Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 26, 2012

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THIS WEEK:

Kidnapping; Garza

Wilson v. State, A12A1054 (10/16/12)

Appellant was convicted of burglary, armed robbery, possession of a firearm during the commission of a felony and kidnapping. Appellant contended that the evidence was insufficient to sustain his kidnapping conviction, and that the trial court erred in charging the jury that the "slightest movement" was sufficient to prove the element of asportation for the kidnapping offense. The Court agreed that the evidence was insufficient to support the kidnapping conviction, and therefore reversed his conviction.

The Court noted that a person commits the offense of kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will. O.C.G.A. § 16-5-40(a) (2007). Specifically, the Court stated that the element of asportation was not established under the standard set forth in *Garza*, and thus, appellant's kidnapping conviction must be reversed. The Court noted that appellant's acts and conviction occurred prior to the issuance of the *Garza* decision, but the rule must be retroactively applied. In applying the *Garza* factors in this case, the Court stated that it was clear the victim's movement did not constitute the necessary asportation to support a kidnapping conviction. Here, the act of forcing the victim from a standing position to laying on the floor was merely a positional change of minimal duration. Furthermore, the positional changes occurred while the burglary and armed robbery crimes were in progress and were incidental to those crimes. The positional change did not significantly increase the dangers over those that the victim already faced during the commission of the burglary and armed robbery crimes. Consequently, the element of asportation necessary for kidnapping was not established under the circumstances in this case.

Marijuana Possession; Search & Seizure

Wilson v. State, A12A1156 (10/17/12)

Appellant was convicted of possession of less than one ounce of marijuana. The evidence showed that a special agent with the narcotics team of the sheriff's office was conducting surveillance of a residence in connection with the possible sale of marijuana from the residence. As the agent watched, a vehicle arrived at the residence. The driver got out of the vehicle and walked up the driveway; about 30 seconds later, the driver drove away in the vehicle. Associating the driver's behavior with "possible narcotic activity," the agent began following the vehicle. When the agent was "pretty much immediately behind" the vehicle,

he saw the driver move into a turning lane and then turn, effecting both moves without signaling. The agent called a lieutenant with the city police department who was in the area and asked him to stop the vehicle for having changed lanes and turning without signaling. The agent told the lieutenant that "they" had been involved in a drug investigation. The lieutenant saw the vehicle and began following it. He saw that the driver was not wearing a seatbelt. Based on the suspected seatbelt and signal violations, the lieutenant activated his emergency equipment and initiated a stop. Appellant was driving the vehicle, and there were two passengers inside. The lieutenant told appellant that he had stopped him for the seatbelt and signal violations and appellant admitted to the lieutenant that he had not been wearing a seatbelt, but explained that he did not think he needed to use a turn signal under the circumstances. The lieutenant noticed that appellant was very nervous and his hands were shaking so badly that he "was having difficulty actually manipulating his . . . his wallet to get anything out." He also noticed "a pretty strong" odor coming out of the vehicle, such as cologne or "some sort of . . . a cover-up odor," that seemed to be mixed with a faint odor of marijuana. He asked appellant to step out of the vehicle and asked "about marijuana in the car" or about "recent smoking in the vehicle." The lieutenant testified that appellant stated that he had "a history of smoking marijuana . . . but there was no marijuana in the vehicle currently." When asked if he would consent to a search of the vehicle, appellant declined. Knowing that a "K9" unit was nearby, the lieutenant asked the unit to respond while he continued his investigation. The trial court found, after viewing a videotape of the traffic stop, that three minutes elapsed between the time the stop began and the time the lieutenant requested the canine unit, and seven minutes elapsed between the time of the request and the time the canine unit arrived. The special agent was watching from across the street when the canine unit arrived at the scene of the traffic stop. The special agent watched the narcotic detection dog "go around" appellant's vehicle; he testified that he was told that there was "a positive result for — positive detection from the K9," and the vehicle was searched. The search revealed less than one ounce of marijuana.

Appellant contended the trial court erred in denying his motion to suppress when police unlawfully extended the duration of the traffic stop. The Court disagreed. Specifically, the Court noted the trial court finding that ten minutes had elapsed between the time the stop was initiated and the time the narcotic detection dog arrived and searched the vehicle. The record also showed that the lieutenant requested the canine unit while he continued his investigation, and that appellant was issued citations for the alleged traffic violations. Furthermore, the Court found the evidence gave rise to a reasonable articulable suspicion of other illegal activity and considering the totality of the circumstances, it held that the trial court did not err in concluding that the minimal delay was justified.

Re-Sentencing; Presumption of Vindictiveness

Hudson v. State, A12A1149 (10/17/12)

In the first appeal, *Hudson v. State*, 309 Ga.App. 580 (2011) ("*Hudson I*"), the Court vacated appellant's sentences for the offenses of aggravated sexual battery and child molestation because the trial court failed to merge the convictions, and the Court remanded the case for resentencing. Appellant challenged the new sentence contending that the trial court violated his due process rights by increasing his custodial sentence for child molestation because the new sentence was more severe than the original sentence. The Court reversed and remanded the case again for the trial court to reconsider appellant's sentence.

Appellant was convicted of aggravated sexual battery and child molestation based on evidence that he had molested his niece. The trial court sentenced appellant to life on the aggravated sexual battery charge, with 25 years to serve and the remainder probated. The trial court sentenced appellant to 30 years on the child molestation charge, with 10 years to serve and the remainder probated. The two sentences were to run concurrently. On appeal from those sentences, the Court held in *Hudson I* that appellant's conviction for aggravated sexual battery should have merged with the conviction for child molestation.

Following remand, the trial court resentenced appellant to 30 years on the child molestation charge, increasing the custodial term to 25 years, rather than 10 years, and probating the remainder. Appellant argued that the trial court violated his due process rights under the principle articulated in *North Carolina v. Pearce*, 395 U. S. 711 (1969), when it increased his custodial sentence on the child molestation conviction by 15 years. In *Pearce*, the Supreme Court of the United States created a presumption of vindictiveness that arises whenever a more severe sentence is imposed after a defendant has successfully attacked his sentence on appeal. The presumption of vindictiveness, however, may be overcome by objective information in the record justifying the increased sentence. However, Georgia courts are split as to the proper way to compare sentences. In *Anthony v. Hopper*, 235 Ga. 336 (1975), the Supreme Court of Georgia, applied a "count-by-count" approach, which requires a court to compare the sentences on each count of an indictment separately. However, in *Adams v. State*, 287 Ga. 513 (2010), a plurality of the Supreme Court of Georgia criticized the count-by-count approach and applied the "aggregate" approach instead. Under the aggregate approach, a court must "compare the total original sentence to the total sentence after resentencing. If the new sentence is greater than the original sentence, the new sentence is considered more severe."

The Court found that the appropriate test was the "count-by count" approach. Under this approach, appellant's new sentence was more severe than his original sentence on the child molestation count, giving rise to the *Pearce* presumption of vindictiveness. Since the *Pearce* presumption of vindictiveness was triggered, the trial court was required to overcome it with affirmative reasons or facts to substantiate the new sentence. However, *Pearce* required the reasons for the new sentence to be based upon identifiable conduct occurring after the time of the original sentencing proceeding. Upon reviewing the circumstances cited by the trial court, the Court found they were the same as those that previously existed at the first sentencing proceeding, and thus provided no basis for an increased sentence on the child molestation charge. Thus, the Court remanded for reconsideration of appellant's sentence so that it conformed with the law established by *Pearce* and its progeny.

Possession with Intent to Distribute; Sufficiency of the Evidence

Beard v. State, A12A1587 (10/19/12)

Appellant challenged the trial court's denial of his motion for new trial after a jury convicted him of one count of possession of marijuana with the intent to distribute and one count of intent to distribute marijuana within 1000 feet of a housing project. The Court reversed.

The evidence showed that two narcotics officers approached a car parked in front of appellant's residence. Appellant was exiting from the driver's seat of the car, and Braxton Davis Walton, Jr., was sitting in the passenger's seat. After one officer, who was dressed in plain clothes, approached the car and displayed his badge, appellant dropped a white plastic grocery bag he was holding. As the bag sat on the ground, the officer could see what appeared to be bags of marijuana inside. Upon further inspection, the officer discovered four sandwich bags, with what was later determined to be approximately twenty-eight grams, or one ounce, of marijuana in each. The officer requested and received appellant's consent to search the apartment after appellant admitted that he also had a small amount of drugs inside. The officers discovered an additional bag containing another 28 grams of marijuana inside the apartment. An officer testified that the marijuana was "street level," with an approximate total value in 2003 of $500 to $600. The officer did not testify that the packaging or amount of the marijuana in this case had any significance, but in response to the prosecution's inquiry, he stated that a nickel bag, holding less than one gram, was "the smallest quantity of marijuana sold for personal use that [he had] encountered" as a narcotics investigator. Both officers further testified that appellant's residence, where this incident occurred, was a subsidized housing project. The officer did not arrest appellant after this first incident; instead, the officers enlisted appellant and Walton to do a controlled buy the same day of a larger amount of marijuana, and in exchange for their full cooperation, the officers indicated that they would ask the district attorney for some leniency. Although the officer asked appellant to contact him a few days after the controlled buy, appellant never called and approximately one month later, the officer obtained an arrest warrant for him.

Appellant asserted that this evidence was insufficient to establish the "intent to distribute" required for a conviction under O.C.G.A. § 16-13-30(j). Specifically, he asserted that the State merely proved that he possessed the marijuana. The Court agreed. The Court noted that the State proved only that appellant possessed $500-$600 of "street level" marijuana, packaged in five separate plastic bags weighing one ounce each. The Court further stated that the State did not produce any evidence that appellant possessed scales or other drug-dealing paraphernalia or that they found large amounts of cash on appellant's person or in his apartment; nor did they introduce any prior similar transaction involving possession with intent to distribute. And although the five ounces of marijuana appellant possessed were separated into five separate bags containing one ounce each, the State presented no testimony indicating that the amount of the drugs or their packaging was indicative of drug dealing as opposed to personal use. Thus, the Court found that the State's evidence failed to rule out every reasonable hypothesis except guilt of the crime charged and the evidence was insufficient to convict appellant.

Ineffective Assistance of Counsel; Commenting on Pre-arrest Silence

State v. Moore, A12A1502 (10/19/12)

Moore was convicted of the rape of J. S. However, the trial court granted a new trial, finding that Moore had been denied the effective assistance of counsel. The State had improperly commented on Moore's pre-arrest silence, but defense counsel had failed to object. The State appealed and contended, notwithstanding that Moore later voluntarily turned himself in, that its improper comments referred to flight, not pre-arrest silence and that trial counsel was therefore not ineffective for failing to object. The State further contended that the evidence of guilt was overwhelming and that any deficiencies in trial counsel's performance were therefore harmless.

A summary of the facts showed that J. S. testified that she was sleeping and awoke to find Moore having intercourse with her without her consent. Moore testified that he and J. S. had had a consensual sexual relationship, and they had consensual sex on the night in question. The nurse who conducted a rape examination of J. S. testified that J. S. was visibly upset. The nurse found no visible signs of trauma. This was equally consistent with J. S. having been asleep at the time of the intercourse or with the intercourse having been consensual. The testimony at issue was primarily that of a detective who telephoned Moore and informed Moore that he was investigating a rape and that he was named as the suspect and needed to speak with him about it. Moore replied that he could not talk at that time because he was on his way to Augusta, South Carolina to confront his son about dropping out of college. The detective told Moore that if he didn't come speak with him that he would take a warrant out for his arrest. Moore replied that if the detective took a warrant for his arrest, then Moore wasn't going to talk to him.

At trial, the prosecutor asked Moore, "Not one time in that phone conversation with . . . Detective Ervin did you tell him you had consensual sex with her, did you?" Moore responded, "No, sir; and not one time did he ever ask me." In closing argument, the prosecutor commented on Moore's pre-arrest silence. The trial court found that the State intentionally elicited improper testimony and improperly commented on Moore's pre-arrest silence, and that trial counsel's failure to object was deficient. The Court agreed and noted that the Georgia Supreme Court has consistently held that "in criminal cases, a comment upon a defendant's silence or failure to come forward is far more prejudicial than probative. Accordingly, . . . such a comment will not be allowed even where the defendant has not received *Miranda* warnings and takes the stand in his own defense." *Mallory v. State*, 261 Ga. 625 (1991).

The outcome of the trial depended on whether or not the jury found the intercourse to be consensual. There were no eyewitnesses and no physical evidence indicating the use of force. Although the State reinforced J. S.'s testimony that she had not consented to intercourse with testimony from outcry witnesses, the jury's determination of the credibility of Moore and J. S. was critical to its verdict. The trial court concluded that the prosecutor's comments on Moore's pre-arrest silence impacted his credibility, making it reasonably probable that the outcome of the trial would have been different had defense counsel

objected. Further, the evidence of Moore's guilt was not overwhelming. Thus, the Court concluded that the trial court correctly determined there was a reasonable probability that trial counsel's deficient performance affected the outcome of the trial.

Probation Revocation

Orr v. State, A12A0840 (10/18/12)

Appellant was convicted of two counts of reckless conduct and given two 12-month sentences to be served consecutively on probation. Several months later, the State filed a petition to revoke appellant's probation, alleging that appellant had violated two conditions of probation in that he had: (i) committed a new criminal offense, terroristic threats; and (ii) failed to timely pay fines, resulting in $38.00 in arrears. After a hearing on the petition, the trial court entered an order finding that appellant had violated both conditions, revoking the balance of his probation, imposing upon appellant confinement, and providing further: "remit the case allowing probation to FIFA the balance."

Appellant challenged the sufficiency of the evidence for terroristic threats, but the Court found this contention without merit. However, the Court found that the record contained no evidence supporting the trial court's finding that appellant violated the condition of his probation that required him to pay a fine. Specifically, the Court noted that at the outset of the probation revocation hearing, the prosecutor and the probation officer reported to the court that no amount was outstanding. And in its brief on appeal, "[t]he state agree[d] that the defendant had paid the $38.00 in fines." Furthermore, the Court noted that the revocation order provided: "remit the case allowing probation to FIFA the balance." Yet the record did not reflect that, on or before the date of the revocation order, the trial court was presented evidence of any "balance" which was due, nor did the State claim that the trial court was so presented any such evidence. Thus, the Court vacated the order of revocation as based, in part, on a finding not supported by the evidence and remanded the case to the trial court for entry of judgment authorized by the evidence.