Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 8, 2016

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THIS WEEK:

Procedural Double Jeopardy; Sufficiency of the Evidence

Randolph v. State, A15A1024 (11/13/15)

Appellant was convicted of multiple counts of VGCSA and gang-related crimes. The record showed that a person named Foley was found shot to death in a torched house in which he was living. After an investigation, appellant was arrested and charged with murder, armed robbery, arson, and gun possession. He was not charged with any drug or gang-related crimes. At trial, appellant testified in his own defense and the jury acquitted him on all counts. Thereafter, based on appellant's sworn testimony at the trial, he was indicted for distributing marijuana, conspiring to distribute marijuana, and violating the Georgia Street Gang Terrorism and Prevention Act. He went to trial again and was convicted.

Appellant first contended that the trial court erred by denying his motion to dismiss the indictment on procedural double jeopardy grounds. The Court stated that the procedural aspect of the double jeopardy rule prohibits multiple prosecutions arising from the same conduct. O.C.G.A. § 16-1-7(b) requires the State to prosecute crimes in a single prosecution "[i]f the several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court." A second prosecution is barred under O.C.G.A. § 16-1-8(b)(1) if it is for crimes which should have been brought in the first prosecution under O.C.G.A. § 16-1-7(b). Appellant argued that his second prosecution was barred because the State was aware of his marijuana distribution and gang crimes before the first trial.

The Court stated that appellant bore the burden of showing that the prosecutor had actual knowledge before the first prosecution of the facts supporting the charges in the second prosecution. The trial court concluded that what the prosecutor knew before the first trial was a question of fact that should be resolved by the jury rather than by the court as a matter of law. Thus, he failed to show that he was entitled to judgment as a matter of law on his double jeopardy defense.

Moreover, at the second trial, the State presented evidence that before the first trial, the only information it had about appellant's involvement in marijuana distribution was witness statements that he had previously bought small quantities of marijuana from Foley and had arranged, along with two other men, to buy a pound of marijuana from Foley on the morning of the murder. These witness statements did not demand a finding, as a matter of law, that the prosecutor had actual knowledge that appellant had committed the crimes of conspiring to distribute marijuana

and distributing marijuana. With regard to the gang crime, there was evidence that the State knew only that appellant had joined a gang years before, not that he was currently involved in drug-related gang activity. Under these circumstances, the Court concluded, the trial court did not err by denying appellant's motion to dismiss on double jeopardy grounds.

Appellant also contended that there was insufficient evidence to support his conviction for violating the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq. The Court agreed. The Court noted that to prove gang-related offenses under the Act, it is not enough for the State simply to show that the defendant and other gang members committed a criminal act; rather, there must be some nexus between the act and an intent to further street gang activity.

Here, the Court found, the State's case against appellant rested almost entirely on his sworn testimony in the first trial, which was read aloud to the jury. That former testimony showed that appellant, who was a member of Folk Nation, had introduced Foley, who was not affiliated with a gang, to a variety of other people — some gang-affiliated and some not — and had helped Foley distribute small amounts of marijuana to those people. Thus, while the State may have shown that appellant intended, by distributing marijuana, to further the interests of individual gang members in obtaining small quantities of marijuana for personal use, the State did not show that appellant meant to further the interests of Folk Nation as an entity. There was no evidence, for example, that appellant wore gang colors or accessories, talked about his gang affiliation, or otherwise "represented" the gang while he was committing drug crimes. Nor was there any evidence that appellant's distribution of personal-use amounts of marijuana to individual gang members benefitted the gang itself through monetary profit, enhanced reputation, or other means. Because the State failed to present evidence of the necessary nexus between appellant's drug crimes and an intent to further gang interests, his conviction under the Georgia Street Gang Terrorism and Prevention Act was reversed.

O.C.G.A. § 16-6-5.1(b)(1); Sufficiency of the Evidence

Morrow v. State, A15A0905 (11/16/15)

Appellant was convicted of one count of sexual assault in violation of O.C.G.A. § 16-6-5.1(b)(1). He contended that the State failed to prove that he had any supervisory or disciplinary authority over the victim and therefore, the evidence was insufficient to support his conviction. The Court agreed and reversed.

The evidence showed that appellant was employed as a paraprofessional at a high school where he also served as a wrestling coach. Appellant was hired as a paraprofessional to attend to the needs of a specific, special-needs child, referred to by the parties as "Pablo." Appellant accompanied Pablo to all of his classes, and during the victim's freshman and sophomore years, the victim shared both home room and a math class with Pablo. The victim understood that appellant's job was different from that of a paraprofessional whose job it was to assist a classroom teacher. Specifically, the victim testified that a different paraprofessional assisted her math teacher during her sophomore year, and she characterized that paraprofessional as a "disciplinary figure. He would monitor the classroom when [the teacher] left the room." By contrast, the victim knew that appellant's sole job was to sit with Pablo, whom the victim described as having "mental issues," and ensure that Pablo did not disrupt the class. Appellant never disciplined or otherwise exercised any authority over the victim. When asked if she believed that appellant had the authority to discipline her, the victim responded that she did not know. At some point, the victim and appellant engaged in sexual contact.

The Court noted that to convict a person under O.C.G.A. § 16-6-5.1(b)(1), the State must prove both that the defendant was "a teacher, principal, assistant principal, or other administrator" of the school at which the victim was enrolled and that the defendant had supervisory or disciplinary authority over the victim. Although the victim testified that she viewed appellant as "an authority figure," the State introduced no evidence showing that appellant had any kind of general supervisory or disciplinary authority over students at the school. Moreover, a showing that all teachers at a school, including the accused, have some kind of general authority over students in the school, is insufficient to demonstrate the supervisory or disciplinary authority required to convict a defendant under O.C.G.A. § 16-6-5.1. And here, the Court found, the State offered no evidence to show that appellant had any kind of direct authority over the victim, either as a paraprofessional/teacher or as a wrestling coach. There was no testimony or other evidence showing that appellant had the authority to give directives to the victim, to enforce school rules against the victim, or even to refer the victim to administrators for discipline as a result of her violation of either the defendant's directives or some other school rule or policy. Furthermore, the victim testified that she understood that appellant's job was to accompany Pablo to his classes and ensure that Pablo (as opposed to any other student) did not disrupt class. And when asked whether appellant had any kind of authority over her specifically, the victim replied that she did not know. Accordingly, the Court found, because the State failed to prove an essential element of the charged crime, his conviction must be reversed.

Criminal Contempt

In Re Sprayberry, A15A1616 (11/16/15)

Appellant, a state public defender, appealed her conviction and fine of $25 for criminal contempt. The record showed that on February 26, 2015, during the calling of a criminal motion calendar, appellant's cell phone began to vibrate. When appellant apologized, the trial court said, "We'll deal with Ms. Sprayberry" and opined that "the Obama White House [was] calling" to offer her "a position with the Federal Public Defender's Office paying a hundred and fifty thousand a year." The trial court then ordered bailiffs to "cut the thing off" and "put that thing outside somewhere."

After the conclusion of other business, the trial court returned to the matter of appellant's cell phone. As appellant repeated that "all I did was stop it from vibrating," the trial court interrupted her to say that on the same morning, in drug court the court had notified counsel that they would be fined $50.00 for any cell phone that disrupted the proceedings. As the prosecutor confirmed that this rule had been set that morning, appellant stated that the matter had not been discussed in drug court that morning and repeated that

her phone had only vibrated. The trial court then said that "since [appellant] had [the phone] on … vibrate," it would "reduce [the fine] to [$25]." When appellant protested that she didn't think that she "should get a fine at all," the prosecutor noted that the trial court had already "hit the gavel." When appellant again protested, the trial court noted that appellant "may be like me" in that "her mama or her daddy might have spoiled her" and then adjourned the proceedings. One minute later, appellant succeeded in reestablishing a record and explained that if she didn't keep her phone on vibrate mode, she would not be able to communicate with her office. The trial court responded that "[a]ll you got to do is pay your fine" and refused any further discussion, twice saying, "The best thing to do is not talk about it." On the same day, the trial court entered an order finding that appellant had allowed her telephone to ring during court and imposing a fine of $25.

The Court found that based on the record, the trial court did not afford appellant any meaningful opportunity to be heard. The trial court was conducting a motions hearing, not a trial, such that a short time could have been spent allowing her to offer an explanation to the court before it reached a judgment as to her contempt. The transcript also showed that the trial court repeatedly interrupted appellant as she attempted to explain herself, with the result that the question whether she had notice of the rule barring cell phones, which had been promulgated by the court only that morning, remained unexplored. Because this was a summary criminal contempt hearing, it was incumbent upon the court to afford appellant an opportunity to be heard on this issue. The trial court failed to provide appellant with such an opportunity, with the result that the judgment of contempt against was reversed.

Search & Seizure

Reyes v. State, A15A1498 (11/16/15)

Appellant was convicted of possession of cocaine and possession of heroin. He contended that the trial court erred in denying his motion to suppress. The evidence, briefly stated, showed that a trooper was working with Homeland Security, conducting surveillance in connection with an investigation into money laundering. The trooper saw a Jeep drive into a business parking lot and as he learned via radio from other officers, deliver a bag containing approximately $200,000 to a federal agent. The trooper then followed the Jeep through two counties. The Jeep drove in a manner that suggested it was trying to determine if it was being followed. The Jeep stopped while the vehicle's occupants went in and out of a restaurant. Another vehicle then pulled up and two suitcases were transferred from the other vehicle to the Jeep. The Jeep then headed back towards the county where it was first seen.

The trooper asked for the Jeep to be pulled over if the Jeep committed a traffic infraction. An officer then pulled the Jeep over after observing it drive outside its lane and turn without signaling. The officer then questioned appellant, the driver, and his passenger about their trip and the two gave inconsistent stories and responses that the trooper knew to be false from his personal observations. After 24 minutes, the officer issued appellant a warning citation, returned appellant's license to him, and gave appellant a form for consent to search the Jeep. In a conversation that lasted several more minutes, appellant asked questions about the consent form, expressed reservations because the Jeep did not belong to him, and ultimately refused to consent to a search of the Jeep. After appellant refused, the officer requested the K-9 officer who had arrived sometime earlier to perform a dog sniff of the vehicle. The dog alerted, the vehicle was searched, and the officers found heroin and cocaine in the suitcases.

The trial court found that the officers did not unreasonably extend the stop of the car or its occupants. In so doing, the trial court stated that it "does not find that the use of the canine *contemporaneously* with the traffic stop to conduct an open air search of the vehicle was in violation of the Defendant's rights." (Emphasis supplied). The court also found as a matter of fact that appellant and his passenger gave conflicting stories, that appellant indicated that he was driving a friend's car but declined to name the friend, and that appellant was nervous and shaking during the encounter.

Appellant did not contest the validity of the initial traffic stop. Rather, he contended that the officers detained him after the traffic stop was completed in order to perform the dog sniff and that the officers did not have reasonable suspicion of criminal activity to do so. The Court noted that the video showed, and the State conceded, that the dog sniff was performed after the completion of the traffic-violation stop was concluded and after several more minutes of attempting to get appellant to consent to a search of the Jeep. The dog sniff clearly prolonged the traffic-violation portion of the stop and therefore, the trial court's conclusion that the dog sniff occurred during the traffic stop was incorrect. The trial court relied on that finding and did not analyze whether the officers had reasonable suspicion of other criminal activity to justify either the initial stop or appellant's continued detention for the dog sniff.

Nevertheless, the Court stated, a stop may be justified based on reasonable suspicion of a separate violation of law from the basis given by the officer for the stop. And here, in addition to probable cause for failure to signal and maintain lane while driving, the officers may have had reasonable suspicion prior to stopping the Jeep of other illegal activity arising out of the collective knowledge of the officers who were in communication with each other both during the money laundering investigation and the subsequent events leading up to the stop. Thus, because the trial court erred by finding that the dog sniff occurred contemporaneously with the traffic stop and because the trial court did not make findings regarding appellant's possible involvement in events discovered during the money laundering investigation, the Court vacated both the trial court's order denying appellant's motion to suppress and the judgment of conviction and remand the case for further proceedings

Transcripts; Non-indigent Defendants

Walton v. State, A15A2217 (11/17/15)

Appellant was convicted of speeding and filed a timely notice of appeal from that conviction. Thereafter, the trial court denied her subsequent motion to require the official court reporter to transcribe all pre-trial and jury trial matters and provide her with a free transcript of the proceedings. This appeal concerned only that denial.

The Court noted that appellant was not indigent. Nevertheless, appellant contended, she was entitled to a free digital copy of the

trial transcript pursuant to Judicial Council of Georgia Rule 2.3 (A), effective January 1, 2015, which provides: "In all criminal cases, when a transcript is required or requested to be prepared, it shall be filed with the clerk of court immediately upon completion and certification. The court reporter shall notify the court, prosecutor, defense attorney(s), and/or self-represented defendants(s) of the date the transcript is filed with the clerk of court and provide each with a digital copy of the transcript at no charge. Once filed, the transcript is a public record (O.C.G.A. § 50-18-70), and copies may be provided at the rate determined by the clerk or by law as any other public record."

The Court noted that appellant's contention, if accepted, would shift the cost of transcripts from non-indigent criminal case defendants to the general public. But, the Court stated, "If that is the law, to quote Charles Dickens' Mr. Bumble, 'the law is a ass--a idiot.' But that is not the law." Instead, the Court found, O.C.G.A. § 15-14-5 provides in part: "[i]t shall be the duty of each court reporter to transcribe the evidence and other proceedings of which he has taken notes as provided by law whenever requested so to do by counsel for any party to such case and upon being paid the legal fees for such transcripts." The Judicial Council rule cannot trump this statute. Thus, if a non-indigent criminal defendant requests a transcript, the statute obligates a court reporter to prepare one, upon getting paid by the requesting party. Inasmuch as Judicial Council Rule 2.3 (A) cannot override that statute, the only reasonable interpretation of the Rule is that it reflects our modern digital age and provides for free digital copies of a transcript to parties once the requesting party pays for the initial transcript.

Armed Robbery; Sufficiency of the Evidence

Page v. State, A15A1256 (11/18/15)

Appellant was convicted of armed robbery. He contended that the evidence was insufficient to support his conviction. The Court agreed and reversed. The evidence showed that the victim was in the basement of his home when he heard someone run upstairs toward the bedrooms. The victim expected his adult daughter to return home that day, so he was not surprised at the sound and went upstairs to meet her. Instead of his daughter, the victim came upon appellant, who was in the victim's bedroom, coming out of a closet and walking toward the bathroom. Appellant was holding the victim's wife's jewelry box in one hand and carrying the victim's gun in the other hand. Appellant pointed the gun at the victim and told him to get out, at which point the victim first fled to another bedroom and then back to the basement and outside. From a neighbor's house, the victim called 911, and when police arrived at the scene, the victim saw pieces of jewelry scattered in the house along the route appellant would have taken from the bedroom to escape via the kitchen.

Appellant was charged with committing armed robbery of the victim by taking the victim's firearm and jewelry box "by use of an offensive weapon … a handgun." Citing *Fox v. State*, 289 Ga. 34, 35-36(1)(a)(2011) and *Hicks v. State*, 232 Ga. 393, 402-403 (1974) the Court found that appellant had exercised control over the items (the gun and the jewelry box) *prior* to exerting any force against the victim, who appeared after appellant had obtained the items. Moreover, the Court found, neither its review of the record nor the State's brief revealed evidence in the record to exclude the hypothesis that appellant left the scene after confronting the victim without taking additional property. Accordingly, appellant's conviction for armed robbery was reversed.

Search & Seizure

Watts v. State, A15A0796 (11/20/15)

Appellant was convicted of VGCSA, and a weapons offense. He contended that the trial court erred in denying his motion to suppress. The Court agreed.

The evidence, briefly stated, showed that appellant was one of three passengers in a vehicle driven by Gay. An officer pulled Gay over for a tag violation. After determining that Gay was driving with a revoked license, but appellant's license was valid, the officers arrested Gay. The officer then turned his attention to the two female passengers. While questioning the women, the officer asked for the assistance of a drug dog because Gay refused consent to search his vehicle. Two minutes after confirming that legal status and identity of the women, the drug dog arrived. Two minutes after that, and about 15 minutes after Gay's arrest, the drug dog began a free-air sniff of the vehicle. The dog alerted and appellant was subsequently arrested for the drugs found in the vehicle.

For purposes of the appeal, the Court first assumed that the traffic stop was not complete until the police had ascertained the identity of and run a warrant check on each of Gay's passengers. Nevertheless, citing *Rodriguez v. United States*, ___ U. S. ___ (II)(135 SCt 1609, 1615-1616, 191 LE2d 492)(2015) and *State v. Allen*, ___ Ga. ___ (2)(c), 2015 Ga. LEXIS 789 (2015), the Court found that the four-minute extension of the traffic stop at issue for the purpose of allowing the drug dog to perform a free-air sniff around Gay's car violated appellant's Fourth Amendment rights.

The State, however, argued that the further detention of appellant was warranted because the officer had reasonable, articulable suspicion that the driver was engaged in other illegal activity. Specifically, the State relied on five observations by the officer to support its claim: 1) the length of time it took Gay to pull over after the officer activated his blue lights; 2) appellant and Gay gave somewhat conflicting statements about their relationship to one another; 3) Gay had "cotton mouth" and both Gay and appellant had bloodshot eyes; 4) Gay and appellant were smoking cigars; and 5) appellant appeared nervous.

The Court found that as a matter of law, the allegedly conflicting statements made by appellant and Gay provides no basis for suspecting illegal activity, even if viewed in conjunction with the remaining four facts. Nevertheless, the Court stated that it was unable to address whether the State had proven the existence of a reasonable, articulable suspicion of criminal activity sufficient to support the extension of the traffic stop because the trial court made no findings in this regard. The Court therefore vacated the order denying the motion to suppress and the judgment of conviction and remanded the case to the trial court to determine what credit and weight to give the officer's testimony and to determine whether that testimony, when viewed in conjunction with the video recordings of the traffic stop, supported an extension of the traffic stop for the purpose of conducting a drug investigation.

Character Evidence; O.C.G.A. § 24-6-608

Gaskin v. State, A15A0472 (11/20/15)

Appellant was convicted of two counts of child molestation against a 15 year old. After the State rested, appellant called the victim's mother to testify about his truthfulness. Defense counsel asked whether she was aware of appellant's reputation in the community for truthfulness, and she replied, "Yes." Appellant then asked whether knowing appellant's reputation for truthfulness in the community, she would believe testimony that appellant gave under oath. The victim's mother again replied in the affirmative. On cross-examination, the prosecutor asked her if her opinion of appellant's reputation for truthfulness would change if she was aware that he had been arrested "on a couple of occasions." She replied that her opinion would not change and that she was aware of his prior arrests. At that point, appellant's counsel objected to any questions about the specific arrests, but after a bench conference, the trial court stated that the prosecutor could ask about "the three arrests that you know about over the defendant's objection." The prosecution then asked the victim's mother if she was aware of four prior arrests: for possession, manufacturing, or distribution of marijuana; simple battery; criminal damage to property; and obstruction of a person making a 911 call.

The trial court at the motion for new trial found that the questions posed by the prosecutor were in error, but that the admission was harmless and denied the motion for new trial. The Court stated that O.C.G.A. § 24-6-608 provides very specific, limited methods for attacking or supporting the credibility of a witness by evidence in the form of opinion or reputation. The Court noted that in interpreting Fed. R. Evid. 608, the federal provision comparable to O.C.G.A. § 24-6-608, the federal courts have found that the evidence must involve offenses or acts probative of untruthfulness including such acts as forgery, perjury, and fraud. However, the government may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable. Therefore, for example, the Eleventh Circuit has found that Fed. R. Evid. 608 (b) does not allow the admission of evidence of prior convictions or prior instances of drug use.

Applying this authority, the Court agree with the trial court that it was an abuse of discretion to allow the prosecution to question the victim's mother regarding appellant's prior arrests for marijuana possession, simple battery, criminal damage to property, and obstruction of a person making a 911 call, as none of these arrests related to offenses involving truthfulness. Moreover, the victim's mother had already testified that she was aware of appellant's prior arrests and that they did not change her opinion of his character. Thus, the Court concluded, the State's questions regarding the specific crimes involved in the arrests constituted an improper attempt to use impeachment as a guise for presenting otherwise inadmissible evidence to the jury.

The Court further found that it could not agree with the trial court that the admission of the evidence was harmless. Instead, the Court found, this was a classic example of a "he said, she said" scenario. The State presented no medical evidence to support the charges, instead relying primarily upon the victim's statements to others. Therefore, the Court could not say that the fact that appellant had been arrested for four prior offenses did not enter into the jury's evaluation of his testimony and his credibility, and thus, that it was not highly probable that this evidence did not contribute to the jury's verdict.