

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING DECEMBER 4, 2015

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State Prosecutor

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## THIS WEEK:

- **Search & Seizure; Prolonged Detentions**
- **Ineffective Assistance of Counsel; Conflicts of Interest**
- **Sufficiency of the Evidence; Merger**
- **Motions to Withdraw Guilty Plea; Uniform Superior Court Rule 33.11**
- **Sufficiency of the Evidence; Mere Presence**

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### *Search & Seizure; Prolonged Detentions*

*Sherod v. State, A15A1460 (11/3/15)*

The Court granted an interlocutory review after the trial court denied appellant's motion to suppress evidence that was discovered after a traffic stop and subsequent search of the tractor-trailer he was driving. The evidence, briefly stated, showed that the officer stopped appellant's tractor-trailer after he noticed it weave over the white fog line two times. After speaking with appellant and his co-driver, checking the logbooks, noting that the truck was carrying perishable goods, inspecting the truck and running the criminal histories of appellant and his co-driver, the officer decided to issue a written warning citation to appellant. The officer testified that at the point when he returned appellant's documents and issued the written citation, appellant *was not free to leave*. And immediately after issuing the citation, the officer asked appellant for consent to search the truck, which appellant did not give. The officer then asked for permission to walk his K-9 dog around the truck, and when appellant did not give consent for that either, the officer informed appellant that he nevertheless intended to detain the drivers to walk the dog around the truck. The dog alerted

almost immediately and over 200 pounds of marijuana were subsequently discovered.

The Court noted that since the State did not dispute that the officer issued the written citation to appellant, a second detention began. Thus, the issue was whether the investigating officer had reasonable articulable suspicion of other illegal activity to justify further detaining appellant after concluding the initial stop. The Court stated that at the time the officer decided to detain appellant to conduct a K-9 sniff, he knew the following: that a co-driver had been lying down to rest behind the closed curtain of the tractor-trailer's sleeping compartment when appellant stopped and when he retrieved the requested documentation; that appellant retrieved the requested documentation from behind the closed curtain, which was, in the officer's experience, unusual; that the co-driver kept the curtain closed when he later emerged from the sleeping compartment; that the co-driver had two drug-related criminal convictions dating back to 1994 and 1998; that the cargo load was not sealed; and that on one occasion during a cross-country trip to California and back to Georgia, neither driver was behind the wheel for one 10-hour period, which was, in the officer's experience, unusual when transporting perishable goods.

Viewing the totality of the circumstances, the Court agreed that the officer had reasonable articulable suspicion to justify the continued detention of appellant's vehicle. In so holding, the Court noted that the co-driver's two drug-related criminal convictions, when considered together with all of the other information available to the officer at the time of appellant's detention, "contribute powerfully to the reasonable suspicion calculus."

## ***Ineffective Assistance of Counsel; Conflicts of Interest*** *Tolbert v. State, S15A1073 (11/23/15)*

Appellant was convicted of murder and unlawful possession of a firearm during the commission of a felony. The evidence showed that in 1996, the police executed a search warrant at the victim's residence. The victim accused brothers Dewey and Leroy Sims of being snitches. He confronted Leroy, and shortly thereafter, Dewey and appellant (the nephew of the Sims brothers) arrived on the scene, both carrying guns. Dewey shot the victim and all three fled.

Appellant contended that he received ineffective assistance of counsel at trial because his lawyer also represented Leroy, and the concurrent representation of these two co-defendants created a conflict of interest for the lawyer. The Court noted that the lawyer died prior to the motion for new trial hearing and the trial court, in ruling against the motion without the benefit of the lawyer's testimony, must have determined that appellant and Leroy, who both testified, lacked credibility.

The Court stated that there is the potential for serious conflicts of interest when one lawyer represents co-defendants in a criminal proceeding. Even so, the concurrent representation of co-defendants is not a "per se violation" of constitutional guarantees of effective assistance of counsel. To prevail on a claim that a conflict of interest worked a denial of the effective assistance of counsel, a defendant like appellant — one who failed to object to the conflict at trial — must show that an actual conflict of interest adversely affected his lawyer's performance. An "actual conflict of interest" means a conflict that affected counsel's performance — as opposed to a mere theoretical division of loyalties. Thus, the test of a claim that a conflict of interest worked a denial of the effective assistance of counsel is whether the representation deprived either defendant of the undivided loyalty of counsel, i.e., did counsel slight one defendant to favor the other?

Appellant contended that the lawyer was paid only by Leroy. The Court stated that if Leroy alone paid the lawyer, that certainly could have provided an incentive for the lawyer to prioritize the interests of Leroy over those of appellant. Appellant also contended that he never met with the lawyer outside the presence

of Leroy. Again, the Court stated, a lawyer meeting alone with one client, but not the other, in the context of a joint representation, is worrisome. However, there must still be shown an actual conflict of interest.

First, appellant contended that an actual conflict of interest occurred because Leroy was offered a favorable plea bargain at trial, but he was offered none, and this circumstance, he argued, showed that his lawyer prioritized the interests of Leroy over his own. But, the Court found, there was no reliable evidence that Leroy was in fact offered a plea bargain. Likewise, there was no evidence that the prosecuting attorney would have been inclined to offer a favorable plea bargain to appellant, even if the lawyer had proposed that appellant would be willing to testify against Leroy. And appellant failed to show that he could or would have given testimony against Leroy that would have been of meaningful value to the State at trial. To the contrary, appellant gave testimony that was largely exculpatory of Leroy. Consequently, there simply was no evidence that appellant would have been offered a favorable plea bargain, if only his lawyer had explored the possibility of appellant testifying against Leroy. Thus, appellant failed to carry his burden as to this claim.

Next, appellant argued that his lawyer could have argued at trial that appellant was less culpable than Leroy, but the lawyer did not because such an argument would only have focused the jury on the greater culpability of Leroy. But, the Court stated, a mere failure to emphasize the different culpability of each co-defendant does not always and necessarily demonstrate an actual conflict. Here, the Court found, there was evidence to support an argument that Leroy was more culpable than appellant. However, there was also evidence that appellant was the more culpable of the two. Moreover, the Court noted, it could not say that an argument that appellant was less culpable than Leroy would have been significantly stronger than the common defense that the lawyer actually advanced at trial for appellant and Leroy, and accordingly, it could not conclude that the failure to urge a defense based on comparative culpability likely was motivated by a conflict of interest. An alternative defense theory of differential culpability would have helped appellant only if it would have convinced the jury that appellant was so much less culpable that he

— unlike Leroy — was not a party to the crime. Instead, the Court found, rather than differentiating between Leroy and appellant, their lawyer argued at trial that Dewey had acted in self-defense when he shot the victim (which was consistent with Dewey's own defense), and that even if Dewey were not justified, neither Leroy nor appellant was a party to the crime. The unified defense strategy was to show that both appellant and Leroy were innocent; neither of them testified, much less did one point the finger at the other. And there was no suggestion that urging this defense on behalf of Leroy somehow would have made the jury less likely to accept the same defense urged on behalf of appellant. Thus, this contention was also without merit. Accordingly, the trial court's finding of no actual conflict was affirmed.

## ***Sufficiency of the Evidence; Merger***

*Harris v. State, A15A1006 (11/2/15)*

Appellant was convicted of armed robbery, aggravated assault, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon. The evidence showed that as the victim was walking through an apartment complex, he encountered appellant. Appellant voiced his displeasure with the victim and pulled a gun on him. Appellant hit the victim in the head and face with the gun, splitting the victim's chin. Appellant snatched the victim's necklace from his neck. Then appellant shot the victim in the arm. The police found the necklace in a grassy area, 30 yards away from where the incident occurred.

Appellant argued that the evidence was insufficient to support the armed robbery conviction because it showed only that the victim's necklace was broken and fell to the ground, so there was neither a change in location nor a transfer of complete dominion over the property. The Court disagreed. Under O.C.G.A. § 16-8-41, the slightest change of location whereby the complete dominion of the property is transferred from the true owner to the trespasser is sufficient asportation to meet the statutory criterion. It is not required that the property taken be permanently appropriated. Here, the evidence enabled the jury to find that appellant ripped the victim's necklace from his neck and carried it 30

yards away before dropping it. This evidence supported the armed robbery conviction.

Appellant also argued that the armed robbery and aggravated assault convictions should have merged because both arose out of the same act or transaction. The Court again disagreed. The evidence showed that appellant took the victim's necklace after hitting him in the head and face with the gun, the act for which he was indicted for armed robbery. After taking the necklace, appellant shot the victim in the arm, the act for which he was indicted for aggravated assault. Thus, the armed robbery and aggravated assault were separate events, the armed robbery being complete before the commission of the aggravated assault. Therefore, the trial court did not err in sentencing appellant for both crimes.

### **Motions to Withdraw Guilty Plea; Uniform Superior Court Rule 33.11**

*Williams v. State, A15A1551 (11/2/15)*

Appellant appealed from the state court's denial of his post-sentencing motion to withdraw his guilty plea for simple battery and criminal trespass. Specifically, he argued that because the record did not contain a verbatim transcript, it did not sufficiently show that the trial court determined that there was a factual basis for the plea. The Court stated that while it is true that Uniform Superior Court Rule 33.11 requires "[a] verbatim transcript of the proceedings at which a defendant enters a plea of guilty or nolo contendere," this case came before a state court. In state court, a verbatim transcript of a plea hearing is required only when the plea results in additional incarceration. The requirements of Uniform State Court Rule 33.11 may be satisfied by a combination of documentary or extrinsic sources, as long as they provide reviewing courts with a record of the plea proceedings to determine if challenged pleas have been entered voluntarily and with proper understanding.

Furthermore, the Court stated, even if it were to assume that the State failed to provide the trial court with sufficient facts on which to accept his guilty plea, this would not automatically require reversal. In order to successfully attack a guilty plea after sentencing, a defendant must show that the trial court's acceptance of his guilty plea caused him to suffer a manifest injustice. Here,

the Court found, appellant failed to make such a showing. Instead, the Court found, the evidence of the plea form combined with trial counsel's testimony authorized the trial court to find that the State had met its burden of showing the plea to be knowing and voluntary. As appellant failed to show a manifest injustice, the trial court's order denying the motion to withdraw his guilty plea was affirmed.

### **Sufficiency of the Evidence; Mere Presence**

*Lehman v. State, A15A1594 (11/3/15)*

Appellant was convicted of possession of methamphetamine and possession of oxycodone. He contended that the evidence was insufficient to support his conviction. The Court agreed and reversed.

The evidence showed that an officer pulled over the pickup truck in which appellant was a passenger because a headlight was not working. Appellant's co-defendant, Nobles, owned the truck and was the driver. The officer had Nobles step out of the vehicle and obtained Nobles' consent to search the vehicle. The officer searched the truck while appellant was still inside the truck and Nobles was still outside, and saw a container on top of a pile of clothes on the back seat floorboard. The container held .11 grams of methamphetamine and one tablet of oxycodone. Both appellant and Nobles denied having knowledge of the container and were each arrested.

The Court stated that evidence of mere presence at the scene of the crime, and nothing more to show participation of a defendant in the illegal act, is insufficient to support a conviction. A finding of constructive possession must be based upon some connection between the defendant and the contraband other than spatial proximity or mere presence in the vehicle where the contraband is found. The only evidence of appellant's constructive possession offered by the State other than spatial proximity is the testimony of Nobles. However, the Court stated, while the testimony of a single witness is generally sufficient to establish a fact, in "*felony cases where the only witness is an accomplice*, the testimony of a single witness shall not be sufficient." O.C.G.A. 24-14-8 (emphasis supplied). As the

testimony of Nobles was the only evidence other than spatial proximity connecting appellant to the contraband, the evidence was insufficient to support a conviction based on constructive possession.