

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 11, 2011

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THIS WEEK:

- **Right To Jury Trial; Sentencing**
- **Jury Charges; Deliberate Ignorance**
- **Merger; Sentencing**
- **Jury Charges; Sentencing**

Right To Jury Trial; Sentencing

Rosser v. State, A11A1732 (10/26/11)

Appellant was convicted of failing to comply with the requirements of the sexual offender registry law. He contended that the trial court erred in conducting a bench trial without first ensuring that he knowingly, intelligently, and voluntarily waived his right to a jury trial. The Court stated that when the purported waiver of this right is questioned, the State bears the burden of showing the waiver was made both intelligently and knowingly, either (1) by showing on the record that the defendant was cognizant of the right being waived; or (2) by filling a silent or incomplete record through the use of extrinsic evidence which affirmatively shows that the waiver was knowingly and voluntarily made. Here, the State conceded that the record's silence prevented it from meeting its burden of demonstrating a knowing and voluntary waiver. Therefore, because the record failed to adequately demonstrate whether appellant made a knowing and intelligent waiver of his right to a jury trial, the conviction was vacated, and the case remanded to the trial court for an evidentiary hearing on this issue. The Court stated that if the trial court determines from the evidence adduced at the hearing that appellant did make such a waiver and that he personally participated in

the decision, the conviction and sentence may be reinstated, and appellant will be entitled to file a new appeal directed to this issue.

Appellant also contended that he should have been sentenced to two years' probation, not ten years. The Court found that the version of OCGA § 42-1-12 (n) (3) (2007) in effect at the time of the commission of the offense, December 8, 2006, imposed a sentencing range of ten to 30 years. The statute was amended, effective May 20, 2010, to proscribe a sentencing range of one to 30 years. Appellant argued that because his conviction and sentence were not final when the statute was amended, he should be given the benefit of the favorable change under the "pipeline rule." Under that rule, "a new rule of criminal procedure . . . will be applied to all cases then on direct review or not yet final." But, the Court found, it has long been the law that, in general, a crime is to be construed and punished according to the provisions of the law existing at the time of its commission. Making a lesser penalty applicable to offenses committed prior to the enactment of the legislation creating the lesser penalty is contrary to the judicial interpretation of the laws of this State under which the penalty for a criminal offense relates only to those offenses committed when and after such legislation becomes effective. Therefore, because at the time appellant committed the offense the law proscribed a sentencing range of ten to 30 years, the trial court did not err in sentencing him to ten years on probation.

Jury Charges; Deliberate Ignorance

Able v. State, A11A1179 (10/27/11)

Appellant was convicted of possession of marijuana with intent to distribute. He con-

tended that the trial court erred in its charge to the jury. The Court agreed and reversed his conviction.

Appellant first argued that the trial court committed harmful error when it misstated the law in its jury instructions on “mere association” and “mere presence.” The trial court instructed as follows: “A jury is not authorized to find a person who was *merely associated* with other persons involved in the commission of a crime guilty of the commission of the crime, or guilty of consent to the commission of the crime, or guilty of concurrence in the commission of the crime, or guilty as a party to a crime unless the evidence presented by the State of Georgia proves beyond a reasonable doubt that such person committed the crime, or consented to the commission of the crime, or concurred in the commission of the crime, or was a party to the crime. A jury is not authorized to find a person who was *merely present* at the scene of the commission of a crime at the time of its perpetration guilty of the commission of the crime or guilty of consent to the commission of the crime or guilty of concurrence in the commission of the crime or guilty as a party to the crime unless the evidence presented by the State of Georgia proves beyond a reasonable doubt that such person committed the crime or consented to the commission of the crime or concurred in the commission of the crime or was a party to the crime.” The Court found that viewing the trial court’s charge as a whole, there was a reasonable probability that the erroneous charges may have misled or confused the jury regarding what the State was required to prove, because the charges misinformed the jury that they would be authorized to convict appellant even if they found that he only consented to or concurred in the commission of the crimes, as opposed to intentionally assisting or participating in them. Moreover, the fact that the trial court subsequently gave correct jury instructions on knowledge, intent and party to a crime, did not render the errors harmless, because there was a clear conflict between the erroneous instructions on “mere association” and “mere presence” and the correct, related instructions. Where two or more jury instructions directly conflict with one another, a new trial is required.

Appellant also argued that the trial court erred in charging the jury on “deliberate ignorance.” The Court stated that the knowledge

element of a violation of a criminal statute can be proved by demonstrating either actual knowledge or deliberate ignorance of criminal activity. The deliberate ignorance instruction is based on the alternative to the actual knowledge requirement at common law that if a party has his suspicions aroused but then deliberately omits to make further inquiries, because he wishes to remain in ignorance, he is deemed to have knowledge. A deliberate ignorance instruction is appropriate when the facts support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution. A court should not instruct a jury on deliberate ignorance when the evidence points to actual knowledge or no knowledge on the defendant’s part.

Here, the Court found that the trial court was correct to give an instruction on deliberate ignorance, but gave an incorrect statement of the law to the jury on the subject. Because the Court already ruled that appellant was entitled to a new trial, it was unnecessary to decide, after considering the evidence presented and reading the trial court’s jury charge as a whole, whether the record showed that the erroneous “deliberate ignorance” instruction was harmless. Instead, the Court held that, if the instruction is given during retrial, it should state as follows: “The element of knowledge may be satisfied by inferences drawn from proof that a Defendant deliberately closed his or her eyes to what would otherwise have been obvious to him or her. A finding beyond a reasonable doubt of conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a Defendant’s knowledge of a fact may be inferred from willful blindness to the existence of the fact. Again, whether or not you draw any such inference is a matter solely within your discretion.”

Merger; Sentencing

Hall v. State, A11A1416 (10/27/11)

Appellant was convicted of armed robbery, three counts of aggravated assault with a deadly weapon, burglary, and possession of a firearm during the commission of a crime. He contended that the trial court erred in failing to merge one of his aggravated assault convictions into his armed robbery conviction. The record

showed that Count 1 alleged that appellant committed the offense of armed robbery in that, with the intent to commit theft, he took an Xbox™ game console from the immediate presence of the victim “by use of an offensive weapon, . . . to wit: a handgun[.]” Count 3 alleged that appellant committed the offense of aggravated assault with a deadly weapon in that he assaulted “the person of [the victim] . . . by threatening [her] with [a] handgun.”

The Court stated that the act of “using an offensive weapon” for the purposes of committing an armed robbery is the legal equivalent of assault —i.e., placing a victim “in reasonable apprehension of immediately receiving a violent injury” —for the purposes of committing an aggravated assault. And, when examining the crimes of armed robbery and aggravated assault with a deadly weapon in the context of the merger analysis, although an armed robbery requires proof of a fact —i.e. the taking of property —that an aggravated assault does not, the inverse is not true; the crime of aggravated assault with a deadly weapon does not require proof of any fact that armed robbery does not. Therefore, appellant’s aggravated assault conviction on Count 3 should have merged into his armed robbery conviction on Count 1.

In so holding, the Court found that the State’s argument that appellant’s taking of the Xbox™ console was an “afterthought” in no way changed this result. It was not determinative under the merger analysis that the desired object of appellant’s armed robbery was something other than that which he actually took. Instead, what dictated merger was the fact that both crimes for which he was convicted were predicated upon the same conduct —namely, his use of the handgun to overpower and intimidate the victim for the purpose of robbing the victims of their belongings. Accordingly, the Court vacated appellant’s aggravated assault conviction and remanded the case to the trial court for re-sentencing.

Jury Charges; Sentencing

Schneider v. State, A11A1552 (10/26/11)

Appellant was convicted of terroristic threats, false imprisonment and felony theft by taking.

He argued that the trial court erred in instructing the jury on the statutory definition of terroristic threats —that a person commits the offense when he “threatens to commit any crime of violence with the purpose of terror-

izing another or in reckless disregard of the risk of causing such terror” —when the indictment specifically charged him with “threaten[ing] to commit a crime of violence, to wit: to give [the victim] a heart attack by throwing a hair dryer into the water-filled bathtub which she occupied.” The Court noted that under OCGA § 17-8-58 (a) & (b), because appellant did not raise any objections to the jury charge at trial, appellate review is precluded unless the jury instruction constituted plain error affecting substantial rights of the parties. Since, appellant’s challenge raised a possible due process violation, the Court was required to review the jury charge for plain error.

The Court stated that a criminal defendant’s right to due process may be endangered when an indictment charges the defendant with committing a crime in a specific manner and the trial court’s jury instruction defines the crime as an act which may be committed in a manner other than the manner alleged in the indictment. The giving of a jury instruction which deviates from the indictment violates due process where there is evidence to support a conviction on the unalleged manner of committing the crime and the jury is not instructed to limit its consideration to the manner specified in the indictment. Here, the Court stated, premitting whether the statutory definition of terroristic threats provides different methods of committing the crime or whether there is evidence that appellant made such a threat in an unalleged manner, the Court found no due process violation. A reversal is not mandated where, as here, the charge as a whole limits the jury’s consideration to the specific manner of committing the crime alleged in the indictment. Here, the trial court instructed the jurors that the indictment, which had been read to them, formed the issue that they had been sworn to try, and that the State had the burden of proving beyond a reasonable doubt “every material allegation of the indictment and every essential element of the crime charged.” The trial court also sent the indictment out with the jury during deliberations, instructing them that “[t]he body of the indictment that you will need to read sets forth in each count specifically what the State contends is the crime in this case.” These limiting instructions, the Court held, cured any complained of problem with the terroristic threats charge. Thus, considering the jury charge as a whole, there was no reasonable

probability that the jury convicted appellant of terroristic threats in a manner not alleged in the indictment.

Appellant also argued that his felony conviction for theft by taking the victim’s jewelry should have been overturned because the State failed to prove that the value of the jewelry exceeded \$500. But, the Court stated, value is not an element of theft by taking as proscribed by OCGA § 16-8-2. The value of stolen property is relevant only for purposes of distinguishing between a misdemeanor and a felony. Felony theft by taking occurs when value of the stolen property exceeds \$500.

Nevertheless, the Court agreed with appellant that the State failed to establish that the value of the stolen jewelry (nine rings) exceeded \$500. The evidence showed that appellant took and then pawned some of the victim’s jewelry. The only evidence of value cited by the State was testimony that the items in question were rings that were part of an entire lot of jewelry—including necklaces, bracelets, rings and pendants—that the victim had previously purchased from the pawn shop for \$10,000. But the State never introduced any testimony that the value of the *specific items* taken by appellant exceeded \$500. Rather, the only evidence related to those items showed that appellant pawned jewelry for \$275. Because there was not sufficient evidence to establish that the value of the stolen property exceeded \$500, the Court found that it must vacate appellant’s felony sentence as to that count of the indictment, and remand the case with direction that a conviction and sentence be entered for a misdemeanor offense.