Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 27, 2017

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THIS WEEK:

Homicide by Vehicle; Jury Charges

Smith v. State, A17A1252 (9/7/17)

Appellant was convicted of homicide by vehicle in the first degree for causing the death of another person while driving with an alcohol concentration of 0.08 grams or more (DUI-per se), DUI (less safe) and DUI (per se). He argued that the trial court committed reversible error by refusing to give his requested charge to the jury on the lesser included offense of homicide by vehicle in the second degree. The evidence showed that appellant's vehicle made a left turn in front of the victim's motorcycle, causing the motorcycle to hit the rear passenger side of appellant's vehicle. The Court agreed and reversed his conviction.

The Court stated that in the context of a vehicular homicide charge premised upon DUI, an instruction on second degree vehicular homicide must be given if there is any evidence showing that a less culpable traffic offense caused the fatal collision. Significantly, a defendant need not be charged with a traffic offense involving less culpable conduct before a charge on vehicular homicide in the second degree is authorized. Here, the Court found, although there was sufficient evidence to authorize appellant's conviction of vehicular homicide in the first degree in the manner charged, there was also evidence that he committed the separate traffic offense of failing to yield and that this less-culpable traffic violation may have caused the collision resulting in the victim's death. Thus, the Court noted, the investigating officer testified that appellant "turn[ed] in front of the motorcycle causing the motorcycle to hit thepassenger's side," and the State's accident reconstruction expert testified as to his conclusion that appellant "failed to yield [the] right of way while turning left."

Therefore, the Court stated, because the State must prove that the more culpable traffic offense actually caused the victim's death, a jury could believe that appellant was guilty of DUI, but nevertheless conclude that the victim's death was caused by appellant's failure to yield. Under such circumstances, there is no evidentiary or legal impediment to the return of a verdict of guilt as to DUI and a verdict of guilt as to second degree vehicular homicide. Consequently, the Court held, the trial court erred in refusing to give appellant's request to charge on second degree vehicular homicide.

OCGA § 24-8-820; Retroactivity

State v. Walker, A17A0794 (9/8/17)

Walker was indicted in 2015 for acts of child molestation occurring in 2011. The State filed a notice of intent to introduce a forensic interview of the victim by a child advocate recorded on April 2, 2015, two days before the victim's 15th birthday. The trial court ruled the evidence inadmissible because former

OCGA § 24-3-16 authorized the admission of only those hearsay statements made by a child "under the age of 14 years." The State appealed.

The State argued that OCGA § 24-8-820 now authorizes the admission of child hearsay statements "made by a child younger than 16 years of age," and that this statute should apply and render the victim's statement admissible. The Court disagreed. Citing *Laster v. State*, 340 Ga. App. 96, 99 (1), n. 2 (2017) the Court held that the admissibility of a child hearsay statement as to an act of child molestation occurring before July 1, 2013 is controlled by former OCGA § 24-3-16.

Nevertheless, the State argued, the time of trial should determine the effective date of current OCGA § 24-8-820, and that this rule of evidence, being a procedural one, should apply retroactively. The Court again disagreed. Arguments as to the retroactive application of a procedural rule may be considered only if the Legislature did not express a contrary intention — that is, if the Legislature did not express its will as to the effective date of the statute at issue. Here, the Legislature explicitly provided that OCGA § 24-8-820 "shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date," while "[a]ny offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense." Ga. L. 2013, p. 222, § 21. Therefore, the Court concluded, the trial court did not err when it concluded that former OCGA § 24-3-16 applies to Walker's offense, which took place at some point in 2011.

Sentencing; Recidivism

Parham v. State, A17A1663 (9/8/17)

Appellant was indicted on two counts of theft by deception in violation of OCGA § 16-8-3 (a). The indictment alleged that appellant had two prior misdemeanor convictions for theft by deception, such that he was eligible for felony punishment under the specific recidivist provision applicable to certain theft offenses, OCGA § 16-8-12 (a) (1) (D). Before trial, the State also served appellant with notice of its intent to seek to punish him as a habitual felon under the general recidivist statute, OCGA § 17-10-7 (a) and (c), based on his prior convictions for several felony offenses. He was convicted of both counts. The trial court elected to treat appellant's two theft-by-deception convictions as felonies under OCGA § 16-8-12 (a) (1) (D) in light of his two prior misdemeanor convictions for that offense. Additionally, pursuant to OCGA § 17-10-7 (a) and (c), the trial court found that appellant was a habitual felon in light of his other multiple prior felony convictions, and the court sentenced him to a term of five years in prison on Count 1 and to a term of five years, to serve three years in prison, on Count 2, with the sentences to run consecutively, for a total term of 10 years, with the first eight years in prison.

Appellant argued that that the trial court erred in sentencing him under the general recidivist statute, OCGA § 17-10-7 (a) and (c), because OCGA § 16-8-12 (a) (1) (D) is the more specific recidivist provision applicable to his theft-by-deception convictions. Specifically, the general and specific recidivist provisions are mutually exclusive and inconsistent with one another, and the trial court thus should have sentenced him as a recidivist only under the more specific provision of OCGA § 16-8-12 (a)(1) (D), which gave the court discretion to impose a sentence of between one and five years on each count if the trial court elected to sentence him as for a felony. The Court disagreed.

Relying on *Goldberg v. State*, 282 Ga. 542 (2007), the Court found that there was no error in sentencing appellant as a habitual felon under the general recidivist provisions of OCGA § 17-10-7 (a) and (c). The specific recidivist provision applicable to theft-by-deception and certain other theft convictions, OCGA § 16-8-12 (a)(1) (D), does not contain any language blocking the application of the general recidivist statute, and thus the general recidivist statute must be read as supplementing rather than conflicting with the specific recidivist provision in accordance with the mandate of OCGA § 17-10-7 (e). When OCGA § 16-8-12 (a) (1) (D) and the general recidivist statute are harmonized, the former provision applies when a defendant is a repeat offender having only prior convictions for theft offenses under OCGA § § 16-8-2 through 16-8-9, or when the trial court acts in its discretion to treat the current theft conviction as a misdemeanor. In contrast, the general recidivist statute applies when the trial court elects to treat the defendant's current theft conviction as a felony, and the defendant has prior convictions for felony offenses other than those set forth in OCGA § § 16-8-2 through 16-8-9. And here, the trial court elected to treat appellant's current theft-by-deception convictions as felonies. Furthermore, appellant had multiple prior convictions for felony offenses other than those found in OCGA § § 16-8-2 through 16-8-9, including five prior felony convictions for theft by shoplifting and a prior felony conviction for financial transaction card fraud. Consequently, because appellant was more than a repeat offender of theft offenses under OCGA § 16-8-12 (a) (1) (D), the trial court was authorized to sentence him as a habitual felon under OCGA § 17-10-7 (a) and (c).

Nevertheless, appellant noted that OCGA § 16-8-12 (a) (5), which addresses recidivist punishment for telemarketing-related thefts, expressly states that the general recidivist statute should be applied to that paragraph. Thus, he argued, because the General Assembly expressly stated in OCGA § 16-8-12 (a) (5) (B) that the general recidivist statute should apply to convictions under OCGA § 16-8-12 (a) (5) (A), but did not include similar language for convictions under OCGA § 16-8-12 (a) (1) (D), the general recidivist statute should not be applied to convictions under the latter provision. The Court disagreed. The Court found instead that OCGA § 16-8-12 (a) (5) (B) *expands* the application of the general recidivist statute to telemarketing-related offenses beyond what would otherwise be contemplated by OCGA § 17-10-7 (e); it does not block the application of the general recidivist statute or have any bearing on whether that statute applies to other provisions of OCGA § 16-8-12 addressing recidivist punishment.

Video Conferencing; Right of Confrontation

In Re E. T., A16A1575 (9/8/17)

Appellant was adjudicated a delinquent for aggravated assault, aggravated battery and criminal attempt to commit a felony. The victim testified from Miami via video conferencing because he was awaiting transplant of his entire digestive system as a result of the extensive injuries he suffered from appellant's attack.

Appellant first contended that the court's decision to allow the victim to testify via video conference was prohibited by the Uniform Juvenile Court Rules. Both parties contended there is an inconsistency between Rule 2.7-2 (A) and (C). The Court disagreed. The plain language of subsection (A) allows a Juvenile Court to conduct "any Juvenile Court mat-

ters" by video conference with two exceptions, including formal adjudicatory delinquency hearings. On the other hand, Rule 2.7-2 (C) provides that "In *any pending matter*, a witness may testify via video-conference." (Emphasis supplied). Thus, subsection (C), which pertains to witnesses rather than matters or hearings, gives a court conducting "any pending [juvenile court] matter" — without stating any exceptions — the discretion to allow individual witnesses to testify via video conference. Thus, the Court found, the plain language of Rule 2.7-2 gave the juvenile court the discretion to allow the victim to testify via video conference upon a showing of good cause. And, because appellant did not challenge the finding of good cause, the Court concluded that the trial court acted within its discretion under that rule.

The Court then addressed whether allowing the video conferencing violated appellant's federal and state constitutional right of confrontation. The Court noted that in *Maryland v. Craig*, 497 U.S. 836, 844 (II) (110 SCt 3157, 111 LE2d 666) (1990), the U. S. Supreme Court stated it has never held that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial. Rather, in what is now referred to as the *Craig* test, the Supreme Court held that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. The requisite finding of necessity must of course be a case-specific one. Under *Craig*, it is the State's burden to make an adequate showing of necessity during a required evidentiary hearing.

Here, the Court found, the trial court did not hold an evidentiary hearing or examine whether having the victim testify via video conference was necessary to further an important public policy. The trial court determined only that, based on the State's representations, good cause for a video conference had been shown under Rule 2.7-2 and that appellant's right to confront the witnesses against him could be safeguarded as long as the technical standards of video conferencing found in that rule were met. But, the Court stated, that rule's standards do not address public policy concerns. Rather, they are related to *Craig*'s concern regarding the reliability of the evidence, the second prong of the *Craig* test. And even if the rule's technical standards were sufficient to satisfy the reliability prong of the *Craig* test, a mere finding that evidence is reliable is insufficient to outweigh a defendant's confrontation rights if the denial of confrontation is not necessary to further an important public policy. Also, the Court concluded, the "good cause" portion of the Rule 2.7-2 test could not, in this case, substitute for the first part of the *Craig* test — that video-conference testimony by the victim was "necessary to further an important public policy," especially when the court had another option, namely a face-to-face videotaped pretrial deposition.

Thus, the Court found, the trial court erred by failing to apply the *Craig* test to the specific circumstances raised in this case. Further, an alternate procedure was available whereby a face-to-face confrontation could have been accomplished. Moreover, given that the trial court itself admitted that the victim's testimony was the critical factor used to identify appellant as the assailant, the error was not harmless. The Court therefore vacated appellant's adjudication and remanded for a new adjudicatory hearing.

Best Evidence Rule; Duplicate Copies

Mackey v. State, A17A1028 (9/13/17)

Appellant was convicted of pimping a person under the age of 18, contributing to the delinquency of a minor, and trafficking a person for sexual servitude. The evidence showed that appellant acted as a pimp for 16-year-old B. W. Appellant contended that the trial court erred by admitting copies of the birth

certificate and social security card found in B. W.'s purse when she was arrested. Specifically, he argued that they were not authenticated and that admitting the copies violated the best evidence rule. The Court disagreed.

The best evidence rule, codified at OCGA § 24-10-1002 provides: "To prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph shall be required." The trial court admitted the documents under a corollary to the best evidence rule, OCGA § 24-10-1003, which provides: "A duplicate shall be admissible to the same extent as an original unless: (1) A genuine question is raised as to the authenticity of the original; or (2) A circumstance exists where it would be unfair to admit the duplicate in lieu of the original." This has been interpreted to mean that a duplicate may be admitted into evidence unless opposing counsel meets the burden of showing that there is a genuine issue as to the authenticity of the unintroduced original, or as to the trustworthiness of the duplicate, or as to the fairness of substituting the duplicate for the original.

Appellant argued that because B. W. denied that she was the person identified in the documents she carried, a genuine question was raised as to the authenticity of the copies tendered by the State. Nevertheless, there was never any issue raised that the copies entered into evidence were not accurate duplicates of the documents found in B. W.'s purse. That B. W. at one time denied being the person identified in the documents did not bear on the admissibility of the copies as an accurate representation of what was found in her purse. The documents introduced by the State were tendered as copies of the documents in the possession of B. W., and they were authenticated as such by the officer who found them. Therefore, the Court concluded, based on these circumstances, we discern no abuse of discretion in the trial court's admission of copies of the documents found in B. W.'s possession.

Search & Seizure

Taylor v. State, A17A1043 (9/14/17)

Appellant was convicted of trafficking in marijuana. He contended that the trial court erred in denying his motion to suppress. The evidence showed that an officer, who was a canine handler, stopped appellant on I-75 for traffic infractions. The officer observed that appellant's car had numerous (between 20 and 25) air fresheners that were releasing an "overwhelming" odor. Appellant's hands were shaking, which the officer took as a sign of nervousness. While the officer wrote out two warning citations, he engaged appellant in conversation. Appellant told the officer that he had been visiting his uncle in an Atlanta hospital, but could not identify the hospital his uncle was in or why his uncle was there. Appellant also gave conflicting statements as to where he stayed the night before. The officer asked for consent to search, which appellant refused. At that time, the officer was still holding appellant's license and registration along with a

written warning for the traffic offenses, and the dispatcher had not yet confirmed appellant's license and registration information. The officer then went to get his K-9 to walk around the vehicle. As the officer was walking to his patrol car to retrieve the dog, the dispatcher replied to the officer confirming appellant's license and registration information. The officer then proceeded to walk the dog around the car. After a positive response from the dog, the officer searched the vehicle and discovered the marijuana in the trunk.

Appellant argued that the officer lacked a reasonable articulable suspicion of criminal activity sufficient to detain him for a drug sniff of the vehicle after the purpose of the traffic stop had concluded. The Court disagreed.

First, the Court agreed with the trial court that appellant's supposed nervousness was not a factor, on its own, that the officer could consider in forming a reasonable suspicion of criminal activity. Second, the Court agreed with the trial court that the strong smell of air fresheners in the vehicle, appellant's vague and conflicting statements about his uncle's illness and his own whereabouts the night before, and the location of the traffic stop along a stretch of Interstate 75 that was known by the officer to be a drug trafficking corridor were factors that allowed the officer to form and articulate a reasonable suspicion of drug activity. Thus, the totality of the circumstances encountered by the officer at the scene allowed him to form the requisite level of suspicion necessary to convert the traffic stop into a broader criminal investigation.

Nevertheless, appellant argued, *State v. Thompson*, 256 Ga. App. 188 (2002) was controlling and mandated a conclusion that the trial court erred. The Court again disagreed. In *Thompson*, even though the stop occurred on I-20, the officers in that case did not appear to have articulated the location of the stop as a basis for their suspicion or that the court considered evidence that the area was a known trafficking corridor. Thus, in *Thompson*, the officers were relying solely on their observation of the defendant's nervousness and the smell of detergent and air freshener in forming their suspicion. Here, however, the trial court determined that the overwhelming smell of air fresheners, the location of the stop along the interstate, *and* appellant's inconsistent statements to the officer were all factors that, in totality, could allow the officer to form the required suspicion. The strong odor of air freshener along with other seemingly innocuous activities may allow an officer to form a reasonable suspicion that criminal activity is taking place. Additionally, an officer may consider conflicting or vague stories presented by a person in the vehicle and the modes or patterns of operation of certain kinds of lawbreakers in forming reasonable suspicion of criminal activity. Thus, the Court stated, "Though we acknowledge that Interstate 75, like any other public thoroughfare, may be traveled for legitimate purposes, we are not blind to the considerable experience of law enforcement agencies in dealing with those who use major interstate highways to transport illegal substances. We are also cognizant that an experienced and properly trained law enforcement officer may conclude that otherwise lawful activity which takes place on a 'known drug route' is actually evidence of ongoing criminal activity." Therefore, the Court found, because the facts of this case showed that factors in addition to those considered in *Thompson* formed part of the officer's suspicion, *Thompson* was inapposite to the Court's analysis.

Accordingly, the Court concluded, although appellant's conduct observed by the officer at the time of the stop in this case may have been susceptible to an innocent explanation, it is also consistent with illegal activity. Consequently, the trial court properly found that the totality of the circumstances encountered by the officer–namely, the smell of air fresheners, the location of the stop along what the officer knew to be a trafficking corridor, and the vague and conflicting stories offered by appellant–allowed him to form the reasonable suspicion necessary to commence a criminal investigation.

Courtroom Security Measures

Garner v. State, A17A1170 (9/15/17)

Appellant was convicted of aggravated assault and possession of a firearm during the commission of a crime. Appellant argued that the trial court denied his Sixth and Fourteenth Amendment rights by requiring him to wear a shock belt during the course of trial. Although the shock belt was attached to his ankle underneath his pants and not visible to the jury, he contended that the stress of wearing the belt inhibited his ability to assist in his own defense.

The Court noted that while the use of a properly concealed shock device will never be so inherently prejudicial as to pose an unacceptable threat to the defendant's right to a fair trial, the analysis should not end there if the defendant claims that the shock device also violated his Sixth Amendment right to counsel or his due-process-based right to be present at trial. In such situations, the defendant must show that the use of the shock device prejudiced his due process rights or interfered with his right to counsel. And here, the Court found, neither appellant nor his counsel raised any complaints during the course of the trial that the shock belt was interfering with appellant's ability to assist in his own defense, other than counsel's initial objection that he thought the shock belt made appellant nervous. Appellant also did not testify at the hearing on his motion for new trial, and there was no other evidence presented at that hearing as to how the shock belt affected him. Accordingly, the Court held, because the record was devoid of any evidence of harm or prejudice to appellant from the use of the shock belt, he could not establish that he was deprived of a fair trial on this ground. In addition, based on the facts and circumstances of this case, including evidence that appellant had threatened the victim and his children, the Court found no abuse of discretion in the trial court's overruling of appellant's objection to the use of the shock device.

Appellant similarly argued that the trial court violated his Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process by allowing an extra metal detector to be placed outside the entrance to appellant's courtroom in view of the jury. The Court noted that as with the shock belt, the use of this security measure was within the trial court's discretion. However, appellant contended, the trial court failed to exercise discretion, and instead, he argued, the court merely deferred to the sheriff's office, which in turn deferred to the prosecution, in placing the extra metal detector outside of the courtroom.

Quoting *Holbrook v. Flynn*, 475 U. S. 560, 569 (106 SCt 1340, 89 LE2d 525) (1986), the Court stated that while shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that

the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards.

Finding no cases in Georgia specifically addressing the use of extra metal detectors, the Court looked to other jurisdictions and found that the reasoning in *Holbrook* applies equally to such devices because, unlike personal restraints, they do not indicate that the defendant himself presents any particular danger. Thus, the Court concluded, when asserting that a security measure outside the courtroom violates his constitutional right to a fair trial, the defendant must show prejudice or harm resulting from the security measure. And here, the Court held, appellant failed to show that the use of the extra metal detector prejudiced his right to a fair trial. Accordingly, the trial court did not abuse its discretion in overruling appellant's objection to the extra metal detector.