

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 8, 2010

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THIS WEEK:

- **Stalking**
- **Search & Seizure**
- **Forfeitures; OCGA § 16-13-49**
- **Armed Robbery: Juveniles**
- **Coercion; Statutory Rape**
- **Similar Transactions**

Stalking

Autry v. State, A10A0879

Appellant was charged with two counts of stalking. He was convicted of count 1 and acquitted on count 2. Under OCGA § 16-5-90 (a) (1), stalking is committed by a person “when he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person.” Appellant contended that the evidence was insufficient to support his conviction. The Court agreed and reversed his conviction.

The count upon which appellant was convicted charged that, on June 5, 2007, he “did unlawfully place Angie Reed, another person under surveillance without the consent of said other person, for the purpose of harassing and intimidating such other person, to wit: followed her in her vehicle to a store and watched her going into and out of said store.” The Court stated that the term “harassing and intimidating” means a knowing and willful *course of conduct* directed at a specific person which causes emotional distress by placing such person in reasonable fear for such person’s safety or the safety of a member of his or her immediate family, by establishing a *pattern* of harassing and intimidating behavior, and

which serves no legitimate purpose. Under the facts of the case, the Court found, it was apparent that appellant’s behavior underlying Count 1 — “to wit: followed [Reed] in her vehicle to a store and watched her going into and out of said store” - fell short of demonstrating the requisite pattern. Although the State argued evidence it presented to prove Count 2 to prove a pattern, the Court discounted such evidence, noting the not guilty verdict on that count and the behavior alleged in Count 2 was not alleged (as part of a pattern) in Count 1 of the accusation. Thus, the Court held, pretermitted whether the State could have established a pattern or course of conduct in reliance upon the whole of appellant’s behavior, the fact remained that it made no attempt to do so in prosecuting him in the only count upon which he was convicted. Therefore, the State failed to establish a course of conduct or pattern of behavior required by the Code.

Search & Seizure

Taylor v. State, A10A1033 (9/23/10)

Appellant was convicted of VGCSA. He contended that the trial court erred in denying his motion to suppress. Specifically, he contended that the affidavit in support of the search warrant lacked sufficient evidence to show probable cause because his 2002 arrest for cocaine possession was stale and the affidavit failed to demonstrate the reliability of the informants and their information. The evidence showed that on March 10, 2006, the affidavit in support of the warrant stated that in 2002, the sheriff’s office had received numerous anonymous complaints that appellant sold marijuana from his house in Sylvania. Appellant had been convicted of possession of cocaine and possession of cocaine with intent

to distribute and had several prior arrests for drug offenses. Two informants, one of which was known as “Blue,” told the detective that appellant typically engaged in marijuana sales at his house in the late afternoon hours; that he kept large amounts of marijuana in the woodline outside his residence; and that he secured small amounts of marijuana inside his residence. “Blue” had given information that led to the seizure of marijuana within the past five months. Additionally, investigators verified that appellant lived at Beaver Dam Road in Sylvania. Between December 2005 and March 10, 2006, a deputy observed a high volume of vehicular traffic at appellant’s home in the afternoon hours during his surveillance activities. On March 3, 2006, another deputy conducted surveillance of appellant’s home and observed 16 vehicles enter and leave the driveway in a two-hour span, with no vehicle remaining more than five minutes. Based on the detective’s experience, the vehicles’ traffic pattern was consistent with drug activity. Finally, on March 10, 2006, the detective observed a confidential informant make a controlled buy of marijuana from appellant at his home.

The Court held that the affidavit was sufficient. “Blue’s” information that appellant sold marijuana from his Beaver Dam Road home; that he stored marijuana in and around his home; and that he conducted drug sales there in the late afternoon hours was corroborated by a second anonymous informant who provided information to the affiant three weeks before the warrant application. “Blue’s” reliability “could be inferred from the fact that [“Blue”] had previously provided information to the affiant which led to the seizure of [marijuana]” in the past five months. Investigators verified that appellant lived at Beaver Dam Road, which corroborated information provided by the 2002 informants. Evidence of a high volume of vehicular traffic at appellant’s residence consistent with drug activities as recent as one week before the warrant application, and dating back a period of three months, provided strong corroboration of the informants’ veracity and basis of knowledge. And the Court stated, “[b]y far, the confidential informant’s controlled buy of marijuana from [appellant] at his residence on the day the detective applied for the warrant independently confirmed that illegal drug activities were taking place at [appellant]’s home.” Accordingly, the trial court did not err in denying the motion to suppress.

Davis v. State, A10A1302 (9/23/10)

Appellant was convicted of possession of methamphetamine. She contended that the trial court erred in denying her motion to suppress. The evidence showed that an officer observed a vehicle with a tag number matching the description of a vehicle reported as connected with drug activities. After the vehicle ran a red light, the officer stopped it. The officer approached the vehicle driven by appellant, obtained her driver’s license, explained his reason for the stop, and indicated that he would give her a warning ticket. After writing up the warning, the officer asked appellant to exit her vehicle. He then gave her the written warning, returned her driver’s license, and advised her that she was free to go. As he did so, the officer asked her if she was aware that the area was known for high drug activity, and she indicated that she was and that she worked at a nearby store. Thereafter, appellant consented to the officer’s request to search her vehicle. In the search of the vehicle which followed, methamphetamine was found in her purse, which she had left inside her vehicle.

Appellant argued that her consent to search was invalid as the product of an illegal detention following a valid traffic stop. However, the Court found that the duration of the brief traffic stop was approximately seven minutes. After returning her driver’s license and issuing the warning ticket, the officer told her that she was free to leave. Upon receiving her license and warning ticket, a reasonable person would have concluded that the traffic stop had ended. But here, appellant remained on the scene and engaged in casual conversation about the high level of drug activity in the area and the fact that she worked nearby. Her conduct showed that she did not feel intimidated by the officer’s presence. Under the circumstances, therefore, the initial traffic stop had de-escalated into a consensual encounter and as such, appellant’s consent to search the vehicle was not the product of an illegal detention.

Forfeitures; OCGA § 16-13-49

Sumner v. State, A10A1206 (9/17/10)

Appellant appealed from an order granting forfeiture of a 2002 Cadillac seized after her son, Jarvis Clark, was stopped for traffic violations and subsequently arrested and

charged with VGCSA. The evidence showed that the son was stopped while driving the vehicle and a subsequent search of the vehicle revealed 17.6 ounces of suspected marijuana and a heat sealed bag in a locked glove box, and a marijuana cigarette. Appellant argued that the presence of her son’s personal property in the vehicle did not support the trial court’s conclusion that she held the vehicle “jointly, in common, or in community with [Jarvis].” The Court held that while appellant produced evidence that she was the title owner of the vehicle and had allowed her son to use it for the weekend, the evidence supported the trial court’s findings that she held the vehicle “jointly, in common, or in community” with her son based on their shared ownership and use of the vehicle. As noted by Black’s Law Dictionary, “joint,” when used to define a thing, such as a vehicle, means “common to or shared by two or more persons or entities.” Here, the son installed a “boom box” in the trunk of the vehicle, which occupied the entire trunk; he installed custom tires and rims on the vehicle, which appellant admitted belonged to the son, but she kept them because she needed new tires; he painted the vehicle a few days before his arrest; and the son’s personal effects were in the vehicle, including several photographs of him and a female, an insurance binder in his name, and a brush. The son’s admission that he owned the vehicle for a couple of years and his “life earnings and savings went in to [the Cadillac].” also supports the trial court’s findings. The trial court, therefore, was authorized to reject appellant’s claim of sole innocent ownership and conclude that she held the Cadillac “jointly, in common, and in community with [her son].”

Armed Robbery: Juveniles

Gutierrez v. State, A10A1469 (9/23/10)

Appellant appealed from the denial of his motion to transfer his case to juvenile court, asserting that the trial court erred in finding that the evidence was sufficient to support his indictment for armed robbery. For the superior court to assert jurisdiction, the State was required to present evidence sufficient to support the allegations relating to the armed robbery charge of the indictment. OCGA § 15-11-28 (b) (2) (A) (vii). Under OCGA § 16-8-41 (a), armed robbery occurs when a person, with the intent to commit theft, “takes

property of another from the person or the immediate presence of another by use of an offensive weapon.” The evidence showed that five masked males, including appellant, entered a restaurant through the establishment’s back door. The five men were armed with a handgun, an aluminum baseball bat, an Airsoft pistol, a hammer, and a plastic gun. Upon entering, the suspect with the baseball bat began striking the restaurant owner with the bat and demanding money.

Under Georgia law, a taking occurs upon the slightest change of location of the property that is the subject of the robbery whereby the complete dominion of the property is (even temporarily) transferred from the victim to the perpetrator. It is not required that the property taken be permanently appropriated nor is it required that the defendant physically touch the property. Here, the restaurant owner’s son opened the cash register after the perpetrators beat his mother with a baseball bat, threatened the mother and son with guns, and attempted to open the register themselves, all while demanding money. Thus, the armed robbery was completed at the time the son opened the cash register and raised the flap resting on top of the cash, thereby ceding control of the money to the perpetrators. At that point, the complete dominion of the property was transferred from the true owner to the trespasser and the opening of the register drawer was sufficient asportation to meet the statutory criterion. To prove armed robbery, the State must show only that the defendants exercised dominion over the property moved; it does not require a showing that the defendants actually touched the property. Therefore, the trial court did not err in denying the motion to transfer because the evidence was sufficient to support the charge of armed robbery.

Coercion; Statutory Rape

Rodriguez v. State, A10A1490 (9/22/10)

Appellant was convicted of statutory rape. He argued that the trial court erred in refusing his request to charge the jury on the affirmative defense of coercion. The evidence shows that 18-year-old appellant climbed through the bedroom window of his 12-year-old cousin, who was not his wife, and they had sexual intercourse. Appellant testified at trial. According to him, the victim told him that if he did not have sex with her she would tell

her father they were having sex, in which case her father “was going to do something bad to [him].” Fearing that the victim’s father would kill him, appellant had sex with the victim. The victim’s father was at home that evening.

Coercion is a defense to criminal conduct, apart from murder, “if the act upon which the supposed criminal liability is based is performed under such coercion that the person reasonably believes that performing the act is the only way to prevent his imminent death or great bodily injury.” OCGA § 16-3-26. The danger must be of present and immediate violence at the time of the commission of the forbidden act, and not a danger of future violence. Here, the Court found, assuming appellant’s testimony to be true, the victim’s threat contemplated future violence; she would tell her daddy and *then* bad things would happen. Appellant was not forced to have sex with the victim under a threat of *present and immediate* harm, notwithstanding the presence of the father elsewhere in the apartment. Therefore, the trial court did not err.

Appellant also contended that the trial court erroneously sentenced him for felony statutory rape because the indictment did not specifically designate that he was charged with a felony. Citing OCGA § 16-6-3 (c), which provides that “[i]f the victim is at least 14 but less than 16 years of age and the person convicted of statutory rape is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor.” Appellant argued that since the indictment did not allege the victim to be under the age of 14 or specify that the count was for a felony or a misdemeanor that the trial court was limited to sentencing him for a misdemeanor. The Court disagreed. The indictment accused appellant of engaging “in sexual intercourse with [the victim], a person under the age of 16 years, not his spouse.” This was sufficient to apprise appellant he was being charged with felony statutory rape.

Similar Transactions

Lee v. State, A10A1245 (9/17/10)

Appellant was convicted of aggravated sexual battery upon a 13-year-old victim. The evidence showed that the victim was babysitting for appellant’s 4-year-old brother. Appellant forced himself on the victim and inserted two fingers into her vagina.

Appellant contended that the trial court erred in admitting similar transaction evidence because the prejudicial effect of the prior offense outweighed its probative value, and as a juvenile, he was incapable of forming criminal intent. The similar transaction showed that appellant, at the age of 12, attacked an 11-year-old girl, hit her, demanded oral sex from her, pulled out his penis and forcibly “humped” her. The Court found that the evidence was properly admitted. The prior offense and the crime charged occurred at a residence; the victims were under the age of 14; appellant used suggestive language and sexual innuendo; and he grabbed each victim against her will and forcibly committed acts of a sexual nature. Since the State introduced the prior offense to show appellant’s lustful disposition and course of conduct, there was a probative connection between the prior offense and the crime charged.

Moreover, appellant’s age alone did not render the prior offense inadmissible. Although appellant contended that he lacked the capacity to form criminal intent as a 12-year-old, a defendant’s youth at the time of the prior offense is a relevant consideration when deciding if the testimony should be admitted to show lustful disposition and inclination, i.e., bent of mind. Evidence that appellant bragged about his sexual prowess; demanded that the victim perform oral sex on him; and committed sexual acts with her, demonstrated his lustful disposition. Furthermore, the Court added, these actions were not the “faultless act[s] of an innocent child.” Accordingly, the trial court did not err in admitting the prior offense.