Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 3, 2010

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THIS WEEK:

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- Juveniles; Special Demurrer
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- Similar Transactions; Merger
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- Immunity; OCGA § 24-9-28 (a)

Search & Seizure

Groves v. State, A10A1499 (11/15/10)

Appellants appealed from the denial of their motion to suppress. The evidence showed that they were sitting in the front seats of a vehicle that was parked at the edge of an empty truck plaza parking lot. An officer pulled up behind them and decided to call in the tag. After a minute or two, the occupants noticed the officer and the vehicle started to drive away. The officer then stopped the vehicle. The officer smelled alcohol on the driver and after obtaining consent, found drugs in the vehicle

The Court reversed. The officer had no reasonable articulable suspicion justifying the stop. The officer testified that the car seemed "extremely out of place" in the empty truck plaza parking lot, but he had no other reason to suspect any criminal activity. The Court stated that this was no more than a generalized suspicion or hunch, and in the absence of other circumstances, the vehicle's mere presence in an empty truck plaza parking lot was not sufficient to warrant a traffic stop. Moreover, the actions of the driver in pulling away once he saw the officer were proper because at the time, it was no more than a first tier encounter and a citizen's ability to walk away from or otherwise avoid a police officer is the touchstone of a first-tier encounter. Therefore, the drugs at issue in this case were inadmissible because they were discovered pursuant to consent that was the product of an unauthorized traffic stop. Likewise, the smell of alcohol about the driver's person did not authorize further investigation or detention because it was observed during the unauthorized traffic stop. Accordingly, the trial court's denial of the defendants' motions to suppress was reversed

Santos v. State, A10A2311 (11/10/10)

Appellant was convicted of obstruction of a law enforcement officer and of battery. He contended that the trial court erred in denying his motion in limine to exclude all evidence that flowed from his allegedly illegal detention. The evidence showed that an officer was in uniform and in a marked patrol car at an apartment complex known for both violent and nonviolent crimes. Appellant and two companions walked by. The officer got out and asked appellant if he lived there. Appellant stopped, answered yes, but could not provide an address. During the conversation, appellant was nervous, fidgety with his hands and kept placing them in his pockets, despite the officer's repeated requests that he keep his hands where the officer could see them. The officer then attempted to pat appellant down for the officer's safety and got elbowed in the face for his troubles.

Appellant contended that the trial court erred in finding that a second-tier detention

was justified. Specifically, he contended that, just as a citizen in a first-tier encounter is free to decline an officer's request to stop and talk, a citizen is free to refuse any other request, including keeping his or her hands visible. The Court stated that "[t]his position is too extreme. Although a person is free to walk or run away from an officer during a first-tier encounter, a person who chooses instead to stop and talk to the officer may by menacing conduct during that first-tier encounter give rise to a reasonable suspicion that he or she poses a threat to personal safety." Here, the evidence before the trial court authorized the court to find that, at the moment the consensual encounter escalated into a second-tier detention, the officer actually believed that appellant posed a threat to the officer's personal safety and that such belief was reasonable considering all of the circumstances, including appellant's repeated refusal to keep his hands away from the pockets of his baggy clothes, his nervous demeanor, the presence of his two companions, and the officer's knowledge of the pattern of violent crime in the apartment complex. Therefore, the second-tier *Terry* frisk did not constitute an illegal detention.

State v. Driggers, A10A1971 (11/17/10)

The State appealed from an order granting a motion to suppress. The evidence showed that the victim, Driggers and their children were living at Driggers' home. Driggers was arrested at the home for DUI and the victim left to stay at her mother's home. Eight days later, the victim was dragged out of a friend's house by Driggers and forced to return to Driggers' home. The police were called. After knocking on the door, the victim came out onto the porch. Two officers went inside and forced Driggers to stay with them. Upon hearing the victim's story and noticing her appearance, the officers arrested Driggers inside his house. Driggers refused consent to enter and refused consent to search. After he was taken away from the scene, an officer and the victim returned inside to take her statement because there was "nowhere on the front porch area for her to do that." Once inside, the officer noticed some Xanax in a pill bottle and started questioning the victim about Driggers' drug use. Based on the victim's statements, a search warrant was obtained and more drugs and money were seized.

The Court held that the first entry into the house was valid because an emergency call concerning domestic violence in progress provides the exigent circumstances sufficient to justify a warrantless entry at the identified location for the purpose of apprehending an attacker. Even if the victim may have been momentarily out of danger as soon as she came out onto the porch, her appearance at the door of the house in a disheveled and obvious nervous condition was sufficient to justify a warrantless entry into the house for the purpose of Driggers's arrest.

However, the second entry was illegal. The Court noted that the trial court specifically found that the victim was no longer a resident of the house. Even if she was a resident, under *Georgia v. Randolph*, 547 U. S. 103, 122-123 (2006), the Court held that the entry would have been illegal because Driggers, before he was taken away, refused consent to enter or search. Moreover, the exigent circumstances no longer existed and "[t]he mere convenience of having a hard surface on which to sign a statement" does not provide sufficient grounds for a re-entry into the home. Therefore, both the statements concerning Driggers's drug use and the drugs, paraphernalia, and money seized were obtained as a direct result of the officer's illegal presence in the living room, where he saw the bottle of mixed pills in plain view and began to question the victim about Driggers's drug use. Accordingly, the trial court did not err when it suppressed this evidence as fruit of the poisonous tree.

State v. Edwards, A10A1280 (11/16/10)

Edwards was charged with possession of marijuana. The State appealed from the grant of his motion to suppress. The evidence showed that officers went to a house from which a 911 "hang-up" call had been made. Edwards was leaving the house as the officers were arriving. They met on the sidewalk. Officers detained him until they determined that there was in fact no emergency inside the home. Nevertheless, because of Edwards' fidgetiness and nervousness, the officers called dispatch to check on outstanding warrants. Dispatch advised of an outstanding arrest warrant and Edwards was arrested. Marijuana was found on his person incident to arrest. At the motions hearing, the State did not produce the arrest warrant. Instead, the State only produced the arresting officer, who could not state any information concerning the warrant, except that he was told it did exist and was outstanding.

The State contended that the trial court erred because the officer had the right to rely on the information given him by dispatch. The Court stated that it was "constrained to agree." The Court found that *Harvey v. State*, 266 Ga. 671 (1996) provides binding precedent that the radio transmission, which confirmed the outstanding warrants, established the necessary probable cause to arrest Edwards. Therefore, the Court was "compelled" to follow *Harvey*. The Court also found that the testimony of the officer was rank hearsay and cited its recent decision in *Sosebee v. State*, 303 Ga. App. 499, 501 (2010), in which the Court concluded that the State had failed to prove that the search of a hotel room was conducted pursuant to a valid search warrant when the State failed to produce the warrant or supporting affidavit during the motion hearing, instead relying upon the hearsay testimony of the sheriff who had conducted the search. However, the Court then stated that *Harvey*, which did not address this hearsay issue, nevertheless still controlled. The Court then reluctantly reversed the trial court.

It should be noted that Judge Ellington wrote the decision, but Judges Andrews and Doyle concurred in judgment only.

Juveniles; Special Demurrer

In the Interest of C. H., A10A1545; A10A1546 (11/17/10)

Appellant was adjudicated as a delinquent and unruly child. He first contended that the trial court erred in denying his motion to dismiss the petition because the adjudicatory hearing was not held within ten days of the filing of the petition pursuant to OCGA § 15-11-39(a), which provides that "[a]fter the petition has been filed the court shall set a hearing thereon, which, if the child is in detention, shall not be later than 10 days after the filing of the petition." The record showed that the petition was filed on August 13, and that a detention hearing commenced on August 20, but at the beginning of that hearing, the State requested a continuance so that service could be made on a co-defendant. The trial court granted the motion for a continuance and the hearing was subsequently held on August 28. Therefore, the hearing was set and held within ten days of the filing of the petition although it

was then continued, an action that was within the trial court's discretion.

Appellant also contended that the trial court erred in denying his special demurrer as to the petition charging him as unruly. Due process requires that the juvenile petition must (1) contain sufficient factual details to inform the juvenile of the nature of the offense; and (2) provide data adequate to enable the accused to prepare his defense. Here, the petition stated "8/06/09: said accused is habitually disobedient of the lawful and reasonable commands of his mother." Although the petition alleged the date appellant was disobedient, it provided no factual details. The petition merely mirrored the language of OCGA § 15-11-2 (12) (B): " 'Unruly child' means a child who: . . . [i]s habitually disobedient of the reasonable and lawful commands of his or her parent, guardian, or other custodian and is ungovernable."

The Court held that although recitation of a statute may, in certain cases, be a sufficient, though not desirable, method of apprising a defendant of the charges against him, recitation of portions of the statute is not sufficient if, reading the accusation together with the statute, a defendant is unable to determine which of his acts are alleged to be criminal in nature. Here, reading the petition together with the statute, the Court held that appellant was unable to determine what acts of disobedience supported the allegation that he was unruly. Because the petition did not allege appellant's misconduct with particularity, the juvenile court erred in denying the special demurrer. Therefore, appellant's adjudication of being an unruly child was reversed.

Probation Revocation

Marks v. State, A10A2110 (11/16/10)

Appellant was on probation for aggravated stalking of his ex-wife. The record showed that his sentence began on Nov. 30, 2009; a warrant was issued for his arrest on Feb. 17, 2009 for probation violation; and he was arrested on March 3, 2009. Appellant contended that the trial court erred in determining that he violated the terms of his probation by contacting his ex-wife. The Court agreed. The evidence showed that appellant had not called or visited her, but rather that he had posted untrue statements about her on several websites. The Court held that in determining whether appellant's posting of statements about his ex-wife on the internet constitutes "contact" with her, the term "contact" is readily understood by people of ordinary intelligence as meaning "to get in touch with; communicate with." While a probationary condition that forbids a defendant from "contacting" the victim may also be interpreted as proscribing "indirect contacts," such contacts must still be for the purpose of getting in touch with or communicating with the victim. Here, no evidence was presented suggesting that appellant authored the web postings in order to get in touch with or communicate with his ex-wife.

Appellant also contended that the trial court erred in fining that he had violated the terms of his probation by failing to attend a domestic violence intervention program or completing any of his community service requirement. The Court again agreed. Here, appellant's sentence required him to "enter into and successfully complete" a domestic violence intervention program. The sentence did not require him to complete the program by any specific date during the term of his "Intensive Probation Supervision." In fact, no evidence was presented that it was even possible for him to have completed such a program during the approximately three months that he served on probation prior to being arrested for violating the terms of his probationary sentence. The same was true for the requirement that he "perform a minimum of 96 hours, and up to a maximum of 132 hours, of community service as directed by the probation staff." No evidence was presented that appellant was ever directed to begin his community service on any specific date or at all.

Identification; Showups

Freeman v. State, A10A1525 (11/15/10)

Appellant was convicted of armed robbery. He contended that the trial court erred in failing to suppress the identification evidence at trial because the one-on-one showup conducted by police was impermissibly suggestive, and created a substantial likelihood of misidentification. Although one-on-one showups are inherently suggestive, an identification resulting from a showup need not be excluded as long as under all the circumstances the identification was reliable notwithstanding any suggestive procedure. The key issue is whether a substantial likelihood of irreparable misidentification exists. In evaluating this likelihood, four factors should be considered: (1) the witness' opportunity to view the criminal during the crime; (2) the witness' degree of attention; (3) the accuracy of any prior description; and (4) the length of time between the crime and the showup.

Appellant argued that the showup identification was impermissibly suggestive because when the victim identified him, he had been sitting in the back seat of the officer's patrol vehicle, and was taken out of the car with lights shining on him. However, the Court held, the mere fact that appellant was in a police car when [he was] identified does not taint the identification. Here, the victim observed appellant from "two or three feet away" for several minutes while he was being robbed, and although the incident occurred at night, the area of the parking lot where the robbery occurred was well lit. Furthermore, the victim identified appellant less than 30 minutes after the incident occurred, and expressed a high degree of certainty that appellant was the man who robbed him, despite a difference in the T-shirt color. Given the totality of these circumstances, the trial court was authorized to find that no substantial likelihood of irreparable misidentification existed. Accordingly, it properly denied appellant's motion to suppress.

Right to be Present; Contempt

Johnson v. State A10A1645 (11/17/10)

Appellant was convicted of family violence battery. During the trial, he walked out without excuse or permission. When he returned the next day, the trial court found him in contempt of court. After serving his 20 day sentence on the contempt, he was sentenced on the battery conviction to a year in custody. He was let out early by mistake and failed twice to appear for scheduled hearings on his motion for new trial, although his counsel was present and announced ready. The trial court dismissed the motion because of his failure to appear.

The Court held that the trial court erred in dismissing appellant's motion for new trial. A criminal defendant who is not laboring under the penalty of death has no right to be present during the hearing held upon his motion for new trial. Even for those convicted of a felony, the constitutional right of the accused to be present during the course of the

trial does not extend to post-verdict procedures such as a motion for new trial. Thus, appellant did not waive his motion for new trial by his absence; all he waived was his presence at the hearing. The case was remanded for a hearing on the merits.

Appellant also contended that the trial court erred in holding him in contempt. However, the Court held that this issue was moot because where a litigant is found to be in contempt of court and is ordered held in jail, his appeal of that order becomes moot upon his release from jail. Although an exception to this rule has been made in cases involving an attorney, the exception did not apply here because appellant was not an attorney. Therefore, because appellant had served the 20-day sentence imposed for contempt, his appeal of his conviction for contempt was moot.

Sexual Registration; Change of Address

Volz v. State, A10A1677 (11/10/10)

Appellant was indicted for failing to notify the sheriff of his change or residence under the sexual offender registration requirements of OCGA § 42-1-12 (f) (5). Citing *Santos v. State*, 284 Ga. 514 (2008), appellant contended that the trial court erred in failing to grant his special demurrer to the indictment because he was homeless. The Court agreed that this case was like *Santos* because it is undisputed that appellant was a sexual offender required to register under OCGA § 42-1-12; that, after he registered a residence address with the sheriff, he left that address and gave no notice to the sheriff pursuant to OCGA § 42-1-12 (f) (5) before or after he left; and that he was subsequently arrested and charged with failing to timely report a "change of address." However, the case was unlike and not controlled by *Santos* because there was no undisputed facts or stipulations establishing that appellant was homeless and had no street or route address during the period after he left the registered residence address until he was arrested. Thus, at trial, the State may disprove appellant's contentions by producing evidence sufficient to prove that, unlike the sexual offender in *Santos*, appellant was not homeless and without a street or route address during the applicable time period. "We know of no rule of law that would permit an indictment to be quashed on the ground that the state's subsequent proof might not authorize a conviction for the offense charged in the indictment. Such a rule would be incapable of application for the reason that at this stage of the proceedings —post indictment, pretrial —no one knows what the state's proof will show."

Similar Transactions; Merger

Robertson v. State, A10A1311 (11/5/10)

Appellant was convicted of selling cocaine, possession of cocaine and possession of marijuana. The evidence showed that appellant sold cocaine to a CI and thereafter was arrested and found to be in possession of cocaine and marijuana. Appellant contended that the trial court erred in admitting evidence of two prior sales of cocaine convictions as similar transaction evidence. He argued the trial court used the wrong standard in determining whether to admit the evidence. Specifically, the trial court found that the probative evidence *outweighs* its prejudicial effect and appellant argued, citing OCGA § 24-9-84.1 (a) (2), that the trial court should have found that the probative evidence *substantially outweighs* its prejudicial effect. The Court disagreed. OCGA § 24-9-84.1 (a) (2), by its own terms, applies to the admissibility of prior convictions for the purpose of impeaching a testifying defendant. It does not apply when the prior conviction is admitted as a similar transaction for non-impeachment purposes. Similar transactions are admissible at trial whether or not the defendant testifies, while prior felonies are only admissible as impeachment pursuant to OCGA § 24-9-84.1 (a) (2). The addition of a more rigorous standard for admissibility for impeachment evidence under OCGA § 24-9-84.1 (a) (2)]—requiring the judge to find that the probative value of admitting the evidence substantially outweighs its prejudicial effect to the defendant —may have been intended to remedy the lack of pretrial notice and hearing granted to defendants by Uniform Superior Court Rule 31.3.

Appellant also contended that the trial court erred by failing to merge the convictions for possession of cocaine and selling cocaine because the indictment failed to include sufficient detail to distinguish between the cocaine he sold (turned over by the informant) and the cocaine he possessed (found in the car he occupied at the time of arrest). Appellant contended that the two merged under the "actual evidence" test. However, the Court stated that *Drinkard v. Walker*, 281 Ga. 211(2006), disapproved of the "actual evidence" test in favor of the "required evidence" test. The "required evidence" test addresses the culpability of "a single act" and does not apply unless the same conduct of the accused establishes the commission of multiple crimes. Here, the offense of selling cocaine was proven by the evidence of the crack cocaine sale to the CI, and the offense of possessing cocaine was proven by the evidence that appellant possessed the additional crack cocaine later found in the car he occupied. Since two discrete portions of cocaine were used to prove the two discrete offenses, the two counts did not merge.

Child Hearsay; Gregg Hearings

Barclay v. State, A10A1740 (11/10/10)

Appellant was convicted of aggravated child molestation. He contended that the trial court abused its discretion in admitting into evidence the videotaped interview of the victim, his three-year-old son. OCGA § 24-3-16, the Child Hearsay Rule, provides that the out-of-court statement of a "child under the age of 14 years describing any act of sexual contact or physical abuse performed with . . . the child is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability." Pursuant to *Gregg v. State*, 201 Ga. App. 238, 240 (a) (b) (1991), the trial court held a hearing on the admissibility of the video interview into evidence. Under *Gregg*, a child's out-of-court statement is properly admitted if supported by sufficient evidence of indicia of reliability based upon such factors as the circumstances under which the statement was made, the child's age and general demeanor, whether the statement was voluntarily given or given upon coaching, the nature of the child's statement as consistent with that of a child, and/or with other out-of-court statements. The *Gregg* factors are to be "applied neither in a mechanical nor mathematical fashion, but in that manner best calculated to facilitate determination of the existence or absence of the requisite degree of trustworthi-

ness." Here, the trial court found that video was properly admitted because it reflected the requisite degree of trustworthiness; that the victim spontaneously gave the interview; that the victim was interviewed by a qualified forensic interviewer who was not employed as a law enforcement officer; that coaching was not indicated; and that the victim used the word "bootie" knowingly in reference to his buttocks. Thus, the trial court did not abuse its discretion in admitting the video.

DUI; Intoxilyzer 5000

Jacobson v. State, A10A2041 (11/16/10)

Appellant was convicted of DUI. He contended that the trial court erred in allowing the State to admit the results of the Breathalyzer test because it failed to provide a copy of the results to him during discovery, in violation of OCGA § 17-16-23. The Court found, however, that since appellant received a copy of the test results from the jail staff immediately after the results were recorded, the trial court did not err in determining that appellant was not harmed by the State's discovery violation.

Appellant also argued that the trial court erred in allowing the State to admit certificates of inspection for the Intoxilyzer 5000. Citing to *Melendez-Diaz v. Massachusetts* , __U. S.__ ,129 SC 2527, 174 LE2d 314 (2009), he asserted that the State was required by the Confrontation Clause to put forward testimony from a live witness stating that the machine was in good working order. However, the Court held, certificates of inspection for the Intoxilyzer 5000 do not fall within the class of documents prohibited by *Melendez-Diaz* because they are not generated for the prosecution of a particular defendant. Therefore, the trial court did not err in permitting the State to introduce the certificates of inspection.

Finally, appellant contended that the trial court erred in refusing his request to admit maintenance logs showing when the particular Intoxilyzer 5000, which was used to conduct his breath test, was taken out of service. The Court held that such decisions regarding relevance cannot be overturned except for manifest abuse of discretion. Since Intoxilyzer 5000 maintenance logs are not even relevant enough to be discoverable pursuant to OCGA § 40-6-392 (a) (4), the trial court did not abuse its discretion in refusing appellant's request to admit the maintenance logs into evidence.

Immunity; OCGA § 24-9-28 (a)

Gilbert v. State, A10A1403 (11/15/10)

Appellant was convicted of armed robbery. He contended that the trial court erred by conferring use immunity to his co-defendant. OCGA § 24-9-28 (a) provides that "[w]henever in the judgment of the Attorney General or any district attorney the testimony of any person or the production of evidence of any kind by any person in any criminal proceeding before a court or grand jury is necessary to the public interest, the Attorney General or the district attorney may request the superior court in writing to order that person to testify or produce the evidence. . . . Any order entered under this Code section shall be entered of record in the minutes of the court so as to afford a permanent record thereof; and any testimony given by a person pursuant to such order shall be transcribed and filed for permanent record in the office of the clerk of the court." Appellant argued that (1) the State's request for immunity for the co-defendant was not in writing; (2) the State did not demonstrate or even argue that the testimony was "necessary to the public interest"; and (3) the trial court's grant of use immunity was neither written nor "filed for permanent record in the office of the clerk of the court."

The Court held that the trial court did not err. Since appellant did not object at trial, the issue on appeal was waived. But, even if he did, the Court found that under *King v. State*, 273 Ga. 258 (2000), appellant had no standing to contest the grant of use immunity to a co-defendant.