

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 13, 2013

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THIS WEEK:

- **Indictments; Jurisdiction**
- **Statements; Miranda**
- **Search & Seizure; Roadblocks**
- **Search & Seizure; Consent**
- **Aggravated Assault; "Serious Bodily Injury"**
- **Similar Transactions; Notice**
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- **Recidivist Sentencing; Notice Requirements**

Indictments; Jurisdiction

Kenerly v. State, A13A1370 (11/22/13)

Appellant was granted an interlocutory appeal from an order denying his motion to quash a second indictment against him on the same charges asserted in an earlier indictment. The record showed that a special purpose grand jury indicted appellant and appellant appealed a denial of his motion to quash that indictment. The Court of Appeals found that the indictment was void. While the State sought a petition for writ of certiorari to the Supreme Court, the State also obtained from a regularly-impaneled grand jury a second indictment against appellant. The second indictment contained the same three charges as the charges contained in the first indictment. The Supreme Court denied the petition and the remittitur was eventually sent back to the trial court.

Appellant argued that the pending appeal of the first indictment deprived the trial court of jurisdiction to accept return of the second indictment. The Court disagreed. Not every action by a trial court is barred during the pendency of an appeal. Rather the trial court cannot execute a sentence or entertain proceedings which either require a ruling on the matters on appeal or which directly or indirectly affect such matters. The loss of jurisdiction is limited only to those proceedings which either require a ruling on the matters on appeal or directly or indirectly affect such matter. Thus, the Court stated, the real issue was whether the return of the second indictment required the trial court to issue a ruling on the exact matter being considered in the first appeal, or whether it directly or indirectly affected such matters.

The Court found that the trial court did not lose jurisdiction to accept the return of the second indictment. The first appeal concerned the issue of whether the first indictment was returned by an authorized body (a special purpose grand jury). The second indictment initiated a completely separate prosecution on the same charges, but no contention was raised that the second indictment suffered from the same infirmity as the first indictment. Thus, the trial court's acceptance of the second indictment did not require a ruling on the matter on appeal or directly or indirectly affect such matter.

Statements; Miranda

Cody v. State, A13A0837 (11/19/13)

Appellant was convicted of multiple counts of child molestation. He contended that the trial court erred by failing to exclude his police statement. He conceded that he

was properly informed of his *Miranda* rights. However, he argued, he unambiguously invoked his right to counsel with the statements: “Can I get a lawyer now? Right now?” Therefore, he contended, his police statement was inadmissible.

The Court stated that a suspect who asks for a lawyer at any time during a custodial interrogation may not be subjected to further questioning by law enforcement until an attorney has been made available or until the suspect reinitiates the conversation. Thus, even when an arrested suspect has unequivocally invoked his right to counsel, it does not necessarily follow that any subsequent police statement must be excluded. Instead, the law requires analysis of whether, after a request for counsel, the police subjected the defendant to further interrogation, and, if so, whether the additional questioning was initiated by the defendant rather than the police. Thus, the Court found, even assuming that appellant’s statement “Can I get a lawyer now? Right now?” constituted an unambiguous request for counsel, the circumstances require consideration of whether the detective subjected appellant to further interrogation and whether the additional questioning was initiated by appellant rather than the detective.

“Interrogation” in this context is defined as “express questioning by law enforcement officers” or its functional equivalent “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

Here, the Court found, the detective’s immediate response to appellant’s question “Can I get a lawyer now? Right now?” did not fall within that definition of “interrogation.” The detective’s response neither expressly questioned appellant nor equated to words or actions that the detective should have known were reasonably likely to elicit incriminating information from appellant. Furthermore, the additional questioning that ensued was initiated by appellant; that is, after hearing the detective’s response, appellant revealed to the detective, “I would rather go on and get this over with” After appellant revealed that he “would rather go on and get this

over with,” the detective’s statements and actions were permissibly aimed at clarifying appellant’s apparent decision to waive the right to counsel and the right to remain silent, and thus proceed with the interrogation without counsel. Indeed, the Court noted, appellant thereupon affirmed his decision orally and by executing a written waiver to give up those rights and proceed with un-counseled interrogation. Therefore, under the totality of these circumstances, the trial court did not err in admitting appellant’s police statement.

Search & Seizure; Roadblocks

Spragins v. State, A13A0941 (11/20/13)

Appellant was convicted of DUI. He contended that the trial court erred in denying his motion to suppress. The evidence showed that a lieutenant in the sheriff’s office verbally instructed two deputies, who were trained to conduct roadblocks and field sobriety tests, to conduct a roadblock. The deputies began the roadblock as instructed, and appellant was stopped 18 minutes later and arrested for driving under the influence of alcohol to the extent he was less safe. The deputies concluded the roadblock at 12:30 a.m. Two days following the roadblock, the lieutenant filled out and signed an “Approval to Initiate Road Check” form that listed the purpose of the roadblock, the date, the location, and that it took place from 11:15 p.m. on December 2 to 12:30 a.m. on December 3. The form also provided that all cars were to be stopped and that the order for the roadblock was communicated “in person.” It also noted that “well identified police check point signs” were not utilized.

Appellant argued that the roadblock was illegally authorized, implemented and conducted pursuant to the unfettered discretion of field officers. Specifically, he contended, the roadblock was illegal because not all vehicles were stopped and the officers were not advised or trained on any procedures to determine when a traffic backup constituted a safety hazard sufficient to temporarily halt the roadblock. The trial court noted that only two deputies were assigned to the roadblock and the court concluded that some vehicles were waved through the roadblock because of a lack of manpower.

The Court stated that in *Brown v. State*, __Ga.__ (Case No. S12G1287; decided

October 21, 2013), the Supreme Court recently noted that sufficient staffing of a checkpoint is “relevant in evaluating all of the *LaFontaine* requirements.” *Brown*, supra, slip op. at 37(3)(c). The Supreme Court held further that understaffing may “make it impossible to stop all vehicles while keeping the delay to law-abiding motorists minimal,” and that two-officer staffing, while not necessarily a constitutional violation, can inhibit the State’s “ability to show that the checkpoint was implemented and operated lawfully.” *Id.* at 38-39(3)(c). Because the trial court ruled without the benefit of the Georgia Supreme Court’s recent ruling in *Brown*, the Court remanded this case for the trial court to reconsider its ruling on appellant’s motion to suppress in light of that holding.

Search & Seizure; Consent

Hernandez-Espino v. State, A13A1434 (11/19/13)

Appellant was indicted for possession of cocaine. He contended that the trial court erred in denying his motion to suppress. In a 4-3 decision, the Court agreed and reversed.

The evidence showed that an officer was working an extra shift at an apartment complex that had been experiencing problems with crime, including drug activity. The officer was wearing his police uniform and an armored vest and was carrying his weapon. Around 9 p.m., he saw appellant emerge from a building that had been identified as a location in which narcotics were sold. The officer approached appellant and asked if he lived in the complex. Appellant replied that he did not, but that he was there visiting a friend. The officer asked for the friend’s name, and appellant said he did not know but pointed to an apartment. The officer, who was familiar with the residents of that apartment, testified that he “just knew that [appellant] wasn’t telling the truth.” He said to appellant, “man, just give me the drugs you just bought.” Appellant denied having any drugs. The officer then asked for consent to search, and appellant agreed. The officer found crack cocaine in appellant’s pocket.

The Court first determined that the interaction escalated to a second-tier encounter. The Court found that there was no doubt that the officer commanded appellant to turn over the drugs in appellant’s possession. Thus, a reasonable person in

appellant's position would not have felt free to decline the officer's direction to give him the drugs or otherwise terminate the encounter, as required for a first-tier encounter. In so holding, the Court noted that the trial court found that the encounter remained first-tier because appellant himself did not consider the officer's statement to be a command because appellant did not respond by handing over drugs. But, the Court held, whether an officer-citizen encounter is a first- or second-tier encounter, is not governed by the citizen's willingness to comply with the officer. Here, the officer's words were a command, and there was no evidence that they were anything other than a command.

The Court next determined that the officer lacked reasonable, articulable suspicion to escalate the interaction into a second-tier encounter. A second-tier, investigative detention requires the officer to have a particularized and objective basis for suspecting that the citizen was or was about to be involved in criminal activity. To stop a citizen, the officer must possess more than a subjective, unparticularized suspicion or hunch. The officer's action must be justified by specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion, and the officer must have some basis from which the court can determine that the detention was neither arbitrary nor harassing. Here, the Court found, the officer demanded that appellant give him the drugs because appellant walked out of an apartment building known for drug activity and could not name the person whom he had been visiting, and because the officer believed that he was lying. Nothing in the record suggested that the officer saw appellant do anything that appeared to be a criminal act. Thus, the facts raised a subjective, unparticularized suspicion or hunch about appellant's reasons for being at the apartment complex, but they did not provide an objective manifestation that he was, or was about to be, engaged in criminal activity. Consequently, the second-tier encounter was unlawful.

Finally, the Court determined that the unlawful second-tier encounter tainted appellant's consent. To justify the warrantless search on the ground of appellant's consent, notwithstanding the unlawful second-tier encounter, the State was obligated to establish

both that his consent was voluntary and also that his consent was not the product of the illegal seizure, but rather was sufficiently an act of free will to purge the primary taint. Proof of a voluntary consent alone is not sufficient. The relevant factors include the temporal proximity of an illegal seizure and consent, intervening circumstances, and the purpose and flagrancy of the official misconduct.

Here, the Court found, the officer obtained the consent to search immediately after he unlawfully escalated the encounter to the second tier, and the record revealed no intervening circumstances that would attenuate the causal chain. Accordingly, because appellant's consent to search was not purged of the taint of the unlawful second-tier encounter, the trial court erred in denying his motion to suppress the evidence found during that search.

Aggravated Assault; "Serious Bodily Injury"

Weaver v. State, A13A1610 (11/20/13)

Appellant pled guilty to one count of aggravated assault for spraying another man with pepper spray. He argued that the trial court erred in denying his motion to withdraw his plea of guilty. Specifically, he contended that the factual basis proffered by the State was insufficient to establish the foundation for the plea because "[t]he act of merely spraying pepper spray into the face of an adult from a foot away as charged here is not a means likely to cause serious bodily injury and did not in fact cause serious bodily injury in this case." The Court disagreed.

The Court noted that a specific definition of "serious bodily injury" has not been provided by statute or case law in Georgia. Instead, whether a weapon is one likely to cause serious bodily injury is a question for the jury, which may consider all the circumstances surrounding the weapon and the manner in which it was used. These circumstances include the manner and means of the object's use, as well as any wounds inflicted and other evidence of the capabilities of the instrument. Here, the State's proffer showed that the victim suffered a burning sensation in his eyes and face, was in a great deal of pain, and was temporarily blinded. Thus, the trial court did not abuse its discretion by concluding that this evidence supported a guilty plea to

aggravated assault based upon the use of "any object, device or instrument which, when used offensively against a person, is likely to . . . result in serious bodily injury." O.C.G.A. § 16-5-21(a)(2). The Court also reviewed cases from other jurisdictions regarding pepper spray and found that these cases supported its conclusion. Accordingly, the Court affirmed the trial court's denial of appellant's motion to withdraw his guilty plea.

Similar Transactions; Notice

Long v. State, A13A0998 (11/20/13)

Appellant was convicted of false imprisonment, aggravated assault, terroristic threats, and simple battery. He contended that the trial court erred in admitting evidence of similar transactions. The record showed that a similar transaction witness testified to crimes committed by appellant including false imprisonment, terroristic threats, and battery. Appellant argued that the trial court erred by allowing the State to introduce evidence of crimes other than false imprisonment because the State listed only "false imprisonment" as the "similar crime or transaction" in its notice of intent. The Court disagreed. In addition to listing the date of the crime, the victim's name, and the county in which the crime was committed, the State attached a copy of the conviction that included other charges for which appellant was convicted and also provided copies of the incident report, the victim's statement, and an investigator's summary. At the hearing pursuant to Uniform Superior Court Rule 31.3(B), appellant objected to the admission of any evidence other than that related to false imprisonment, but did not claim any surprise or inability to respond to the other convictions arising out of and occurring on the same date as the false imprisonment conviction listed in the notice. The trial court ruled that the State could submit evidence about "the rest of it" and that "[a]nything that surrounds the incident, the res gestae of the incident of false imprisonment, is admissible."

The Court stated that USCR 31.3(B) requires that notice be in a specific form to ensure that the State actually notifies the defendant of its intent to use certain evidence so that the defendant will have a meaningful opportunity to rebut that evidence. The rule also is designed to provide a criminal

defendant with fair and adequate notice of the State's intention to utilize similar transaction evidence so that questions as to the admissibility of such evidence can be resolved before trial; and the purpose of the length of the notice period is to allow defendant the opportunity to investigate the validity, relevancy, and other aspects of admissibility of the prior offenses. Here, the Court concluded, even if the State's notice could have been more specific, it substantially complied with the notice requirement and appellant failed to demonstrate how his defense was harmed as a result of the State's failure to provide a more complete notice.

Ineffective Assistance of Counsel; Cross-Examination

Ottley v. State, A13A1321 (11/20/13)

Appellant was convicted of three counts of cruelty to children, one count of sexual battery, two counts of aggravated assault, two counts of rape, one count of child molestation, one count of incest, and two counts of aggravated child molestation. Appellant contended that his trial counsel rendered ineffective assistance and therefore, he was entitled to a new trial. The Court agreed and reversed.

The Court found that part of counsel's trial strategy was to point to the fact that the victim did not raise the allegation of sexual abuse until several months after appellant had separated from her mother and only when appellant and his wife were engaged in an ongoing divorce with large amounts of money at stake. Counsel planned to present testimony about the family situation and the grandmother's unusually strong influence in the household. Additionally, the defense planned to rely on the fact that the child's hymen was completely intact, which counsel believed "indicated that the child never had sex." Accordingly, the trial strategy was to challenge the victim's story by introducing evidence to show "why the little girl would have fabricated this story and that it couldn't have happened." But he did not plan to challenge the State's medical evidence because he thought it was good for the defense.

The State presented two expert witnesses at trial: Cooley, a nurse practitioner in public health and a sexual assault nurse examiner ("SANE"), and Dr. Mansfield, the victim's pediatrician.

Defense counsel stated that no one in his office investigated Cooley's credentials or interviewed her before trial because he did not think that her testimony "was going to be of any significance," as she had examined the child four months after the last incident. But when questioned on the contents of Cooley's report, counsel admitted that he overlooked a reference in the report that the victim's "posterior labia majora [was] stretched and flaccid for [a] 12 year old, looks more like a [30-year-old] woman that has had children." He also testified that he was completely unfamiliar with the SANE program under which Cooley was trained. When Cooley ended up being the "main witness" at trial, he was caught off-guard. Although he objected, sometimes successfully, to some of the evidence Cooley was asked to present, including certain charts, he did not ask her a single question at trial because he and the attorney working with him were "[t]otally unprepared to cross-examine her," and it was "too late at that point."

Defense counsel also said that he did not interview Dr. Mansfield either because he felt his testimony would help the defense as his report indicated that the victim's hymen was intact. He also admitted that he did not do any medical research before trial because he did not see the need for it given Dr. Mansfield's finding in this regard. At trial, defense counsel asked Dr. Mansfield only two questions on cross-examination.

The Court found that appellant carried his burden of establishing that his trial counsel's performance was deficient. The evidence in support of the charges in this case included the victim's own testimony and her prior statements, evidence from those around her regarding changes in her behavior, and the medical evidence. Appellant's counsel's trial strategy was to attack the child's and her family's credibility and to accept the State's medical evidence. However, the Court found, trial counsel's failure to investigate the medical issues and seek and present testimony to rebut that presented by the State was a crucial omission. The State's evidence, other than opinions from their experts, was far from overwhelming. Although the victim testified as to appellant's actions, her testimony and prior statements were at times inconsistent and self-contradictory. Even viewing the situation from counsel's perspective at the time, the

Court held "we cannot say that this strategy was reasonable under the circumstances or that the decision to pursue such a strategy was made in the exercise of reasonable professional judgment."

Thus, because the medical evidence was crucial in establishing that sexual abuse had occurred, appellant's counsel's failure to take any action to counter that evidence was extremely detrimental to the defense. Trial counsel simply did not make the adversarial testing process work. Moreover, because defense counsel failed to present evidence to counter what he should have known would be important medical evidence in the case, a reasonable probability existed that, absent counsel's professional error, the result of the trial would have been different. Accordingly, the Court concluded, appellant was entitled to a new trial.

Similar Transactions; Jury Charges

Dodd v. State, A13A1254 (11/19/13)

Appellant was convicted of possession of methamphetamine with the intent to distribute. He contended that the trial court's initial charge on similar transactions misstated the law and was overly broad. The Court agreed and reversed his conviction.

The record showed that appellant asked that the pattern charge on similar transactions be given, but instead the trial court charged the jury in part as follows: "The law provides that evidence of other offenses of this defendant that are similar in terms of his bent of mind, course of conduct, and motive to the offense for which the defendant is on trial may be admissible and may be considered for the limited purpose of showing, if it does, the state of mind, bent of mind, course of conduct, and motive of the individual and the knowledge and the intent of the defendant *and the crimes charged in the case now on trial...*" Appellant contended that this charge was substantially the same as that given in *Rivers v. State*, 236 Ga.App. 709 (1999) which the Court found to be defective. The State argued that the charge given was not the same as the charge in *Rivers*, the charge given at the conclusion of the evidence corrected the problem, and the parts of the charge that were problematic may have been a transcription error because the charge given at the close of the evidence

was different than the initial charge of similar transactions and was legally correct.

The Court found that the charge here was the same as that in *Rivers*. The charge here informed the jury that the similar transaction evidence “may be considered for the limited purpose of showing, if it does, the state of mind, bent of mind, course of conduct, and motive of the individual and the knowledge and the intent of the defendant *and the crimes charged in the case now on trial.*” (Emphasis supplied.) The charge in *Rivers* instructed the jury that similar transaction evidence “may be considered for the limited purpose of showing, if it does, the identity of the perpetrator, the state of mind, *and the crimes charged in the case now on trial.*” (Emphasis supplied.) Both charges expanded the scope for which similar transaction evidence might be considered to include “the crimes charged in the case now on trial.” Therefore, both charges suffered from the same infirmity.

The Court further found that even if the later charge to the jury expressed a correct statement of the law, the court informed the jury that it was “strictly limited in your consideration of the evidence as to the purposes *previously charged by the Court.*” (Emphasis supplied.) Thus, this charge did not correct the problem with the initial charge, but, in fact, made it part of the charge given at the close of the evidence. Moreover, the error would not have been cured because the jury would have been given two conflicting charges. Where two or more jury instructions directly conflict with one another, a new trial is required.

Finally, the Court stated, it could not speculate on whether the initial charge was a transcription error. If such a mistake was made in preparing the transcript, procedures exist to correct such mistakes and the record failed to show that the prosecution took any step to correct the transcript if, indeed, such a mistake was made. Accordingly, the Court concluded, the charge in this case created a fair risk that the jury was confused and misled as to the proper limited use of similar transaction evidence to the prejudice of appellant. When such a charging error occurs, a rebuttable presumption arises that the charge is prejudicial and harmful, and the Court must so hold unless it appears from the entire record that the error is harmless. Since the Court could not say that the evidence against

appellant was overwhelming, the error was not harmless, and thus appellant’s conviction for possession of methamphetamine with the intent to distribute was reversed.

Aggravated Assault; Ineffective Assistance of Counsel

Byrd v. State, A13A1403 (11/20/13)

Appellant was convicted of one count of armed robbery, two counts of burglary, two counts of aggravated assault (O.C.G.A. § 16-5-21(a)), two counts of possession of a firearm during the commission of a felony, and one count of possession of marijuana with the intent to distribute.

In Count 3 of the indictment, Appellant was charged with committing an aggravated assault upon the victim by striking him in the face with a deadly weapon, a handgun. To convict appellant of aggravated assault as indicted, the State was required to prove that the handgun was used as a deadly weapon. After instructing the jury on the definition of assault, the trial court gave the following charge to the jury: “The State must also prove as a material element of aggravated assault, as alleged in this case, that the assault was made with a deadly weapon. A firearm, when used as such, is a deadly weapon as a matter of law.” Appellant contended that the portion of the charge which states that “[a] firearm, when used as such, is a deadly weapon as a matter of law” was not applicable to Count 3, and that it removed from the jury’s province the issue of whether the handgun was a deadly weapon based on the manner in which it was alleged to have been used. Appellant therefore argued that trial counsel was ineffective for failing to object to this portion of the charge. The Court agreed and reversed his conviction on this count.

In the context of deciding whether or not the State had proved that an instrument used to commit an assault was a deadly weapon, the Court has held that an apparently functional firearm (whether or not actually functional) used in the manner in which a firearm is ordinarily used, i.e. by pointing the gun or using it to shoot at someone, is a deadly weapon per se. This is so because the firearm, when used in such a manner, would reasonably appear to the victim to be deadly.

In Count 3, however, the handgun was not alleged to have been used in the ordinary

manner in which a gun is used; it was alleged to have been used as a bludgeon or club. Therefore, the circumstances surrounding the use of the handgun are crucial. Since the law requires the State to prove all elements of a crime, there must be some evidence to show the circumstances surrounding the use of the handgun to strike the victim in the face, such as the degree of force used, the likelihood of serious injury, or the nature of the injuries actually received. Here, the evidence produced by the State failed to show any details about the use of the handgun as alleged in Count 3 of the indictment that would render the handgun a “deadly weapon” as a matter of law.

Under these particular circumstances, the Court found, trial counsel was ineffective for failing to object to the trial court’s instruction that “[a] firearm, when used as such, is a deadly weapon as a matter of law.” The trial court’s instruction seemingly removed from the jury’s province the question of whether the State had established an essential element of aggravated assault in Count 3, i.e. the use of the handgun as a deadly weapon. Additionally, the Court held, the facts as proven could not support a conclusion that the firearm was used as a deadly weapon as it must have been so used due to the language of the indictment. Thus, the requisite prejudice for trial counsel’s ineffective assistance was shown. Accordingly, appellant’s conviction for aggravated assault in Count 3 of the indictment was reversed.

Recidivist Sentencing; Notice Requirements

Thomas v. State, A13A1053 (11/20/13)

Appellant was convicted of burglary. He contended that the State failed to give him proper notice of its intent to use prior convictions in aggravation of punishment. The record showed that at all material time, appellant was represented by the same counsel. The State filed its first notice of intent to use appellant’s prior conviction for murder in aggravation of punishment in April. In May, the State filed a second notice of intent to use three additional convictions for involuntary manslaughter, armed robbery, and burglary. Appellant’s first trial in May ended in a mistrial. The State did not refile its earlier notices before appellant’s retrial in August. In the second trial, he was convicted of burglary, and the trial court sentenced him

as a recidivist to 20 years without parole. At sentencing, appellant's trial counsel objected that the State had failed to provide her with notice of its intent to use prior convictions. The prosecutor responded that sufficient notice was provided based upon the State's written notice before the original trial and the continuing plea discussions with appellant's counsel after the first trial, in which the State continued to assert that appellant was facing sentencing as a recidivist, and that this was sufficient notice. The trial court agreed and proceeded with sentencing.

The Court stated that under O.C.G.A. § 17-10-2 the State must make its intent to use prior convictions as aggravation of punishment at sentencing known to the defendant prior to the defendant's trial. In evaluating the sufficiency of the State's notice, the Court places substance over form. Thus, oral notification suffices so long as the notice is clear. The important requirement is that the defendant be given an unmistakable advance warning that the prior convictions will be used against him at sentencing so that he will have enough time to rebut or explain any conviction record. Accordingly, even plea negotiations, which identify the prior convictions as a basis for the State's seeking enhanced punishment, suffice as notice.

Thus, the Court found, substantial evidence was presented from which the trial court could conclude that appellant received clear notice of the State's intent to use his prior convictions in aggravation of punishment. While appellant did not receive a third, formal, written notice, evidence supported the trial court's finding that the State notified appellant of its continuing intention to use prior convictions in aggravation of punishment, and that he was aware of this intention. Instead, appellant was, in fact, relying simply on the absence of a "formal notice" and the elevation of form over substance. But, the purpose of the statute is not to insist upon a technical requirement for its own sake. It was designed to ensure sufficient notice to defend against the charges. No prejudice whatsoever to appellant was alleged or shown, and harm as well as error must be shown to warrant reversal. Accordingly, the trial court did not err in sentencing appellant.