Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 11, 2016

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General Counsel

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Traffic Safety Resource Prosecutor

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State Prosecutor

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State Prosecutor

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State Prosecutor

THIS WEEK:

First Offender; Void Sentences

Collins v. State, A16A1269 (10/14/16)

On February 7, 1995, appellant entered a negotiated plea of guilty to one count of theft by taking and one count of theft by receiving stolen property. The court sentenced him to three years to be served on probation under the provisions of the First Offender Act. On Friday, February 6, 1998, a probation officer completed a "Petition Seeking Adjudication of Unsatisfactory Performance Under First Offender Sentence." The petition alleged that appellant failed to fulfill the requirements of first-offender probation in view of appellant's three traffic violations committed during the term of probation, but did not seek an adjudication of guilt or revocation of appellant's probation. The record did not contain any evidence that the petition was filed with the clerk of court or the trial judge or that the petition was served upon appellant or his counsel. On February 9, the trial court issued an order finding appellant's performance "unsatisfactory" and found that appellant was "not entitled to discharge and exoneration." The order was filed on February 11. There was no indication that a hearing was held on the petition.

Seventeen years later, appellant filed a "Motion for Discharge and Exoneration" in which he asked the trial court for an order "formalizing [his] exoneration" under the First Offender Act. The trial court concluded that appellant failed to show "any abuse of discretion in the Court's 1998 determination that [appellant] was not entitled to relief under the First Offender Act" and denied his motion.

The Court first addressed its jurisdiction over the appeal. It found that there is no law which authorized the specific motion appellant filed. However, the Court found, the motion was essentially one to correct a void judgment. Such a motion may be filed at any time. Thus, the Court determined that it had jurisdiction over the appeal.

Applying the law as it currently exists, the Court stated that under the First Offender Act, a person is either exonerated of guilt and stands discharged as a matter of law upon completion of the term of probation (O.C.G.A. § 42-8-60(e) (2016)) or adjudicated guilty in a petition filed prior to the expiration of the sentence (O.C.G.A. § 42-8-60(d) (2016)); the statute does not provide for any other alternative. A punishment which deviates from these limited options is not available and, therefore, void.

Here, the Court noted, prior to the expiration of appellant's sentence, the State completed, but the record contained no indication that it filed, a petition "seeking adjudication of unsatisfactory performance." Bearing in mind the two options available under the First Offender Act, the Court found two primary deficiencies with the State's petition. First, to the extent the petition sought an adjudication of guilt, it was untimely. Second, and of particular relevance, Georgia law does not recognize the trial court's

sentence denying appellant discharge and exoneration as sought by the State. Thus, if a first-offender probationer is not discharged pursuant to O.C.G.A. § 42-8-62, it is only because he did not successfully complete his term of probation. "Successful completion" of the term of probation is measured by whether the State timely filed a petition for revocation. In this case, it did not. Therefore, the Court concluded, the trial court's sentence denying appellant exoneration and discharge was void as a matter of law. As a result, the trial court's order denying appellant's motion was reversed and the case remanded for entry of an order of exoneration and discharge consistent with the First Offender Act.

Relevancy; Closing Arguments

Satterfield v. State, A16A1278 (10/19/16)

Appellant was convicted of three counts of terroristic threats and two counts of terroristic threats with intent to retaliate against a judge. The evidence, briefly stated, showed that appellant's divorce was final in mid-2012. In late 2012, appellant told a nurse that he wanted to hurt a judge's wife because he was very unhappy with a divorce situation. On November 30, 2012, he told a professional counselor at an outpatient counseling session that he was angry with the judge who presided over his divorce and that he wanted to "kill" the judge or the judge's family. On December 30, 2012, the judge received a five-page, typewritten letter from appellant addressed to the judge's wife ("the letter"). In the letter, appellant told the judge's wife that at one point he fully intended to kill her and her children as a way of getting back at, or teaching a lesson to, her husband who had acted in a biased, unethical, and spiteful manner, often siding with his ex-wife's attorney during the divorce proceedings. Appellant then asserted that he had had a change of heart, no longer wanted to kill the judge's family, and now wanted to warn the judge's wife about others who have suffered from similar behavior by the judge. But, despite this purported change of heart, a review of the entire letter showed that appellant was still threatening to kill the judge's family and that appellant was full of thoughts of revenge against the judge for the way he handled appellant's divorce. Appellant was arrested the same day the judge read the letter. A search of appellant's van revealed an unloaded Taurus revolver, which is capable of shooting both .410 shotgun shells and .45 caliber rounds. The manufacturer's name for the gun is "The Judge," and that name is printed on the side of the weapon. Appellant argued that the trial court erred in admitting the introduction of the gun because it was not relevant to the charges. The Court disagreed for two reasons.

First, the Court rejected appellant's claim that the letter showed appellant had "unequivocally renounced, rejected, and repudiated any former intention to harm the judge's family," and that, therefore, the State was not authorized to argue to the jury that the letter showed that appellant intended to kill the judge's family. Instead, it was for the jury to decide whether the defendant's actions constituted a terroristic threat, and a communication is sufficient to constitute a threat if a reasonable person could conclude that it was a threat under the circumstances. And here, the Court stated that its reading of the letter showed many veiled threats to kill the judge's family. Moreover, the jury was not required to believe that appellant had in fact changed his mind about killing the family. Accordingly, a reasonable person could conclude that the letter contained multiple threats to kill, and therefore the State was authorized to argue and the jury was authorized to find that appellant had threatened murder.

Second, the Court rejected appellant's argument that the gun was not "res gestae." The Court stated that the concept of res gestae has been carried forward to the new Evidence Cods under the concept of "intrinsic" evidence, as opposed to "extrinsic" evidence, i.e., evidence of "other crimes, wrongs, or acts," which is subject to the admissibility requirements of O.C.G.A. § 24-4-404(b). Evidence is intrinsic if it is (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense. Here, the Court found, at the time that appellant was arrested, the evidence of the gun, the gun box, and the ammunition strongly suggested that appellant was in the process of executing the steps outlined in the letter in that he was disposing of his assets and arming himself to follow through on his plan to murder the judge's family, motivated by revenge. Accordingly, at a minimum, the gun and related evidence were inextricably intertwined with the evidence of the charged offenses and therefore relevant to the charges against appellant.

Finally, appellant contended that the trial court erred by not sustaining his objection and motion for mistrial when the State violated the "golden rule" in closing argument. In the relevant portion of closing argument, the prosecutor stated: "Again, just — man, read the letter. Read the letter. It will make your heart skip a beat. A mother and father read this letter. You can just imagine how they felt."

The Court stated that a "golden rule" argument is one that, regardless of the nomenclature used, asks the jurors to place themselves in a victim's position. Such an argument is impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. The Court held that the statement did not violate this rule because it was not concerned with how a juror would feel if he or she were the victim. Rather it asked the jurors to imagine how the victims felt when they received the letter, and whether the letter constituted a threat was an issue to be decided by the jury. Accordingly, the trial court did not abuse its discretion by denying appellant's motion for mistrial.

Ineffective Assistance of Counsel; Defense of Habitation

Harris v. State, A16A0970 (10/20/16)

Appellant was tried on several counts of felony murder, aggravated assault, firearms possession, and other offenses. The jury convicted him of the lesser included offense of voluntary manslaughter and other charges. The evidence, very briefly stated, showed that after the victim had been in appellant's house for a while, he initiated an argument with appellant over money appellant allegedly owed him. During the course of the altercation, appellant shot the victim. Appellant contended that his defense counsel was ineffective for withdrawing his requested charge on defense of habitation. The Court disagreed.

The Court stated that the key to a defense of habitation pursuant to O.C.G.A. § 16-3-23 is that the resident defendant had to use force

either to prevent or terminate an unlawful entry into or attack on the defendant's residence. Additionally, the use of deadly force is only defensible if the victim entered or tried to enter "in a violent and tumultuous manner," "unlawfully and forcibly," or for the purpose of committing a felony. And here, the Court found, appellant admitted to the police that the victim stayed with him periodically, that the victim had come over that night to drink, and that appellant had let him inside through the front door. A friend of appellant's testified that when he came to the house, the victim was already located in appellant's nephew's bedroom. The nephew also testified that the victim was at the house "like every night" and sometimes stayed there. Thus, the Court found, the record contained no evidence that the victim entered violently, unlawfully, forcibly, or with the intent to commit a felony. Accordingly, defense counsel did not render deficient performance by withdrawing the defense of habitation.

Search & Seizure

Degeorgis v. State, A16A0927 (10/20/16)

Appellant was convicted of two counts of sexual exploitation of children for possessing both printed and electronic images depicting minors engaged in sexually explicit conduct. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant's estranged wife brought a computer tower to the police department and expressed concern that she had discovered child pornography on its hard drive. Upon speaking to a police lieutenant, appellant's wife explained that she had recently moved out of her and appellant's marital home, but returned when she knew that appellant was absent in order to retrieve computer equipment used by appellant which she knew to contain sexually explicit pictures of herself. While later viewing images on the hard drive of one of the computer towers, she discovered what she believed to be child pornography and brought the tower to the police station. Based on what the wife showed them, the police obtained a search warrant for the home.

Appellant contended that because his wife "was estranged, separated, and had reentered the marital residence without permission to take and view the computers," her consent to search the computer tower was void and the lieutenant's viewing of its contents was unlawful. Appellant further argued that the resultant search warrants for the remaining computer equipment and his residence amounted to fruit from the poisonous tree and were, thus, invalid. The Court disagreed.

Here, the Court found, the evidence was uncontroverted that the lieutenant's initial viewing of the contents of the computer tower's hard drive occurred at the request of appellant's wife, the lieutenant was guided in his search by appellant's wife so as to view the files that she had already viewed, and the lieutenant looked at the images solely for the purpose of verifying whether the computer contained unlawful material. The lieutenant's initial search did not, therefore, amount to a violation of appellant's Fourth Amendment rights because the discovery of contraband by a private citizen and the verification of this evidence by investigators does not violate the Fourth Amendment. After observing what he believed to be child pornography on the tower's hard drive, the lieutenant had probable cause to obtain search warrants for the remaining computer equipment and home. The trial court, therefore, did not err in denying appellant's motion to suppress.

Appellant also contended that the trial court erred in denying his motion to suppress his admission made during the search of his residence that he possessed ziplock baggies containing womens' undergarments. The evidence showed that during the search, the lieutenant found in a locked drawer numerous ziplock baggies containing womens' undergarments, each individually labeled with a female's name and a date. After being questioned about the items, appellant admitted that they were "in his possession." Specifically, appellant argued, the statement was rendered involuntary because the lieutenant had allegedly taken his cellular phone and his car keys and he did not believe that he was free to leave at the time the statement was made.

The Court noted that the the evidence presented to the jury was limited solely to appellant's admission that the ziplocked undergarments found during the search were "in his possession." The Court found that the lieutenant seized appellant's cellular phone because it was specifically enumerated on the search warrant as an item that may contain evidence of a crime, and at no time did the lieutenant or any other law enforcement officer request or seize appellant's car keys. Rather, after being asked if he would produce keys to the myriad of locked containers in his "man cave" so as to avoid the officers cutting those locks, appellant voluntarily produced a key ring holding the key to a locked cabinet in which the remaining keys were stored. Even assuming appellant's car key was inadvertently taken by the lieutenant, appellant's admission to possessing the undergarments was voluntary. Although appellant was asked to remain outside the home for officer safety during the search, he was not placed under arrest, was not confined in any way, and was never told that he could not leave. In fact, the Court noted, the officers testified that had appellant attempted to leave during the search, he would have been permitted to do so. Accordingly, the Court concluded, appellant failed to prove that his statement was involuntary.

Juror Misconduct; Jury Deliberations

Lloyd v. State, A16A0727 (10/18/16)

Appellant was convicted of aggravated assault, but acquitted of malice murder, and two counts of felony murder. According to appellant, he arranged to sell the victim a pair of sneakers and they met in a parking lot. After the victim had them on his feet to see if they fit, the victim pulled out what appellant believed to be a knife, tried to cut him across his stomach, and took off running. Appellant shot at the victim once in the parking lot, chased him, and caught him. The victim swiped at appellant again and began running away, so appellant shot at him again, trying to get him to stop. The entire incident lasted six to eight seconds. A police officer who was driving by saw the victim on the ground, appellant running toward the victim, and then appellant yanking shoes off the victim's feet. No knife was found. The victim was shot in the back and in the buttocks.

The record, briefly stated, showed that the trial court admonished the jury repeatedly not to do any independent research on the case. In its instructions to the jury, the court charged on self-defense and justification. Within two hours of deliberations, the jury sent out a note: "Please provide definition of 'stand your ground'. When is it not allowed[?] What is not considered 'stand your ground'? Is pursuit included?" The trial

court instructed the jury that Georgia does not have the legal concept of "stand your ground" and reinstructed the jury on affirmative defense, self-defense and justification.

Despite these instructions, Juror R. R. approached a police officer at a grocery store during a lunch break. He asked the officer to explain the law of "stand your ground." The officer tried to do so and told Juror R. R. that "you cannot pursue anyone." Juror R. R. tried to share this information with the other jurors, but they had pretty much made up their mind, which was apparently to acquit. Juror R. R. was the lone hold-out to convict. Over the evening recess, Juror R. R. created a presentation to illustrate his position, using the information he gathered from the police officer. He shared this presentation with the jury the following morning. Meanwhile, the trial court was contemplating a mistrial based on a hung jury. But, the jury stated they wanted to continue. After seeing the presentation, the jury voted to convict on aggravated assault. Some of the jurors remained in the courtroom for sentencing and when the judge gave appellant 25 years to serve, they were upset and told defense counsel about Juror R. R.'s misconduct. Appellant then filed an emergency motion for new trial.

The Court stated that the rule in Georgia is that where such an improper communication occurs, there is a presumption of harm and the burden is on the State to show the lack thereof. In so holding, the Court distinguished *Armstrong v. Gynecology & Obstetrics of DeKalb, P.C.*, 327 Ga.App. 737, 738-741 (1) (2014) because its holding that in civil cases there is no presumption of prejudice arising from juror misconduct merely reaffirms prior authority and thus, it "cannot be read to undermine the long line of Supreme Court authority holding that such a presumption does obtain in criminal cases — especially since the analyses in that line of authority do not cite the Evidence Code."

The State argued that the improper communication was harmless. The Court disagreed. Aside from the shot-in-the-back issue, the jury had specifically asked the court whether pursuit was included in "stand your ground." The court told the jury that "stand your ground" is not a specific concept in Georgia, but he did not answer the jury's question directly. Instead, the court properly instructed the jury that an accused is justified in using force when he reasonably believes that force is necessary to prevent death or great bodily harm and when the circumstances would excite the fears of a reasonable person, and that the accused must truly have acted under the influence of these fears and not in a spirit of revenge. At the motion for new trial hearing, Juror R. R. himself testified that, "I asked a question in here, sent a message out on this very point and it didn't really get explained or anything," so he decided to ask the officer, who told him that it is not permissible to pursue someone in a stand-your-ground situation. This testimony was confirmed by one of the jurors called by appellant, who testified that from the way Juror R. R. explained it, she concluded that the officer had told Juror R. R. that it was unjustifiable to shoot the victim when he turned around and ran. And Juror R. R.'s diagram – which he presented just before the jury reached its verdict – included language about pursuit and "stand your ground." The testimony of the jurors indicated that Juror R. R.'s presentation to the jury of the information from the police officer via the diagram convinced them that they could not consider the issue of whether appellant's fear of harm was reasonable when he shot the victim as the victim was running. Thus, because Juror R. R.'s misconduct affected the key issue of self-defense and the verdict became unanimous only after the introduction of the improper communication, the Court concluded that there was a reasonable possibility that the juror's misconduct contributed to appellant's conviction. It therefore reversed appellant's conviction.