Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 2, 2011

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THIS WEEK:

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- Probation; Restitution
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Undocumented Immigrants; Drivers' Licenses

Medina v. State, A11A1322 (11/4/11)

Appellant, an undocumented Mexican immigrant, was convicted of speeding and driving without a driver's license. He claimed that the driver's license charge was unconstitutional. Specifically, he argued that OCGA § 40-5-20, which requires all non-exempted drivers to have a valid driver's license issued under the Code chapter, violates the U. S. Constitution's Supremacy Clause because that Georgia Code section conflicts with the 1943 Convention on the Regulation of Inter-American Automotive Traffic (the "Convention"), an international treaty establishing certain foreign drivers' rights to drive in the signatory countries without obtaining a local license.

The Court held that as an initial matter, the trial court could have taken judicial notice of the Convention. Nevertheless, the trial court correctly ruled that appellant could not demonstrate standing to make the asserted challenge to the statute. First, the Court stated, pretermitting the merits of his argument and the applicability of the Convention to him as an undocumented immigrant, appellant's conduct was not within the scope of that contemplated by the Convention. In addition to the language relied upon by appellant, the Convention also provides that "[a] special international driving license may be required for each operator admitted to circulation in any individual [country] party to this Convention, if the [country] so elects." Georgia requires such a license for drivers with non-English licenses, and it was undisputed that appellant did not obtain such an international license. Therefore, he failed to demonstrate that he is in the class of drivers protected by the Convention.

Second, the Convention also required appellant to show that his alleged Mexican driver's license fulfilled the requirements of the laws of Mexico, and that the driver's license was issued by a Mexican governmental agency that was authorized to issue such licenses. Since the license itself was the best evidence of its validity and, therefore, its compliance with Georgia law, it must show on its face that it was valid and authorized appellant to drive the type or class of vehicle being driven. Appellant failed to demonstrate his compliance with the Convention because his purported Mexican license was not translated. Thus, the license showed none of these requirements.

Eighth Amendment; Juveniles

Middleton v. State, A11A1558 (11/14/11)

Appellant appealed from the denial of his motion to correct a void sentence. The evidence showed that on September 14, 1997, when

he was 14 years old, appellant physically and sexually attacked a 54-year-old female victim and stole her car and money from her purse. He was convicted of armed robbery, aggravated assault, kidnapping and theft by taking. He was sentenced to a 20-year prison term for kidnapping and to a consecutive 10-year prison term for armed robbery, for a total of 30 years imprisonment. The trial court sentenced him to concurrent prison terms on the remaining counts. Pursuant to OCGA § 17-10-6.1, appellant's 30-year sentence was without parole.

Relying exclusively on *Graham v. Fla.*, __U. S.__, 130 SC 2011, 176 LE2d 825 (2010), appellant contended that his sentence violated the Eighth Amendment. The Court disagreed. For a court to find a punishment so disproportionate so as to be cruel and unusual under the Eighth Amendment, the punishment must fall within one of two classifications. First, a punishment may be unconstitutionally cruel and unusual in the rare circumstance where the defendant's sentence is "grossly disproportionate" to the underlying crime. Second, a punishment is unconstitutionally cruel and unusual if it violates certain narrow "categorical restrictions" enunciated by the United States Supreme Court (e.g. imposition of the death penalty upon a juvenile offender).

In *Graham*, the United States adopted a categorical restriction against "the imposition of a life without parole sentence on a juvenile offender who did not commit homicide[;]…[a] State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." The Court of Appeals noted that the juvenile offender in *Graham* was sentenced to life imprisonment without the possibility of parole, whereas appellant was sentenced to a definite term of years without the possibility of parole. Therefore, nothing in *Graham* affects the imposition of a sentence to a term of years without the possibility of parole. Thus, the categorical restriction imposed in *Graham* is inapplicable to the present case, and the trial court committed no error in denying appellant's motion to correct a void sentence.

Statements

Brewer v. State, A11A0975 (11/4/11)

Appellant was convicted of possession of a firearm during the commission of a crime and criminal damage to property. He argued that the trial court erred in admitting his statement made to the police. The evidence showed that appellant drove a friend to the house of the friend's girlfriend. The friend then fired six or seven gunshots into the house and a vehicle. When the police questioned the friend, the friend implicated appellant, who then came to the police station at the request of the investigator. The investigator Mirandized appellant, who then made incriminating statements.

Appellant contended that the statements should have been suppressed because the investigator failed to disclose on his waiver form the potential charges he faced. However, the Court found, a law enforcement officer's failure to advise a suspect as to the crimes about which he is to be questioned prior to the suspect's waiver of his *Miranda* rights is not relevant to the question of whether the suspect's waiver was knowing and voluntary. Appellant also argued for suppression because his statements to the investigator indicated that he believed he would be arrested if he did not answer her questions. But, the Court found, pretermitting whether this argument was supported factually, the fact that he was told he would be arrested if he refused to talk to the police officers does not amount to coercion making his statements inadmissible. Such statements are in the nature of a mere truism and simply made appellant aware of potential legal consequences.

Thus, the Court determined, given all the totality of the circumstances surrounding the making of the statements, the trial court did not err in denying the motion to suppress and finding that the statements were freely and voluntarily given.

Strict Liability Offenses; Defense of Accident

Ogilve v. State A11A0862 (11/9/11)

Appellant was convicted of vehicular homicide (2nd degree) and failing to stop for a pedestrian in a crosswalk. She contended that the trial court erred by declining to give her requested charge on accident. The Court agreed and reversed.

Appellant argued that she was entitled to the charge because she admitted the elements of the offenses with which she was charged and sought merely to justify or excuse it based upon the affirmative defense of accident. The State argued that the defense of accident does not apply to the strict liability offenses with which appellant was charged. OCGA § 16-2-2 provides: "[a] person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking, intention, or criminal negligence." The defense of "Accident" is an affirmative defense whereby it must be established that a defendant acted without criminal intent, was not engaged in a criminal scheme, and was not criminally negligent, i.e., did not act in a manner showing an utter disregard for the safety of others who might reasonably be expected to be injured thereby.

The Court held that while it is true that there is no element of criminal intent for the strict liability offenses contained in OCGA Title 40, Chapter 6, Uniform Rules of the Road, it does not follow that the defense of accident is never available for these crimes. Also, a plain reading of OCGA § 16-2-2 demonstrates that the lack of a criminal intent element in a strict liability offense should not preclude the application of this affirmative defense in all strict liability cases. One of the requirements for application of this defense is a lack of criminal intent, and a strict liability offense, by its very nature, involves a lack of criminal intent.

Here, appellant admitted that she struck the victim in a crosswalk and that she caused his death by failing to yield to him in the crosswalk. Her request for a charge on accident was based upon her testimony that she could not stop in time to avoid hitting the victim because he "was running across the street." The trial court found that her defense—that she did not see him because it was too late—was not an admission that she failed to yield. But, the Court found, appellant did in fact admit under oath that she failed to yield to a pedestrian in a crosswalk. "She never claimed that the pedestrian was not in the crosswalk when she struck him or that her car was already in the crosswalk when she first saw him. The trial court therefore erred by refusing to give the requested charge on accident, and [appellant]'s convictions must be reversed."

Right of Self-Representation

Seymour v. State, A11A0894 (11/9/11)

Appellant was convicted of arson. He contended that the trial court erred in refusing to allow him to represent himself at trial. After voir dire, appellant and the trial court

engaged in a discussion in which appellant wanted to fire his counsel because he allegedly was unwilling to produce evidence on his behalf and counsel requested appellant fire him after appellant interceded in voir dire. After asking appellant questions as to whether he understood a lawyer's role at trial, including the use of objections, the trial court found that appellant did not have the capacity to represent himself and requested appellant's counsel to continue his representation.

The Court reversed appellant's conviction. Both the federal and state constitutions allow a defendant the right of self-representation. A trial court must only determine whether the defendant knowingly and intelligently waived his federal and state constitutional rights to counsel and, in doing so must apprise the defendant of the dangers and disadvantages inherent in representing himself so that the record establishes that "he knows what he is doing and his choice is made with eyes open."

Here, the trial court did not engage appellant in the required colloquy. Rather, he refused appellant's request because he did not believe appellant had the capacity to represent himself. But, the Court found, the test is not whether a defendant is capable of "good lawyering," but whether the defendant knowingly and intelligently waives his right to counsel. Since the evidence presented showed that appellant wished to make and was mentally competent to make a knowing and intelligent waiver of counsel and the trial court employed the wrong standard for making this determination, the trial court committed reversible error. The case therefore was remanded for a new trial.

Probation; Restitution

Odom v. State, *A11A1485* (11/4/11)

The Court granted appellant's application for discretionary review of the revocation of his probation. Appellant contended that the trial court improperly revoked his probation for failing to make restitution. The record showed that in 1999, appellant was ordered to make $44,200 in restitution on a negotiated plea to theft by taking. As a result of a number of tolling orders, his probation was set to end on February 3, 2011. The record also showed that he still owed more than $35,000; he hadn't made a payment since 2007; that he had been unemployed for the last 3 years; and that the last time he reported was July of 2010.

The Court found that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. Here, appellant claimed that he could not find work in his field. The trial court inquired as to appellant's fitness to work and concluded that he had no valid reason for not paying restitution. The trial court explained that appellant could have looked for jobs beneath his skill level, like "digging ditches, flipping hamburgers[,] or doing whatever" to make payments toward restitution. The Court found that although the trial court may not have used the precise language that appellant had failed to make sufficient bona fide efforts legally to acquire the resources to pay his restitution, the trial court considered appellant's testimony regarding his failure to secure employment over the course of his probation, and the trial court determined that those efforts were not sufficient and were not valid reasons for failing to pay restitution. Accordingly, the revocation of probation was affirmed.

DUI; Implied Consent

Buford v. State, A11A1518 (11/4/11)

Appellant was convicted for DUI. He contended that the trial court erred in denying his motion to suppress his blood-alcohol results because he was neither under arrest nor unconscious when the tests were taken. The evidence showed that appellant lost control of his car, which then flipped over and hit a tree. He was airlifted to the hospital. A GSP trooper went to the hospital and found appellant "taped to the spine board," had "tubes coming from every which direction," and "had a [stabilizing] collar on." Appellant's eyes were closed, and he was silent. The trooper, who could smell alcohol on appellant's breath and in the room, told him who he was and attempted to get appellant to respond, but concluded from appellant's silence that he was under the influence of alcohol. The trooper also learned that appellant was taking narcotics for back pain. The trooper then told appellant that he was "going to charge him with DUI" and read him the implied consent notice. Although appellant opened his eyes at one point during these proceedings, he remained silent throughout and appeared to the trooper to be going in and out of consciousness.

Appellant argued that the implied consent notice given pursuant to OCGA § 40-5-67.1 (b) was ineffective because he was not under arrest at the time it was given. The Court disagreed. OCGA § 40-5-55 provides that consent is implied only if a person is placed under a third-tier arrest based on probable cause to believe he has violated OCGA § 40-6-391. Whether an implied consent notice was adequate turns on whether the individual was formally arrested or restrained to a degree associated with a formal arrest, and not whether the police had probable cause to arrest. The test is whether a reasonable person in the suspect's position would have thought the detention would not be temporary.

The Court found that it was undisputed that at the time of his encounter with the trooper, appellant was secured to a board in a hospital room with tubes attached to his body. Even assuming that appellant was alert rather than coming in and out of consciousness at the time, a reasonable person in his situation could not have thought that he was free to leave when the trooper announced that he was charging him with DUI. Thus, the trial court did not clearly err when it found that appellant was under arrest when the trooper announced that he was being charged with DUI.

Identity Fraud; Venue

Zachery v. State, A11A1272 (11/7/11)

Appellant was convicted of financial identity fraud. The evidence showed that through the use of the victim corporation's federal tax identification number, appellant was able to obtain a Home Depot credit card and used it to purchase over $11,000.00 in merchandise and gift cards. Appellant contended that the State failed to prove venue.

Generally, venue in a criminal case is in the county where the crime was committed. Under OCGA § 16-9-125, however, a financial identity fraud crime will be considered to have been committed in any county where the consumer or business victim, i.e., the entity whose means of identification or financial information was appropriated, resides or is found, or in any county in which any other part of the offense took place, regardless of whether the

defendant was ever actually in such county. Here, the indictment named the corporate victim and the victim corporate CEO and alleged that the crimes occurred in Forsyth County. The victim CEO testified that he partly owned the victim corporation and that he had been a resident of Forsyth County for 12 years and the corporation had been located in Forsyth County for 17 years. Therefore, the Court found, a reasonable trier of fact was authorized to find beyond a reasonable doubt that the victims resided or were found in Forsyth County at the time the offense was committed, as alleged in the indictment.

Juveniles; Transfer Orders

In the Interest of A. W., A11A0874 (11/14/11)

Appellant appealed from an order of the juvenile court transferring his case to superior court so that he could be treated as an adult offender as provided by OCGA § 15-11-30.2 (a). Before transferring jurisdiction from juvenile to superior court, the juvenile court must find that there are reasonable grounds to believe that the child committed the delinquent act alleged; the child is not committable to an institution for the mentally retarded or mentally ill; the interests of the child and the community require that the child be placed under legal restraint and the transfer be made; and the child was at least 15 years of age at the time of the alleged delinquent conduct.

Relying on *In the Interest of K. J. T.*, 246 Ga. App. 660 (2000), appellant contended that the juvenile court abused its discretion in determining that there are reasonable grounds to believe that he is not committable to an institution for the mentally retarded or mentally ill. The Court disagreed. In *K. J. T.*, the trial court abused its discretion by granting the motion to transfer based on the testimony of two probation officers because the officers had not been in contact with the child for almost two years and were therefore unable to provide competent evidence to establish K. J. T.'s present mental condition. Furthermore, the psychological evaluation in K. J. T. specifically indicated that the child's current mental state could not be properly determined without inpatient observation and evaluation for psychotropic medication treatment.

Here, however, the Court found that appellant's initial probation officer from Juvenile Court had an encounter with appellant less than one year prior to trial. The officer's testimony indicated that appellant fully understood and answered questions, but was a distant child. Appellant's current probation officer also testified that although she had to explain some things to appellant repeatedly, he was able to understand most questions. In addition, both probation officers noted that appellant was wearing a gold shirt, which signifies his ability to follow rules and regulations at the Youth Detention Center. The trial court was also provided with a psychological evaluation that occurred only 16 months prior to the hearing. The evaluation stated that appellant functioned in the borderline range of intellectual ability, but did not appear to manifest any type of mental retardation. The evaluation cited appellant's lack of motivation as a reason for his slow progression through academic material. Appellant's current probation officer also stated that there was no reason for a second psychological evaluation. Therefore, because there was evidence of appellant's current mental condition to support the condition of transfer, the trial court did not abuse its discretion by finding that he was not committable to a mental institution. Moreover, the psychological evaluation and the explanations given by the probation officers for their opinions as to appellant's mental condition were not insufficient as a matter of law.