Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 13, 2017

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THIS WEEK:

- **Ineffective Assistance of Counsel; Bolstering**
- **Search & Seizure; Roadblocks**
- **Sentencing; Merger**
- **Juveniles; Sentencing Review**

Ineffective Assistance of Counsel; Bolstering

Gilmer v. State, A16A0919 (11/18/16)

Appellant was convicted of child molestation and aggravated child molestation of 11-year-old F. P. He contended that the received ineffective assistance of counsel based on impermissible bolstering by two State witnesses. A divided whole Court disagreed.

In the first instance, the State's expert witness, Anique Whitmore, testified at trial about the victim's use of the word "blowtorch" to describe his experience of the aggravated molestation during a forensic interview. When asked why "that kind of descriptive language [is] important in a disclosure of abuse," Whitmore responded: "… [W]hen you look for the genuine nature of a child's response, you look for words that one would assume — feeling like a — if you got hit by a blowtorch what that might feel like. A child this age perhaps has never experienced anything like this before. That to them is how they describe that pain, that interaction, that force. For him, perhaps he saw a blowtorch and that's how he would — would relate that pain. So the — the spontaneity and the genuineness of that response, for me, adds credibility to what [F. P.] was saying." The Court agreed with appellant that this testimony constituted improper bolstering.

However, the Court found, after reviewing appellant's trial counsel's cross-examination of Whitmore, the Court stated that it was clear that trial counsel's strategy was to co-opt Whitmore as his own expert witness to challenge the way that the forensic interviews were conducted. Under these circumstances, it would not have been unreasonable for counsel to decline to object to the bolstering testimony, inasmuch as it would draw attention to an error Whitmore made in her testimony, which would be inconsistent with counsel's attempt to show that Whitmore was a qualified expert who had serious concerns with the forensic interviews. Moreover, even if counsel had objected, the State could have fairly easily had Whitmore rephrase her testimony to say that the use of the word "blowtorch" was consistent with how a child might describe being molested. A reasonable lawyer thus might have concluded that objecting on the grounds of bolstering would simply emphasize the error, giving the State an opportunity to present similar non-objectionable testimony and magnifying any harmful implications from it. Thus, the Court found, trial counsel did not render deficient performance by failing to object to this testimony.

In the second instance, the State also presented the testimony of a family friend with whom F. P. and his family had been living regarding the outcries that F. P. and his younger brother made to her about the molestation. On cross-examination, appellant's trial counsel established that this witness had never met appellant. Thereafter, the questioning proceeded: "[Counsel]: But you are so certain and positive that this stuff happened? [Witness]: I'm positive that it happened because —" Counsel then interrupted the witness, drawing

an objection from the State. The court ruled that the witness could finish her answer, which led to the following colloquy: "[Witness]: I know this happened for a fact to these kids because these kids wouldn't sit up here and lie. But I have something to say because, for one, I'm one of them kids, too. And when [F. P.] told me that — we was the same age that we was both molested. And — [Counsel]: So you've been molested before? [Witness]: Yes, I have. I was molested by my uncle. But [F. P.] didn't even know that. After he told me what happened to him, I told him, me and you have something in common: I was molested. And he looked at me and said, Aunt Miss [A. P.], you was? I said, yes, I was. We both hugged each other and we both cried. So I don't have no reason to sit up here and lie or come in here and tell a story or anything. I believe them children."

The Court found that this witness also gave improper bolstering testimony. However, the Court found, it was reasonable for trial counsel to not have objected to or moved to strike this testimony. At the new trial hearing, trial counsel testified that he did not find this testimony to be prejudicial to his client's defense because she was crying while on the stand, had never even been in the same state as the defendant, and counsel "was trying to draw out that she was just speaking on emotion rather than just the facts." And while he admitted that it was probably not the trial strategy that he predicted before the trial happened, trial counsel explained that "during the moments that she was testifying, and I think she was being real emotional, it's quite a possibility that I wanted to get out to the jury that's an emotional thing, that she really has no — she never observed or saw, or heard anything up to that point, so, how could she be so sure, when she had no personal observation, whatsoever." The Court found that this was within the wide range of reasonable trial strategy. Accordingly, the Court held that trial counsel had not rendered deficient performance.

Search & Seizure; Roadblocks

Kettle v. State, A16A1338 (11/18/16)

Appellant was accused of DUI. He contended that the trial court erred in denying his motion to suppress. Specifically, that the Georgia State Patrol (GSP) roadblock at which he was stopped was unconstitutional. A divided en banc Court disagreed.

Appellant first contended that the roadblock was unconstitutional because the GSP's road check policy was not properly limited to a primary purpose other than general crime control. The Court noted that when a constitutional challenge to a police checkpoint focuses on the sufficiency of the policy under which the checkpoint was implemented, two distinct questions are presented for resolution by a trial court: (1) Was the police checkpoint at issue implemented pursuant to a checkpoint program that had, when viewed at that programmatic level, an appropriate primary purpose other than general crime control?; and (2) If so, was the decision to implement that specific checkpoint made by a supervisor in advance rather than by an officer in the field? With respect to the first question, which was at issue here, a primary purpose is appropriate if it is both legitimate for law enforcement to pursue and can be distinguished from general crime control.

Here, GSP's policy on roadblocks consisted not only of the 2010 Policy Number 17.05, which provides that "[s]upervisors will schedule road checks and will identify a primary purpose for the road check such as: to verify driver licenses, insurance, vehicle registration, and vehicle equipment," but also of Form DPS-206, which provides that troopers can establish and participate in lawfully authorized roadblocks for the legitimate primary purpose of improving driving safety and more specifically to perform routine traffic checks for several listed reasons. Furthermore, a lieutenant with the GSP, who was a post commander at the time the roadblock at issue was implemented, specifically testified that GSP policy required that Form DPS-206 be filled out for every roadblock and that the permissible purposes, as shown on the form, were to check: driver's license, insurance, registration verification, seatbelt compliance, driver impairment, vehicle fitness, vehicle safety/vehicle safety compliance, location of dangerous felon likely to take designated route, and other. He explained that the use of the "other" category on that form was limited to describing the details of a specific search for a violent felon. The lieutenant also testified that, based on the training he had received and orders he had been given, using a roadblock for general crime deterrence would not be in compliance with GSP roadblock policy and could subject a supervisor to administrative discipline. He further testified that during his time with the GSP (approximately 19 years), a roadblock had never been used for general crime deterrence.

Thus, the Court determined, construed in favor of the trial court's factual findings and judgment, the evidence showed that the GSP's roadblock policy allowed routine traffic checks for a specific list of legitimate purposes and that the use of checkpoints for general crime deterrence would be prohibited. Therefore, the trial court was authorized to conclude that the State presented adequate proof that the GSP roadblock program, when viewed at the programmatic level, had an appropriate primary purpose other than general crime control.

Appellant also contended that the roadblock was not permissible because the State failed to show that the roadblock was well marked as required by *LaFontaine v. State*, 269 Ga. 251 (1998). The Court noted that under *LaFontaine*, a roadblock is satisfactory where the decision to implement the roadblock was made by supervisory personnel rather than the officers in the field; all vehicles are stopped as opposed to random vehicle stops; the delay to motorists is minimal; the roadblock operation is well identified as a police checkpoint; and the "screening" officer's training and experience is sufficient to qualify him to make an initial determination as to which motorists should be given field tests for intoxication.

Here, the Court found, the supervisor who made the decision to implement the roadblock, and also participated in the roadblock, testified that he completed a final report after the roadblock was concluded, which showed that four uniformed troopers were present at the roadblock, all qualified in DUI detection, that there were three marked patrol cars using blue lights, and that the officers wore reflective vests. Although the report stated that cones were used to mark the roadblock, the supervisor testified that they used LED flares. The supervisor also testified that every car was stopped and the delay to motorists was minimal. The corporal who arrested appellant testified that there were multiple cars involved in the road block and that at least one of the cars had its blue lights illuminated. Thus, construed in favor of the trial court's factual findings and judgment, the evidence authorized the trial court to conclude that the road block was well identified as a police checkpoint as required by *LaFontaine*.

Sentencing; Merger

Ward v. State, A16A1339 (11/18/16)

Appellant was convicted of criminal attempt to commit armed robbery, two counts of burglary, possession of a firearm during the commission of a crime, possession of a tool for commission of a crime, possession of a controlled substance, and possession of a firearm by a convicted felon. The evidence showed that appellant and an accomplice went to the victim's apartment to steal money that they had learned was supposedly hidden under a mattress. Appellant forced his way into the apartment with a handgun while his accomplice waited outside. As appellant ransacked the apartment looking for the money, he threatened and hit the victim with the gun. After failing to find the money, appellant and his accomplice fled.

Appellant argued that the trial court should have merged the attempted armed robbery and the two burglary offenses for sentencing because all three counts were based on the same conduct. The Court noted that the two counts of burglary upon which the jury found appellant to be guilty were based on the same unlawful entry into the victim's house, but one count was predicated on the intent to commit a theft and the other was predicated on the intent to commit an aggravated assault. The trial court imposed separate sentences for each burglary count. However, where one course of conduct violates one criminal statute in several ways described in the statute, a defendant is guilty of only one crime. Since appellant's one entry into the victim's house was committed with a dual intent to commit theft and aggravated assault, the trial court should not have imposed two separate sentences and instead should have merged the burglary counts for sentencing. Therefore, the Court vacated the burglary sentences and directed the trial court, on remand, to merge the two burglary counts for sentencing.

As to the armed robbery conviction, the Court applied the "required evidence test" and found that the attempted armed robbery and burglary offenses were not established by proof of the same facts and thus were not included offenses. Therefore, the trial court did not err in refusing to merge the attempted armed robbery with the burglary counts for sentencing.

Juveniles; Sentencing Review

State v. T. M. H., A16A1357 (11/18/16)

T. M. H. was prosecuted as an adult in the superior court, and he was 16 years old at the time of his negotiated plea to armed robbery with a firearm, aggravated assault, and obstruction of a law enforcement officer. He was sentenced by the superior court to ten years with five to serve on the armed robbery count, five years to serve on the aggravated assault count, and twelve months to serve on the obstruction of a law enforcement count. Each of these sentences was to be served concurrently. Later, as T. M. H.'s seventeenth birthday approached, the superior court held a status conference pursuant to O.C.G.A. § 49-4A-9(e) to reevaluate his sentence. As a result of that status conference, the superior court entered orders probating the balance of T. M. H.'s sentence. The State appealed and a divided whole court affirmed.

The Court noted that O.C.G.A. 49-4A-9(e) provides, in part, that "When …a child sentenced in the superior court is approaching his or her seventeenth birthday, the department shall notify the court that a further disposition of the child is necessary. The department shall provide the court with information concerning the participation and progress of the child in programs described in this subsection. The court shall review the case and determine if the child, upon becoming 17 years of age, should be placed on probation, have his or her sentence reduced, be transferred to the Department of Corrections for the remainder of the original sentence, or be subject to any other determination authorized by law." The Court found that this language contained no basis to exclude T. M. H. from the process described therein.

Nevertheless, the State argued, the superior court's authority under subsection (e) does not reach T. M. H.'s sentence in this case because (1) language in O.C.G.A. § 17-10-14(a) — "until such person is 17 years of age at which time such person shall be transferred to the Department of Corrections to serve the remainder of the sentence" — is mandatory and precludes any other outcome for these offenders, and (2) O.C.G.A. § 49-4A-9(a) provides that "any child convicted of a felony punishable by death or by confinement for life shall only be sentenced into the custody of the Department of Corrections." The Court disagreed.

First, the Court found, nothing in that O.C.G.A. § 17-10-14(a) addresses or limits the superior court's basic sentencing authority with respect to juveniles. By its plain terms, it merely addresses where the child must be committed and states that a child shall be transferred at age 17 to the DOC to serve the remainder of the sentence, without any further language addressing what the sentence might be. It does not say "remainder of the original sentence" or otherwise include a limitation on the express authority given to a superior court under O.C.G.A. § 49-4A-9(e). Thus, the Court found, at most, O.C.G.A. § 17-10-14(a) is ambiguous as to any limitation on the superior court's sentencing authority under O.C.G.A. § 49-4A-9(e), and any ambiguity in a criminal statute must be resolved in favor of the defendant.

Second, O.C.G.A. § 49-4A-9(a) designates the DOC as the only custodian of serious child offenders, but it does not, by its express terms, limit the operation of subsection (e), nor was T. M. H.'s treatment here inconsistent with the requirement that he be sentenced to the custody of the DOC. T. M. H. was sentenced into the custody of the DOC (with DOC's discretion as to how to house him), but because he was under 17, he was committed to the DJJ as provided by O.C.G.A. § 17-10-14(a). Further, because he was "sentenced in the superior court and committed to the department," the superior court had authority under O.C.G.A. § 49-4A-9(e) to "determine if … , upon becoming 17 years of age, [T. M. H.] should be placed on probation. …" Thus, the Court found, this is entirely consistent with the overall statutory scheme as currently written.

Accordingly, the Court held, in light of the express authority provided in O.C.G.A. § 49-4A-9(e) to review T. M. H.'s sentence before he turned 17, the superior court was authorized to place T. M. H. on probation based on the court's finding of T. M. H.'s rehabilitation, which finding was supported by the record.