Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 23, 2016

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THIS WEEK:

O.C.G.A. § 16-12-100(b)(8); Prosecutorial Vindictiveness

Gerbert v. State, A16A0868 (10/28/16)

Appellant was convicted of aggravated sodomy and five counts of sexual exploitation of children based on his possession of child pornography. Appellant challenged the sufficiency of the evidence of one of his sexual exploitation convictions based on his possession of digital images of S.P. Specifically, appellant did not dispute possessing images of S. P. engaged in sexually explicit conduct, but argued that the State did not prove that he knew she was a minor at the time the pictures were taken and, therefore, did not establish a violation of O.C.G.A. § 16-12-100(b)(8). The Court agreed.

The Court noted that O.C.G.A. § 16-12-100 defines the crime of sexual exploitation of children in eight different ways. See O.C.G.A. § 16-12-100(b)(1)-(8). Possession of child pornography is defined in O.C.G.A. § 16-12-100(b)(8), which provides that "[i]t is unlawful for any person knowingly to possess or control any material which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct." This paragraph requires the State to prove that the defendant knowingly possessed the illicit materials. And our appellate courts have made it clear that one of the other seven definitions of the crime requires the defendant to know that the victim was a minor. But, the Court stated, "our review of the caselaw does not reveal any decision from our Court or our Supreme Court expressly addressing whether the crime defined in Paragraph (b)(8) requires the State to prove a defendant's knowledge that an illicit image depicted a minor."

Thus, the Court stated, "we explicitly answer it here: § 16-12-100(b)(8) requires the State to prove that the defendant knew the person depicted in the image was under the age of 18." And here, the only evidence the State offered was the direct testimony of S. P. that she was 17 at the time the image was created and that she did not know appellant. Nevertheless, the Court found, nothing about the image itself made clear that S. P. was underage, and the State did not argue that it does. Appellant argued that he never met S. P., had no connection to the image's creation, and did not know her age at the time it was created; the State did not contest this, other than to say his concealment of the image was sufficient to allow the jury to conclude he knew the image was illegal. But, the Court found, although evidence of the hidden folders was relevant to show appellant's knowing possession, it could find no authority for the State's implausible argument that mere concealment of images, standing alone, is

sufficient to prove a defendant's knowledge that those images depict minors. And in the absence of authority for such a non-obvious proposition, "we decline to accept the State's argument." Therefore, the Court found, based on its independent review of the record, there was no other evidence supporting a conclusion that appellant knew of S. P.'s age, and thus, the State failed to prove that appellant knew the age of S. P. in the images. Accordingly, the Court reversed his conviction as to this Count.

Appellant also argued that trial counsel was ineffective for failing to secure a ruling on his motion to dismiss the indictment for prosecutorial vindictiveness. In his motion to dismiss, appellant alleged that immediately after the court granted his request for a continuance to obtain an expert, the prosecutor at the time stated to defense counsel and to appellant's parents, "Nothing personal but I'm coming back with a new indictment and throwing the kitchen sink." The prosecutor subsequently obtained a new indictment in January 7, 2013 — the third and final indictment upon which appellant was tried and convicted — adding five additional counts. Appellant argued that the former prosecutor obtained a new indictment with additional charges for the purpose of punishing him for asserting his right to a continuance to get an expert.

The Court noted that although prosecutors have broad discretion in how to charge a defendant and may seek a superseding indictment at any time prior to trial, a defendant may obtain dismissal of a superseding indictment by establishing that the prosecutor acted vindictively, meaning that the prosecutor was motivated by a desire to punish the defendant for exercising his rights. To establish prosecutorial vindictiveness, the defendant must either provide evidence of actual vindictiveness or show that the particular circumstances of his case give rise to a presumption of vindictiveness. To determine whether the presumption of vindictiveness applies, the Court must examine whether the prosecutor's actions in the context of the entire proceedings establish a "realistic likelihood of vindictiveness." If a defendant establishes a realistic likelihood of vindictiveness, the government may rebut the presumption of vindictiveness by proffering legitimate, objective reasons for its conduct.

Here, the Court found, appellant failed to provide proof of actual vindictiveness and failed to establish a realistic likelihood of vindictiveness. Although appellant's allegation that the former prosecutor stated that he would return with a new indictment that "threw in the kitchen sink" raised the issue of actual vindictiveness, appellant was required to present *actual evidence* of vindictiveness, because unsworn allegations are not evidence. Appellant did not submit such proof, because in his examination of trial counsel at the motion for new trial hearing, he never elicited testimony that the former prosecutor made a statement reflecting a vindictive desire to punish appellant for obtaining the continuance. Thus, appellant failed to present evidence of actual vindictiveness sufficient to allow the Court to conclude that the motion to dismiss would have been granted had it been pursued.

Furthermore, the Court found, appellant failed to establish a realistic likelihood of vindictiveness. His claim was based primarily on the former prosecutor's purported statement that he interpreted as reflecting a desire to punish him for obtaining the continuance, but there was no proof the prosecutor ever made the vindictive statement. Without a showing of prosecutorial vindictiveness, trial counsel could not be said to have been ineffective for failing to pursue the motion to dismiss.

Discovery; Constitutional Challenges

Grier v. State, A16A0236 (11/9/16)

Appellant was convicted of four counts of aggravated child molestation and statutory rape. The evidence showed that appellant was a middle school teacher who initiated a sexual relationship with the fourteen-year-old victim, who was in foster care under DFACS custody. The multiple sexual encounters included sodomy and intercourse.

Appellant argued that the enactment of the reciprocal discovery act expanded discovery to include DFACS records. However, the Court found, the act does not provide an independent statutory basis for the discovery of DFCS files. Thus, access to the DFACS files is prohibited except as otherwise provided by statute, O.C.G.A. §§ 49-5-40(b), 49-5-41(a)(11). And here, the Court found, defense counsel twice subpoenaed the victim's DFACS records, but in each instance, rather than request an in camera inspection by the trial court as mandated by statute, the subpoena directed that the files be sent to the attorney's office. DFACS filed a motion to quash, to which trial counsel did not respond, and ultimately trial counsel never reviewed the victim's DFACS records. Accordingly, because trial counsel did not follow the statutorily prescribed procedure for obtaining the DFACS files, and given that O.C.G.A. § 17-16-1 et seq., does not expand discovery of DFACS records independent of the procedure provided for in O.C.G.A. § 49-5-40(b), appellant's argument was meritless.

Appellant also argued that the trial court erred in denying his motion for new trial based on a Brady violation regarding the DFACS files. The Court disagreed. The record showed that the trial court conducted an in camera inspection of the DFACS records after trial and before the hearing on appellant's motion for new trial. In its order denying the motion for new trial, the trial court found that "there is no exculpatory information contained [in the victim's DFACS file], [and] that any information in the DFACS records was either irrelevant or cumulative of other evidence in the case."

The Court stated that a defendant who is denied access to certain information after the court performs an in camera inspection has the burden on appeal of showing both the materiality and the favorable nature of the evidence sought. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The Court noted that appellant's core contention appeared to be that the victim lacked credibility and that the DFACS records chronicled her prior misconduct, and were thus exculpatory. But, the Court found, this information was merely cumulative of testimony about the victim's misconduct presented at trial.

Further, appellant failed to meet his burden on appeal of demonstrating what excluded material in the DFACS records, which were included in the record on appeal, would have been so material that there was a reasonable opportunity that the outcome of his case would have been different if the records had been disclosed at trial. Moreover, the Court stated, appellant's contention that due process per *Brady v. Maryland*, requires that he have access to any exculpatory information regardless of its duplicative nature was also meritless. The trial court's in camera inspection of evidence satisfied the requirements of *Brady* because

this procedure balances the public's interest in protecting the confidentiality of those records and the defendant's right to due process.

Appellant also contended that his rights under the Equal Protection Clause were violated by the grossly disproportionate and thus cruel and unusual sentence for the crime of aggravated child molestation by sodomy, particularly compared to the much lesser sentence for the crime of sodomy. He further argued that his equal protection rights were violated because similarly situated people — those who commit the act of sodomy with someone younger than 16 — may be charged under either O.C.G.A. § 16-6-2 or O.C.G.A. § 16-6-4(c), resulting in widely disparate sentences. Finally, he argued that because his fundamental right to equal protection is implicated by this sentencing disparity, the State must demonstrate a compelling state interest that requires the radically different sentences for the similar crimes.

The Court noted that appellant compares the aggravated child molestation statute by sodomy to the general sodomy statute, but he also argued that O.C.G.A. § 16-6-2 too broadly defines sodomy between anyone as a criminal because it fails to recognize that under *Powell v. State*, 270 Ga. 327, 335 (1998), the criminalization of private, consensual, non-commercial sodomy between people over the age of consent is unconstitutional. But, the Court stated, if, under *Powell*, the State cannot convict someone for criminal sodomy unless the act was either public, performed for money, or performed on someone under the age of consent, and O.C.G.A. § 16-6-2(a)(2) defines aggravated sodomy as involving a victim younger than 10, then appellant could not even be convicted under that statute with an offense involving a 14-year-old victim. The only statute that permissibly criminalizes that conduct with a victim of that age is O.C.G.A. § 16-6-4(c) and (d), and thus appellant has no valid equal protection argument.

Further, even if, as appellant argued, he could still be charged under either the sodomy statute or the child molestation statute and that his equal protection rights were violated because the same act of consensual sodomy is punished differently under those statutes, under O.C.G.A. § 16-1-7(a), when the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. Therefore, as appellant's conduct satisfied the elements of aggravated child molestation, the argument that he should have been sentenced for the lesser crime of simple sodomy is unavailing. The State is not required to prosecute only a lesser offense committed. It may prosecute the defendant under any or all statutes that fit the defendant's conduct. And, the Court stated, appellant's arguments that the sodomy statute conflicts with the aggravated child molestation statute, and that his equal protection rights were violated as a result, are equally without merit. The sodomy statute was irrelevant here as appellant was not charged with that crime. He was charged with aggravated child molestation and his actions satisfied the elements of that offense.

Finally, regarding appellant's claim that the mandatory sentence for aggravated child molestation constitutes cruel and unusual punishment based on the disparity between the sentences for sodomy and aggravated child molestation, the Court stated that even accepting without deciding that appellant's argument that the current sodomy statute does not comport with *Powell*, he could not be charged under the sodomy statute with criminal conduct for committing the act of sodomy against someone older than 10. Second, if the sentence falls within the statutory range of punishment set by the legislature, the presumption is that the sentence does not violate the Eighth Amendment, and the presumption remains until a defendant sets forth a factual predicate showing that such legislatively authorized punishment was so overly severe or excessive in proportion to the offense as to shock the conscience. And here, appellant failed in so demonstrating.

Forfeitures; Sufficiency of the Answer

Coffey v. State, A16A1440 (11/9/16)

The State filed an in rem drug forfeiture complaint under the new Uniform Civil Forfeiture Procedure Act, O.C.G.A. § 9-16-1 et seq. Appellant filed an answer, but the State filed a motion for a more definite statement contending that the answer failed to comply with the statutory requirements of O.C.G.A. § 9-16-12(c)(1). The trial court granted the motion. After appellant filed an amended answer, the State filed a motion to strike, contending that the amended answer remained inadequate because it (1) did not include the claimant's address at which he resided; (2) recited inapplicable sections of the relevant statute; and (3) did not include sufficient facts supporting the claim that the seized money was not subject to forfeiture. Without specifying what inadequacies remained, the trial court found that the answer was "not amended according to law" and granted the motion to strike.

The Court stated that the General Assembly may impose pleading requirements in special statutory proceedings in addition to those found in our Civil Practice Act. And where our legislature does so, the sufficiency of a pleading must be judged in light of those specific statutory requirements. In a civil in rem forfeiture action, a claimant's answer must be in strict compliance with the special pleading requirements. Thus, the failure to timely file an answer in strict compliance with the specific pleading requirements of the forfeiture statute results in dismissal of the answer.

The State argued that appellant's answer was insufficient because he did not provide the date that he obtained his interest in the defendant currency, any documentation supporting his answer as required by O.C.G.A. § 9-16-12(c)(1)(D) and (F), nor the address at which he resided. Although appellant essentially conceded that he did not expressly provide the address at which he resided in either his initial answer or his amended answer, he argued that he, in essence, provided his address by virtue of his response to paragraph four of the State's complaint, which alleged, "Said property was seized from [appellant], who may be served at the Gwinnett County Jail or at his residence located at 143 Green View Dr. Whitesburg, Tn. 37891." In his amended answer, appellant admitted the defendant currency was seized from him, denied that he could still be served at the Gwinnett County Jail, but did not specifically admit or deny the State's allegation regarding service at his home address. Thus, appellant argued that by not denying that specific portion of the State's allegations in paragraph four, his response constituted an admission pursuant to O.C.G.A. § 9-11-8(d).

The Court, however, stated that while mindful that the strict pleading requirements of O.C.G.A. § 9-16-12 must be interpreted reasonably, there were serious concerns regarding whether appellant's failure to respond to the State's allegation regarding his address satisfied the unambiguous requirement to

affirmatively "set forth … [t]he address at which the claimant resides." O.C.G.A. § 9-16-12(c)(1)(B). However, pretermitting whether appellant's failure to expressly provide the address rendered his answer fatally insufficient, the Court found that appellant's failure to provide even a time frame in which he acquired an interest in the defendant currency subjected his answer to be stricken.

Thus, the Court concluded, the trial court acted well within its discretion under the circumstances of this case when appellant had the opportunity to correct the error after the State, in its motion for more definite statement, specifically noted that appellant had failed to provide a date on which he obtained an interest in the defendant currency, yet appellant chose not to correct the error in his amended answer. Accordingly, the trial court did not abuse its discretion in striking appellant's amended answer.

Constitutional Speedy Trial

McDougler v. State, A16A1347 (10/28/16)

Appellant contended that the trial court erred in denying his motion to dismiss his indictment on constitutional speedy trial grounds. The facts, briefly stated, showed that appellant was arrested in March, 2008, and charged with several drug-related offenses by accusation on April 21, 2008. At jury selection on October 20, 2008, the State was unprepared because it believed that appellant was going to enter a guilty plea. The trial court postponed jury selection until October 22, 2008, however, on October 21, 2008, the State filed a notice of intent to present evidence of similar transactions. This notice failed to comply with the statutory 10-day notice requirement, and accordingly, defense counsel objected. The trial court granted a continuance. Despite the continuance, when the parties met for a hearing on outstanding motions, on January 7, 2009, the State again failed to comply with the requirements for the notice of similar transactions. As a result, the judge sua sponte granted a second continuance, and set the new trial date for July 16, 2009. On July 2, 2009, just two weeks before trial, defense counsel filed a motion to dismiss the indictment, raising the constitutional speedy trial claim. At a hearing on his speedy-trial motion, appellant argued that the delay in a timely trial was attributable to the State and its failure to file a proper notice of similar transaction evidence. He further argued that the time period was presumptively prejudicial, and the delay impaired his interest in a speedy trial. The trial court denied the motion.

Here, the Court found, the delay was just shy of 16 months and therefore presumptively prejudicial. Thus, the four-factor balancing test outlined in *Barker v. Wingo* applied. Since the trial court found that the first two factors — the length of delay and the cause of delay — weighed in appellant's favor, the only issues related to the third and fourth factors. As to the third factor, assertion of the right, the Court found that appellant was arrested in March 2008, and the trial court granted two continuances in October 2008, and January 2009, due to the State's failure to meet its discovery obligations. Appellant, however, did not file his motion to dismiss until July 2, 2009. Although the delay in this case was due to the State's failure to comply with discovery requirement, the trial court was not *required* to mitigate this factor, and it was within the trial court's discretion to decide whether or not to take this in account. The trial court noted that appellant had no articulable reason for the 16-month delay in asserting his right. Thus, the trial court weighed this factor against appellant.

The Court determined that the trial court did not abuse its discretion in weighing this factor. Given the many pre-trial hearings that occurred, and the two continuances granted to the State, appellant arguably did not act "in due course" to assert his right to a speedy trial. Notably, even after the trial court granted the second continuance, appellant waited six months to bring his motion.

As to the last factor, prejudice, the trial court found that appellant presented no evidence that he suffered anxiety or concern, and he made no showing that the delay affected his ability to defend himself. Although appellant contended that the passage of time enhanced the confidential informant's credibility by increasing the length of time in which the informant could undergo, and pass, drug screenings, the State also presented audio and video evidence at trial to corroborate the informant's testimony. Thus, the Court stated, it could not say the trial court abused its discretion in finding that this factor weighed against appellant.

Finally, the Court found no basis to reverse the trial court's weighing of these four factors. In so holding, the Court stated, "Although we do not condone the State's repeated failure to comply with discovery rules, and we might have reached a different conclusion had the issues been subject to our — rather than the trial court's — discretion, we cannot say that the trial court abused its discretion in concluding that the factors weighed against [appellant]."

Aggravated Stalking; Divorce Decrees

State v. Davis, A16A1006 (10/28/16)

Davis was indicted on two counts of aggravated stalking under O.C.G.A. § 16-5-91. The aggravated stalking counts alleged that Davis had violated a Divorce Order by contacting his ex-wife and their older son at a restaurant "for the purpose of harassing and intimidating" them. Davis filed a motion to dismiss, asserting that a violation of a divorce decree is not sufficient to support a charge of aggravated stalking under O.C.G.A. § 16-5-91(a). The trial court agreed and the State appealed.

O.C.G.A. § 16-5-91(a) defines the crime of aggravated stalking as when a person "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" in violation of a bond to keep the peace posted pursuant to Code Section 17-6-110, temporary restraining order, temporary protective order, permanent restraining order, permanent protective order, preliminary injunction, good behavior bond, or permanent injunction or condition of pretrial release, condition of probation, or condition of parole in effect prohibiting the behavior described in this subsection. The Court noted that in concluding that a violation of the Divorce Order could not be the basis for an aggravated stalking prosecution under O.C.G.A. § 16-5-91, the trial court relied at least in part on the Legislature's failure to include "divorce" orders in the list of orders found in O.C.G.A. § 16-5-91(a). But, the Court stated, the proper inquiry is not whether the title of the order matches the statutory list; instead, the question is whether the relevant provision of the Divorce Order falls within the scope of any of the types of orders listed in the statute. That pertinent language provided: "The parties shall only have non-threatening, non-harassing communication only as it relates to their minor children's well-being. Except for the

purpose of pick up and drop off, attend[ing] church events, school events, and medical appointments, [Davis] shall not be within 150 yards of [his ex-wife or their older son], [his ex-wife]'s residence, place of employment and/or school. However, nothing herein shall restrict [Davis]'s ability to attend the extra-curricular activities, church events, social events and school events of [the younger son]. Specifically, even if [Davis's ex-wife and their older son] are at these events, [Davis] shall be allowed to attend. However, [Davis] shall not initiate contact with [his ex-wife or their older son] unless they initiate contact first."

The Court found that regardless of whether the pertinent language in the Divorce Order language could constitute a "permanent protective order" given Davis's apparent waiver of certain formalities, the language clearly constitutes a "permanent injunction" within the meaning of O.C.G.A. § 16-5-91. Thus, the Court stated, Georgia's stalking statute, O.C.G.A. § 16-5-90 et al., does not define "injunction" or "permanent injunction." But injunctions are defined generally as court orders that prohibit someone from doing a specific act or future wrong. The pertinent language in the Divorce Order prohibits Davis from future acts of specific contact against named persons, thereby constituting an injunction within the plain meaning of the term. Such specificity also meets the statutory requirements for injunctions, which provide that an injunction "shall be specific in terms [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained[.]" O.C.G.A. § 9-11-65(d). To refuse to treat the pertinent language in the Divorce Order as an injunction because it is not specifically labeled as such would impermissibly elevate form over substance. Accordingly, the Court concluded, the provision in the Divorce Order that Davis is accused of violating constituted a permanent injunction within the meaning of O.C.G.A. § 16-5-91(a). The trial court therefore erred in dismissing the charges of aggravated stalking.

Mutually Exclusive Verdicts; Ineffective Assistance of Counsel

Frazier v State, A16A1118 (11/10/16)

Appellant was convicted by a jury of aggravated assault, armed robbery, hijacking a motor vehicle, theft by receiving stolen property, and criminal damage to property. During the trial, he also pled guilty to fleeing or attempting to elude a law enforcement officer, financial transaction card theft, and possession of a firearm during the commission of a felony.

He argued that his convictions for hijacking a motor vehicle, armed robbery, and theft by receiving were mutually exclusive because they were all based on taking the same vehicle. The Court stated that verdicts are mutually exclusive where it is legally and logically impossible to convict the accused of both counts. Where verdicts are mutually exclusive, reversal of both verdicts is required because it would be insufficient for an appellate court merely to set aside the lesser verdict, because to do so is to speculate about what the jury might have done if properly instructed, and to usurp the functions of both the jury and trial court. Here, the Court noted, appellant was convicted of armed robbery, for stealing the victim's car keys by use of a handgun; hijacking a motor vehicle, for taking the victim's car by force and violence; and theft by receiving stolen property, for retaining the car that he should have known was stolen.

First, the Court found that appellant's convictions for hijacking the car and theft by receiving the same vehicle are mutually exclusive. It was clear that appellant could not be convicted of both taking and receiving the stolen property because one cannot receive stolen property unless it is first taken by someone else. But, the Court noted, in *Thomas v. State*, 261 Ga. 854, 855 (1) (1992), the Supreme Court of Georgia expressly declined to address the question of whether stealing and retaining stolen property were mutually exclusive. Thus, the Court stated, it must now address the issue. The Court concluded that appellant could not be convicted of retaining property he had already stolen. Accordingly, appellant's convictions for hijacking a motor vehicle and theft by receiving that same car were mutually exclusive. Therefore, the Court reversed these two convictions and remanded the case for a new trial on these charges

Second, the Court found that the same could not be said of armed robbery and hijacking or armed robbery and theft by receiving. The Court noted that stealing the car keys essentially amounted to stealing the car itself because the perpetrators used the keys to hijack the car. Nevertheless, the armed robbery charge and the hijacking charge each involved a separate element as charged — the theft of different property. Thus, it was not logically or legally impossible to convict appellant of stealing both the keys and the car. Moreover, it was not logically or legally impossible to convict appellant of stealing the keys and receiving the victim's stolen car. Therefore, appellant's armed robbery conviction was not mutually exclusive with either his hijacking or his theft by receiving conviction. Accordingly, the Court affirmed appellant's conviction for armed robbery.

Appellant also argued that trial counsel was constitutionally deficient for allowing him to plead guilty to fleeing or eluding where there was insufficient evidence to support the charge. The Court agreed. In *Bradford v. State*, 287 Ga.App. 50, 52-53 (1) (2007), the Court concluded that the evidence was insufficient to convict Jay Bradford, appellant's codefendant, of fleeing and eluding, and the evidence against appellant was identical. In light of the Court's decision in *Bradford* that the evidence was insufficient, the Court found that it must conclude that trial counsel gave constitutionally deficient assistance when he advised appellant to plead to fleeing and eluding. The evidence was insufficient to sustain a conviction on this charge, and therefore, there was a reasonable probability that the outcome would have been different but for trial counsel's conduct. Accordingly, the Court reversed appellant's conviction for fleeing and eluding. Moreover, given the insufficient evidence, the State could not retry appellant on this charge.

Motion to Withdraw Guilty Plea; Out-of-time Appeals

Williams v. State, A16A0812 (10/28/16)

Appellant pled guilty to multiple offenses in October, 2007. He thereafter filed a timely pro se motion to withdraw his plea. The trial court summarily denied it, but appellant did not appeal. A few years later, appellant filed a "Motion for Out-Of-Time Appeal." He asserted that that his plea counsel had abandoned him, that no new counsel was appointed on his behalf, and that because he "did not know how to [appeal]," he was deprived of his right to a timely appeal from the denial of his motion to withdraw his guilty plea. He further contended that the

order denying his motion to withdraw was not reduced to writing and thus, he was not afforded an opportunity to appeal the denial of the motion. The trial court summarily denied his motion for an out-of-time appeal.

Appellant argued that the superior court failed to provide him with the statutorily-mandated notice of the denial of his motion to withdraw his plea. The Court stated that under *Cambron v. Canal Ins. Co.*, 246 Ga. 147 (1980), disapproved to the extent stated in *Wright v. Young*, 297 Ga. 683, 684, n. 3 (2015), when notice of the entry of an appealable order is not given, the losing party should file a motion to set aside, and the trial court should grant the motion and re-enter the judgment, whereupon the 30-day appeal period would begin to run again. In *Wright*, the Supreme Court disapproved of *Cambron* to the extent that *Cambron* states that notice must be sent and *received* in order to deny a motion to set aside. *Wright* interpreted that O.C.G.A. § 15-6-21(c) only requires that the trial court give notice to the losing party. If the trial court has in fact given notice, then a motion to set aside may be properly denied whether or not the losing party actually received the notice. The Court noted that appellant's motion adequately presented the issue of whether the duty imposed on the court in O.C.G.A. § 15-6-21(c) was carried out.

However, the Court found, it could not conclude from the record whether the trial court notified appellant of the denial of his motion to withdraw his guilty plea. Thus, the Court vacated the judgment and remanded with the directions that if the trial court finds notice was not given, then the court must set aside the denial of appellant's motion to withdraw his guilty plea, re-enter the judgment, and allow the losing party 30 days from the re-entry date to seek appellate review. If the court finds that notice was given, then the motion to set aside should be denied.

Jury Charges; Sentencing

Brown v. State, A16A1094 (11/10/16)

Appellant was convicted of multiple charges including two counts of aggravated battery, two counts of aggravated assault, and two counts of leaving the scene of an accident involving serious injury. The evidence showed that appellant stalked his former girlfriend and intentionally ram his vehicle into the vehicle his former girlfriend and her cousin were in, causing the vehicle to crash and the two victims to be injured.

Appellant contended that the trial court erred in failing to define simple assault as an element of aggravated assault. The Court stated that although simple assault is an element of aggravated assault, a charge on simple assault is not always required to complete the definition of aggravated assault. The latter does not necessarily need the former to make it complete. A charge on simple assault is not necessary if, under the facts charged and the proof presented, the jury could not convict the defendant of aggravated assault without implicitly finding that a simple assault had occurred. For example, a charge on simple assault is not always required where a defendant's conduct has resulted in the victim's injury. Thus, there is a distinction between aggravated assault cases with injuries that have been intentionally inflicted based upon the evidence and those where, although there may be injuries, intent may be a question. Where the evidence shows that the charged act injured the victim and the jury is properly instructed on general intent (i.e., that the State is required to prove that the defendant intended to commit the charged act), there is no need for the trial court to instruct the jury on simple assault in connection with its charge on aggravated assault. Under those circumstances, if the jury concludes that the defendant committed the acts in question and that he did so with the requisite criminal intent, there can be no doubt but that a simple assault occurred.

Conversely, an instruction on simple assault is required in those cases where a defendant is charged with aggravated assault even though the victim was not injured. In such cases, a jury would have to be informed that the perpetrator could still be found guilty of aggravated assault despite the fact that he or she did not cause any physical injury to the victim. A charge on simple assault would be required under such circumstances because the jury would need to know that the perpetrator could be found guilty of aggravated assault for having attempted to commit a violent injury to the person of another, or for having committed an act which placed another in reasonable apprehension of immediately receiving a violent injury through the use of a deadly weapon.

Here, the Court found, the unrefuted evidence showed that appellant's conduct resulted in serious bodily injury to both victims. Thus, given that the jury found that appellant intended to strike the victims' car, no question existed as to whether a simple assault had occurred. Under these circumstances, therefore, the trial court did not err in failing to instruct the jury on simple assault as an element of aggravated assault.

Appellant also contended that the trial court erred in failing to merge the two counts of leaving the scene of an accident involving serious injury. The Court agreed. Given that the hit-and-run statute (O.C.G.A. § 40-6-270) criminalizes the act of failing to stop at the scene of an accident, and given that there can be only one failure to stop at any single accident, a defendant may only be charged with a single violation of the hit-and-run statute for any single accident, regardless of the number of victims. In short, the duty imposed by the statute is a collective one — i.e., if the accident involves multiple victims, the duty to stop is owed to the victims collectively. Where a statute imposes such a collective duty, either towards a defined group of individuals or "collectively to the general public," a violation of that statute results in but a single offense. Under such circumstances, because only one violation of the statute has occurred, a defendant may not be convicted of multiple counts merely because the facts show his single act affected more than one person.

In so holding, however, the Court emphasized that a defendant's conduct in causing an accident or injuring accident victims is punishable under statutes that were designed to address conduct other than the failure to stop at an accident scene. And a defendant may be charged separately with respect to the injuries inflicted on each victim of a single accident — i.e., a defendant may be indicted (as appellant was) on multiple charges of aggravated battery, aggravated assault, or even vehicular homicide.

Attempted Felony Murder; Jury Charges

Summerlin v. State, A16A0674 (10/28/16)

Appellant was found guilty but mentally ill on two counts of criminal attempt to commit malice murder, two counts of criminal attempt to commit felony murder, two counts of aggravated assault on a peace officer, and

other related offenses. She contended that the trial court erred in denying her motion for a directed verdict on the two criminal attempt to commit felony murder charges because attempt to commit felony murder is not a crime in Georgia and the inclusion of the charges created a prejudicial effect on the jury's consideration of the other counts in the indictment.

The Court stated that there does not appear to be any case law in Georgia on whether an attempt to commit felony murder is a recognized crime. And, in looking at other jurisdictions that have ruled on this issue, "[t]he majority of jurisdictions which have considered the question have concluded that attempted felony murder is not a crime. . . . [T]he offense of attempt requires an intent to commit a specific offense, while . . . felony murder . . . does not involve an intention to kill. There is no such criminal offense as an attempt to achieve an unintended result." Nevertheless, the Court stated, "[w]hile this logic appears to be sound, we need not decide this issue here."

Thus, the Court found, although the jury returned a verdict of guilty but mentally ill on the two criminal attempt to commit felony murder counts, the trial court merged these two offenses with the two criminal attempt to commit malice murder convictions. The trial court then sentenced appellant on the attempt to commit malice murder convictions, but not on the attempt to commit felony murder counts. Where a defendant is found guilty on alternative counts of malice murder and felony murder and the trial court enters a judgment of conviction and sentence only on the malice murder count, any issue concerning the felony murder count is moot. Here, the "merged" convictions for criminal attempt to commit felony murder were vacated as a matter of law and fact. Furthermore, the Court stated, assuming without deciding that attempt to commit felony murder is not a recognized crime in Georgia, the evidence supporting her other convictions was overwhelming. Therefore, the inclusion of the attempt to commit felony murder counts, even if erroneous, would not have prejudiced the jury's consideration of guilt as to the other counts in the indictment. Accordingly, the trial court's denial of the motion for directed verdict on the attempt to commit felony murder counts was of no consequence to appellant.

Appellant also contended that the trial court erred in its jury charge by failing to instruct the jury that, if a defendant is found guilty but mentally ill, the defendant's treatment is dependent upon availability of State funds. Appellant argued that this information was required by O.C.G.A. § 17-7-131(b)(3). The Court disagreed.

O.C.G.A. § 17-7-131(b)(3)provides, in pertinent part, that "[i]n all cases in which the defense of insanity is interposed, the trial judge shall charge the jury, in addition to other appropriate charges, the following: … (B) I charge you that should you find the defendant guilty but mentally ill at the time of the crime, the defendant will be placed in the custody of the Department of Corrections which will have responsibility for the evaluation and treatment of the mental health needs of the defendant, which may include, at the discretion of the Department of Corrections, referral for temporary hospitalization at a facility operated by the Department of Behavioral Health and Developmental Disabilities." Although the trial court's charge complied with O.C.G.A. § 17-7-131(b)(3)(B) in all respects, appellant argued that a portion of the language in O.C.G.A. § 17-7-131(g)(1) should have also been included in the charge. This subsection states that "[w]henever a defendant is found guilty but mentally ill at the time of a felony … the court shall sentence him or her in the same manner as a defendant found guilty of the offense[.] … A defendant who is found guilty but mentally ill at the time of a felony … shall be committed to an appropriate penal facility and shall be evaluated then treated, if indicated, within the limits of state funds appropriated therefore, in such manner as is psychiatrically indicated for his or her mental illness[.]"

However, the Court found, the provisions of O.C.G.A. § 17-7-131(g)(1) merely specify the respective obligations of the trial court and the penal facility following a conviction based on a verdict of guilty but mentally ill. Appellant provided no authority to support her assertion that the trial court was obligated to instruct the jury that any required treatment would be dependent upon availability of State funding. As the trial court gave the applicable jury charges required by O.C.G.A. § 17-7-131(b)(3), as well as other appropriate jury charges for this criminal case, the Court concluded that there was no error.