Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 30, 2015

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THIS WEEK:

Motions to Withdraw Guilty Pleas; Timeliness

Allen v. State, A15A1446 (9/22/15)

Appellant pled guilty to multiple charges set out in two indictments on May 9, 2013. The court pronounced his sentence and signed the disposition sentencing sheet the same day. However, the final disposition was not stamped and filed by the clerk's office until May 16, 2013. A new term of court started on May 13, 2013. Appellant filed his motion to withdraw his plea in June of 2013, which was within the new term of court and dismissed by the trial court as untimely.

The Court held that the motion was timely. Although no statute sets forth the procedures by which a motion to withdraw a guilty plea may be entertained by the trial court after a sentence has been pronounced, it is well settled that a motion to withdraw a guilty plea must be filed within the same term of court as the sentence entered on the guilty plea. An oral declaration as to what the sentence shall be is not the sentence of the court; the sentence signed by the judge is. This is because what the judge orally declares is no judgment until it has been put into writing and entered as such. Thus, when the trial court orally pronounced sentence in one term, but the sentence was not signed and filed until the next term, as was the case here, the motion to withdraw was timely filed within the term in which the sentence was entered, i.e., filed by the clerk.

VGCSA; Sufficiency of the Evidence

Williams v. State, A15A1037 (9/23/15)

Appellant was convicted of possession of cocaine. The record showed that after the State rested, the defense moved for a directed verdict because the State failed to tender the cocaine into evidence. The court denied the motion and then allowed the State to reopen the evidence and admit the drugs.

Appellant contended that the trial court erred in denying his motion for a directed verdict. The Court disagreed. Here, the State introduced the testimony of the officer who recovered the cocaine from appellant, as well as that of the officer and the GBI chemist who conducted tests which indicated the presence of cocaine. Accordingly, the State had given reasonable assurance of the identity of the evidence. That the cocaine possessed by appellant was not produced at trial was of no significance because the State is not required to introduce the illegal drug itself into evidence.

Thus, the trial court did not err by denying appellant's motions for directed verdict.

Search & Seizure; Roadblocks

Moss v. State, A15A0904 (9/23/15)

Appellant was convicted of DUI. He contended that the trial court erred in denying his motion to suppress. Specifically, he contended that the State failed to establish that the checkpoint had a valid purpose when viewed at the programmatic level, in accordance with the Georgia Supreme Court's recent decisions in *Williams v. State*, 293 Ga. 883 (2013), and *Brown v. State*, 293 Ga. 787 (2013).

The evidence showed that it was not in dispute that the Cobb County Police Department has a detailed written policy governing permissible purposes for checkpoints. The policy was discussed at considerable length at the hearing by counsel, the trial court, and the witnesses, and appellant's counsel referred to it by its section number. But, the State failed to identify or introduce a copy of the written policy into evidence at the hearing on the motion to suppress, and it was not part of the record before the Court.

However, the Court noted, the State introduced additional testimony and documents to show that the primary purpose of the county's checkpoint program was properly limited on a programmatic level. A two-page document titled "Cobb County Police Department/Uniform Division/ Traffic Services Unit/Safety Checkpoint Log" was identified and introduced into evidence. Furthermore, the road sergeant who implemented the checkpoint testified that he completed the forms found in the Checkpoint Log in the course of supervising the checkpoint. He acknowledged the county policy governing checkpoints and specifically Section 5.19 of the police department manual, but added that it had "been a while" since he had read it. Nevertheless, when asked about the primary purpose of the checkpoint, the sergeant testified that in the absence of specialty training, the county's road officers' "primary, sole purpose in doing a checkpoint would be just to check for, like I say, license, insurance. In fact, we don't have any — we don't do specialized checkpoints." He reiterated on cross-examination that "[t]hat's the main purpose we do checkpoints for as road officers" and that "[o]ur sole purpose . . . is to set it up and do driver's license and insurance." He also testified that he had no "input in or authority over the policy."

The Court found that the sergeant's testimony that the sole purpose for which road officers were authorized to set up a checkpoint was driver's licenses and insurance necessary excludes other purposes, including those of general crime control. Furthermore, the log itself is an official record at the programmatic level, showing that checkpoints have been done only for an appropriate purpose. Thus, the log and the sergeant's testimony authorized the trial court to conclude that at the programmatic level, the Cobb County Police Department authorizes checkpoints for the purpose of checking licenses and insurance, and not for general crime control. In so holding, the Court stated that while a written policy certainly provides clearer guidance to the agency's officers and stronger proof for reviewing courts, the evidence was sufficient to support the trial court's ruling.

Speeding; Sufficiency of the Evidence

Klemetti v. State, A15A1193 (9/24/15)

Appellant was convicted of speeding. The evidence showed that city police officer used a radar gun to determine that appellant was driving 49 mph on a city road with a posted speed limit of 35 mph. The State introduced at trial a certified copy of a city council ordinance showing the speed limit of the road in question.

Appellant argued that in order to prove that the speed limit was lawfully set at 35 mph, the State was required to introduce evidence of an engineering and traffic investigation that authorized the governing authority to establish that speed. Without such an investigation, the default speed limit of 55 mph was in effect and his driving at 49 mph was not unlawful. In support of his argument, he relied on O.C.G.A. § 40-6-183(a), which provides in part: "Whenever the governing authority of an incorporated municipality or county, in its respective jurisdiction, determines on the basis of an engineering and traffic investigation that the maximum vehicle speed permitted under [O.C.G.A. § 40-6-181, which establishes maximum lawful vehicle speeds,] is greater than is reasonable and safe under the conditions found to exist upon a highway or part of a highway under its jurisdiction, such authority may determine and declare a reasonable and safe maximum vehicle speed limit thereon…"

The Court disagreed. It found that appellant's argument was in the nature of an affirmative defense and such a defense admits the doing of the act charged, but seeks to justify, excuse, or mitigate it. As with all other affirmative defenses, is a matter for the defendant to raise and not a matter for the State to negate, at least until the defendant has presented some evidence to support it.

Here, the Court found, appellant presented no evidence to support his affirmative defense that the governing authority was not authorized to change the default speed limit. Moreover, the State introduced into evidence a certified copy of a city council ordinance showing the changed speed limit. And it is presumed that public officials have done their duty in cases involving traffic statutes. Moreover, such a presumption, which does not relieve the State from its duty to prove every element of the crime charged beyond a reasonable doubt, is not impermissibly burden-shifting. Finally, the Court noted, appellant cited no Georgia authority, and it found none, that requires a governmental unit to prove its compliance with O.C.G.A. § 40-6-183 in order to obtain a conviction for the crime of speeding.

Pre-trial Motions; Challenges to Venue

State v. Hasson, A15A1368 (9/24/15)

Hassan was charged with DUI, reckless driving and other traffic offenses. The evidence showed that an Atlanta police officer observed Hassan's vehicle in the city, but also in Fulton County. He then executed a stop of Hassan in the city, but after he crossed over into Dekalb County. Hasson filed a motion entitled "Motion to Challenge Venue," which argued that venue was improper in DeKalb County and requested that venue be transferred from DeKalb County State Court to Fulton County State Court. The trial court treated it as a motion to suppress and granted it. The State appealed and the Court reversed.

First, the Court noted, while Hasson sought a transfer of venue, he did not do so pursuant to O.C.G.A. § 17-7-150(a)(1),

which provides for pretrial venue changes where an impartial jury cannot be obtained in the county where the crime was committed. To prevail on a motion to change venue, the petitioner must show (1) that the setting of the trial was inherently prejudicial or (2) that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible. Hasson made no argument or showing on these points.

Second, Hasson's pretrial motion did not seek dismissal of the DeKalb County indictment based on improper venue. Instead, focusing on the function and substance of the motion, rather than on its name, the Court found that Hassan's motion functioned as a substantive challenge as to whether the State can meet its burden of proving venue, and his motion sought to transfer venue on that basis. And, although the trial court referred to the motion as one seeking suppression of evidence, the substance of the trial court's order was a per se determination of venue and, apparently, a grant of Hasson's motion to transfer the case to Fulton County on the basis that venue was improper in DeKalb County.

But, the Court found, the State correctly argued that a determination of venue in the particular context presented is reserved for the finder of fact at trial. Venue is a jurisdictional fact and an essential element that the State must prove beyond a reasonable doubt for every crime. The State may use both direct and circumstantial evidence to prove venue. In general, defendants should be tried in the county where the crime occurred. Pertinently, whether venue has been sufficiently proved is an issue for the jury to determine. Accordingly, the Court reversed the trial court's order and remanded the case.

Jury Charges; Reasonable Doubt

Taylor v. State, A15A1445 (9/25/15)

Appellant was convicted of child molestation. He argued that the trial court erred when it charged the jurors that to find reasonable doubt, their minds had to be "unsettled, unsatisfied *and* wavering." (Emphasis supplied.) The Suggested Pattern Jury Instruction 1.20.10 instead uses the word "or" in instructing the jurors that "if your minds are wavering, unsettled, *or* unsatisfied, then that is a doubt of the law, and you must acquit the defendant." (Emphasis supplied.)

The Court, however, citing *Roman v. State*, 155 Ga.App. 355 (1980), stated that because the words the court used to describe "reasonable doubt" that is, wavering, unsettled and unsatisfied, were used as synonyms to describe the particular belief or feeling of doubt which is the 'doubt of the law' and not three required separate states of mind, it could not agree with appellant's contention of error. While it certainly would have been the better practice for the trial court to have more precisely followed the suggested pattern jury instruction by using the word "or" instead of the word "and" in the charge in question, in viewing the charge as a whole, it was not reasonably likely that the jury misapprehended the State's burden of proof.

Juveniles; Statements

Howard v. State, A15A1219 (9/25/15)

Appellant was convicted of aggravated assault and possession of a firearm during the commission of a crime. The evidence showed that he fired a gun at a police officer and then fled, but was caught a few days later. As a law enforcement officer at the sheriff's office walked appellant down a hallway to the booking desk, appellant spontaneously "apologiz[ed] for what had happened." He stated "that he was angry at the time and wanted to write [the officer] a letter of apology." He also asked repeatedly "how much time he was going to get over this." At the time of the offenses, appellant was 15 years old.

Appellant argued that the trial court erred in admitting evidence of the statements of apology he made as a law enforcement officer walked him to the booking desk at the sheriff's office. He contended that the statements should have been suppressed because some of the statutory booking procedures for juveniles then in effect (former O.C.G.A. §§ 15-11-47and 15-11-48) were not followed, noting that the record was silent as to whether he had been allowed to speak with either a family member or attorney before he made the statements. The Court disagreed.

A violation of the Juvenile Code does not render a juvenile's incriminating statement per se inadmissible. The relevant inquiry is not whether the booking procedures were followed to the letter before a juvenile made a statement, but whether the juvenile made a knowing and intelligent waiver of his constitutional rights when he gave the statement.

Appellant also argued that he made the statements in violation of his Fifth Amendment right against self-incrimination, citing the lack of evidence in the record addressing factors relevant to a juvenile's waiver of rights. But, the Court stated, the Fifth Amendment concerns only statements made by an accused during custodial interrogation. A person's Fifth Amendment rights are not implicated when that person makes a spontaneous, unprompted utterance while in custody. Because the undisputed evidence in this case showed that appellant made the statements at issue to a law enforcement officer spontaneously, and not in response to any police interrogation, the trial court did not err in allowing the jury to hear evidence of those statements.

Special Demurrers; Range of Dates in Indictments

Herring v. State, A15A1597 (9/28/15)

The State indicted appellant with eight sexual offenses against his stepdaughter that took place during three different date ranges — January 11, 2013 to October 28, 2013; October 28, 2013 to August 20, 2014; and August 20, 2014 to September 24, 2014, representing the time periods that appellant and the victim resided in the homes in which she alleged the sexual contact had occurred. Specifically, the indictment alleged appellant committed incest between August 20, 2014 and September 24, 2014 (Count 3) and child molestation between August 20, 2014 and September 24, 2014 (Count 4). Appellant filed a special demurrer arguing that the State failed to adequately narrow the three date ranges, even though it had the ability to do so. After the trial court denied the special demurrer, the Court of Appeals granted an interlocutory appeal.

The record showed that that victim told the investigating officer that while they lived on Highway 111, appellant had sex with her on multiple occasions while at that location, and remembered that September 24, 2014, between 5:30 and 6:30 p.m., was the last day that appellant had sex with her. The date range alleged in the indictment was August 20, 2014 to September 24, 2014, representing Counts 3 and 4. The investigator testified that he included the range of dates because it represented the time appellant and the victim lived on Highway 111 until the date

the victim recalled as the last day they had sex. The investigator further testified that when the victim said that she could not remember the dates that the sexual conduct had occurred, only where they were living when it occurred, and once he was able to ascertain the dates in the different residences, he did not attempt to further narrow the dates by asking the victim questions such as whether the incidents occurred near Christmas, her birthday, or while she was in or out of school. The investigator testified that, rather than bring multiple charges for the various acts, he had charged appellant with only one count each for the crimes committed in each of the three residences.

The Court stated that generally, an indictment which fails to allege a specific date on which the crime was committed is not perfect in form and is subject to a timely special demurrer. However, if the State can show that the evidence does not permit it to allege a specific date, it may allege that the crime occurred between two specific dates. In response to a special demurrer, the State must present evidence to the trial court showing that it cannot narrow the date of the crime, and absent such a showing, an indictment failing to charge a specific date is imperfect and subject to special demurrer.

Here, the Court found, the State presented evidence that the victim told the investigator that she and appellant last had sexual intercourse on September 24, 2014 at the Highway 111 address and also engaged in sexual conduct multiple times during the month they lived at the Highway 111 address. Appellant was charged with one count of incest and one count of child molestation between August 20, 2014 and September 24, 2014. The State contended that the exception to the single-date rule applied because the victim could not identify the exact dates of "multiple prior occasions when [appellant] molested [the] victim" at the Highway 111 address."

However, the Court found, the victim's allegations that appellant committed multiple acts of molestation and incest on unknown dates during that time period were irrelevant to the issue here. Appellant was charged with only one count each of incest and child molestation during this date range. The evidence demonstrated that the State was able to identify a single date on which the conduct occurred, September 24, 2014, and was therefore able to narrow the date of those two crimes in the indictment. Thus, those counts of the indictment are subject to a special demurrer. Accordingly, because the evidence showed that the State reasonably could narrow the range of dates alleged in Counts 3 and 4 of the indictment to a single date, the Court reversed the order of the trial court overruling appellant's special demurrer as to those counts.

Jury Charges; Indictments

Cash v. State, S15A1247 (10/19/15)

Appellant was convicted of murder and other related charges. The evidence showed that his accomplice, Wright, believed that Jackson was having an affair with Wright's wife. Appellant and Jackson were friends. Appellant lured Jackson out to the side of a road on the premise that appellant needed help fixing his car. When the Jackson arrived, Wright ran out from his hiding place and shot Jackson at point blank range. Wright then walked over to the car Jackson arrived in and shot the female victim in the car, believing her to be his estranged wife.

Appellant contended that the trial court erred when it failed to instruct the jury on "intent to murder" because each of the felony murder counts of the indictment charged that he had committed aggravated assault by assaulting the victim "with the intent to murder and while assaulting [the victim] with a firearm, a deadly weapon." In this way, appellant contended, the trial court impermissibly amended the indictment and also undermined his defense because he attempted to show at trial that he was unaware that Wright intended to kill Jackson.

The Court noted that the aggravated assault statute authorizes conviction upon proof of one or more alternative methods of assault — such as "[w]ith intent to murder," O.C.G.A. § 16-5-21(b)(1), or "[w]ith a deadly weapon," O.C.G.A. § 16-5-21(b)(2) — and those methods are expressed in the disjunctive in the statute. In general, when a defendant is charged, as in this case, with the violation of a criminal statute containing disjunctively several ways or methods a crime may be committed, proof of any one of which is sufficient to constitute the crime, the indictment, in order to be good as against a special demurrer, must charge such ways or methods conjunctively if it charges more than one of them. Because of defense counsel's imputed knowledge of this rule, and because the indictment charged that appellant caused the victims' death by assaulting them with intent to murder and with a deadly weapon, appellant was on notice that the State could prove his guilt of the felony murders in either of the ways alleged in the indictment. Thus, the Court found, although the wording of the indictment would have allowed the State to seek convictions for felony murder during the commission of aggravated assault under either paragraph (1) or (2) of O.C.G.A. § 16-5-21(b), the trial court's discretionary decision — without objection by the State — to instruct the jury only on assault with a deadly weapon under paragraph (2) was authorized by the evidence and did not amount to error.

Witness Tampering; Character Evidence

Redding v. State, S15A0985 (10/19/15)

Appellant was convicted of the murder of two victims and related offenses. During trial, the State presented the testimony of Thornton as a similar transaction witness regarding another shooting. In an attempt to impeach Thornton, defense counsel inquired about Thornton's own criminal history and about a plea deal Thornton had made on armed robbery charges, in which he had agreed to testify in appellant's case regarding the similar transaction shooting. Defense counsel probed into why Thornton had not come forward at the time of the shooting, to which Thornton replied he was scared; which led to a colloquy in which Thornton stated that appellant was "a leader of the 30 Deep gang and they pretty much control the whole jail as you can see."

Appellant argued that the trial court erred in denying his motion to strike this testimony and his motion for a mistrial. The Court disagreed. The Court found that Thornton's remarks were a direct and pertinent response to defense counsel's aggressive questioning regarding Thornton's motives for testifying.

Appellant also argued that his defense counsel rendered ineffective assistance by failing to object to evidence regarding a jailhouse assault on Thornton on the eve of his testimony. Thornton, who appeared in court with his face badly bruised, testified that he had been attacked on the previous evening at the jail by two other inmates and that, during the attack, the inmates made remarks that

made Thornton feel threatened by appellant. Thornton also testified that earlier during the week of trial, while being transported from the courthouse to the jail, he had crossed paths with appellant, who tried to ask him about "this situation." Two days after that, Thornton was approached while in the holding cell at the courthouse by an unidentified man, whose remarks, Thornton testified, made him feel threatened by appellant.

The Court stated that it is well established that.an attempt by a third person to influence a witness not to testify or to testify falsely is relevant and may be introduced into evidence in a criminal prosecution on the issue of the defendant's guilt where it is established that the attempt was made with the authorization of the accused. Though appellant argued that there was no evidence that he orchestrated or even authorized the jailhouse attack, the Court found that this claim was belied by Thornton's testimony that his assailants made statements which made him feel threatened by appellant, as well as by Thornton's testimony about the remarks of the unidentified man who approached him in the courthouse holding cell. Thus, the Court found, there was thus ample evidence to support a reasonable and plain inference that appellant was responsible for these acts of intimidation, and evidence regarding such acts was, therefore, properly admitted. Accordingly, counsel's failure to object did not constitute deficient performance.

Continuances

Ingram v. State, S15A1188 (10/19/15)

Appellant was convicted of arson, felony murder and related offenses. The evidence showed that he threw a Molotov cocktail into an apartment window and two children died as a result. Appellant contended that the trial court erred in denying his motion for a continuance. The Court disagreed.

The record showed that the case was selected on September 10, 2001. Based on the events of September 11, 2001, the trial court canceled court that day. Court reconvened on September 12, and appellant moved for a continuance, contending that, because this case involved deaths that occurred by fire and smoke, along with rescuers crawling through thick smoke in an attempt to rescue the children, and because the jurors selected had spent the day of September 11 watching events on television, the trial court should continue the case. The trial court denied the motion.

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. First, the Court found, contrary to appellant's contention, the trial court did not deny the motion based on the need for the country to function normally and with as little disruption as possible after the events of September 11. The trial court did say that a return to normalcy was important, but that, in this case, "[o]bviously, that depends on the jury. If there are jurors who say that they can't continue due to the fact of what happened yesterday … those people should be excused." The court further said that "I agree that we have to have a jury that can function. The jury that you picked … I think could do that; but if the events of yesterday have changed their position, then obviously that's a different matter." To find out how the events of September 11 had impacted the jurors, the trial court voir dired the jurors as a group. No jurors responded to the trial court's question as to whether any of them felt that he or she could not remain fair and impartial in light of the events that transpired on September 11, and defense counsel declined the opportunity to ask the jurors any further questions.

Under these circumstances, and because the events of this case did not involve a terror attack like those of September 11, the Court concluded that the trial court did not clearly abuse its discretion in denying appellant's motion for a continuance.

First Offender Sentencing

Cooper v. State, A15A1348 (9/25/15)

Appellant was convicted after a bench trial of multiple counts of VGCSA and other related offenses. On direct appeal, the Court remanded the case for the trial court to determine whether appellant knowingly and voluntarily waived his right to a jury trial. On appeal after remand, appellant argued that the trial court erred in not resentencing him as a first offender.

The record showed that at the sentencing hearing after the bench trial, the trial court informed appellant that he was eligible for first offender status and the court indicated that it would grant such status if appellant requested it. But after the trial court further explained the benefits and risks of first offender sentencing, appellant declined it and the court did not sentence him as a first offender. Upon remand of the case, appellant requested that the court re-visit the issue and re-sentence him as a first offender. The trial court heard arguments from both appellant and the State, after which it denied the request.

The Court stated that the refusal to consider first offender treatment as part of a sentencing formula or policy of automatic denial constitutes an abuse of discretion and constitutes reversible error. However, there must be a clear statement in the record that constitutes either a general refusal to consider such treatment or an erroneous expression of belief that the law does not permit the exercise of such discretion.

Here, the Court found, the record did not contain any such clear statement by the trial court indicating a general refusal to consider first offender treatment or an erroneous belief that the law does not permit the exercise of such discretion. Instead, the Court found, it was clear from the record that the trial court understood that it could sentence appellant as a first offender, but properly exercised its discretion in deciding not to do so. Accordingly, there was no error.