidavit. Thus, the Court did not err in denying the motion on this ground.

Appellant next contended that the affidavit failed establish that evidence of child molestation and sexual battery would be on the computers, cameras, and electronic storage devices listed on the warrant. Specifically, that there was no information in the affidavit connecting his computer "in any way to the alleged conduct" and that the detective misrepresented in her affidavit that one of the victims described appellant as having a digital camera. But, quoting from the State's "eloquently argue[d]…brief," the Court stated, "While the detective stated that [the victim] never said the words "digital camera," she also testified during cross-examination, that [the victim] said he was able to see his picture on the back of the camera. So, despite the testimony of the detective that [the victim] said it was an 'old-timey' camera, the fact that he could see his picture immediately on the back of the camera would reasonably lead the detective to know that Appellant was using a Digital SLR camera that has the appearance of an old 35 millimeter camera, but is, in fact, digital with a viewing window on the back of the camera from which a person may view a photograph just taken." Furthermore, the Court added, it is a minor, common-sense inference to conclude that a person taking nude photographs using electronic devices that are meant to be connected to a computer would also store the photographs on a computer. Thus, the Court concluded, based upon this reasonable inference drawn from the facts before the magistrate, there was no merit in appellant's claim that there was no probable cause to search his computers.