Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 9, 2015

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THIS WEEK:

Jury Charges; Consent

Madison v. State, A14A1402 (11/20/14)

Appellant was convicted of child molestation, two counts of sexual battery, and aggravated sexual battery. The record showed that appellant's child molestation conviction arose out of his conduct in 2006 when the victim, appellant's adopted step-daughter, was 15 years old. His sexual battery and aggravated sexual battery convictions related to his actions in 2009, when the victim was 18 years old.

Appellant argued that the trial court erred in its charge to the jury on consent. The trial court charged the jury as follows: "I further charge you, Ladies & Gentleman, a female under the age of sixteen years is legally incapable of giving consent. Force may be proven by direct or circumstantial evidence. Lack of resistance, induced by fear, is not legally cognizable consent, but is force. *Force may be inferred as evidence of intimidation arising from the familial relationship*." (Emphasis supplied.) Appellant argued that the last sentence was improper and that the trial court should not have charged on force generally, because force is not an element of either child molestation or sexual battery and that no evidence of intimidation was presented at trial to support such a charge.

The Court stated that in a case in which a lack of consent by the victim is an element of the crime, a trial court may properly charge the jury that consent induced by force, fear, or intimidation does not amount to consent in law. Likewise, it also proper to charge that lack of resistance induced by fear is not consent but constitutes force. The Court noted that in the context of analyzing the sufficiency of the evidence in rape and sodomy cases, both of which require the State to establish force as a separate element of the crime, the Court has stated that force may be inferred by evidence of intimidation arising from the familial relationship. But, the Court found, none of those cases involved a jury charge, and "our research has revealed no Georgia cases addressing the propriety of such a charge in any case, much less a sexual battery case in which force is not an element of the crime." Therefore, the Court found, a charge on force inferred by evidence of intimidation arising from the familial relationship is not appropriate in a sexual battery case involving a victim who is over the age of 18. Moreover, the trial court's charge that "[f]orce may be inferred as evidence of intimidation arising from the familial relationship," in the absence of an accompanying charge explaining that "mental coercion, such as intimidation, shows force if the defendant's words or acts were sufficient to instill a reasonable apprehension of bodily harm, violence, or other dangerous consequences to herself or others," could have confused the jury and resulted in a finding of intimidation based upon the existence of the familial relationship alone. Additionally, the State submitted no evidence showing "words or acts" on the part of appellant sufficient to instill a reasonable apprehension of bodily

harm, violence, or dangerous consequences to the victim or others. The trial court therefore erred by including the last sentence of the charge. Finally, the Court found, this error was not harmless because the issue of the victim's consent went to the heart of appellant's defense. Therefore, the Court reversed his convictions for sexual battery and aggravated sexual battery.

Search & Seizure; Prolonged Detention

Matthews v. State, A14A1200 (11/21/14)

Appellant was convicted of trafficking in cocaine, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon. He argued that the trial court erred in denying his motion to suppress. The Court agreed and reversed. The evidence showed that appellant was stopped on I-20 for a tag violation. The officer questioned appellant about his travel and itinerary and then gave appellant his license and other documents back and handed him a warning ticket. Although the officer testified that "the traffic stop was over at that point," based on the information received by the officer during his conversation with appellant while conducting his investigation, he continued to detain him for a few minutes more until a drug dog arrived. The dog alerted to the car and the cocaine was discovered.

The Court stated that a police officer may lengthen the detention for further questioning beyond that related to the initial stop if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring. Here, the officer stated that he believed that he had developed reasonable suspicion to detain appellant beyond the conclusion of the investigation that warranted the stop because, among other things, the officer observed that appellant was extremely nervous, was driving a borrowed vehicle, and was traveling out of state but had no luggage. But, the Court found, this did not provide a particularized and objective basis for suspecting that appellant was, or was about to be, engaged in criminal activity. And although I-20, like any other route, may be traveled upon to transport illegal substances, many law-abiding citizens routinely utilize that major thoroughfare for legal purposes, such as travel to school and work; there was no testimony that appellant's destination, like the city of his origination, was a known drug source. Moreover, as appellant told the officer that he had visited a cousin in Atlanta, appellant had not been "away from family," and the officer's contrary conclusion was not supported by the evidence.

The evidence also showed that when appellant was explaining the absence of luggage in the vehicle, he initially told the officer that he had worn the same clothes for three days, but he later stated that he had left his clothes in Atlanta. But, the Court found, such "[m]eaningless inconsistencies in answers to police questions . . . do not give rise to reasonable, articulable suspicion." Even if appellant did wear the same clothes for three days, or make a decision (that the officer believed was unwise) to leave his clothes in Atlanta with a relative; and even if appellant's statements to the officer about his clothing were inconsistent; that behavior and those statements did not constitute either illegal or sufficiently unusual conduct that provided any objectively reasonable basis for suspecting that appellant was, or was about to be, engaged in criminal activity. Accordingly, the officer was not authorized to detain appellant beyond the conclusion of the investigation of the traffic infraction. Therefore, the Court concluded, under the totality of the circumstances, the evidence seized in the ensuing search of appellant's vehicle should have been suppressed by the trial court, and appellant's conviction, which was based on the illegally seized contraband, must be reversed.

Search & Seizure; Child Pornography

Shirley v. State, A14A0979 (11/21/14)

Appellant was indicted on 17 counts of sexual exploitation of children. The record showed that an officer applied for and obtained a search warrant based on information received from the FBI that images of child pornography had been accessed from a German website by a computer associated with an IP address registered to appellant's home address. Appellant contended that the trial court erred in denying his motion to suppress and the Court granted him an interlocutory appeal.

Appellant argued that the police officer's affidavit and application were legally insufficient to establish probable cause to show that the images in question were illegal child pornography. Specifically, he contended that the magistrate relied on the officer's conclusion that the images showed child pornography without using independent facts to evaluate that conclusion. He contended that the affidavit did not describe the images and that there was no indication whether the officer viewed the images. A divided Court disagreed.

The Court noted that "Georgia has so far not directly addressed the issue of what type of information provides a substantial basis for granting a warrant in the context of child pornography." But, the Court found, there is no requirement in our law that a judge who reviews a search warrant application must actually view the images that allegedly show child pornography. Also, while ideally an affidavit would describe the images, federal appellate courts have held that an affidavit using the generalized description "child pornography" may offer sufficient indicia of probable cause to issue a warrant in that the meaning of the term "child pornography" and its illegality were sufficiently conveyed so that the judge understood what type of evidence was required.

And here, the Court found, the magistrate was informed of the circumstances supporting the officer's conclusions. Thus, the affidavit stated that the officer relied on information from the FBI which in turn relied upon a tip from German authorities. Also, the internet service provider information showed that that address registered to the IP address was that of appellant. Accordingly, the Court concluded, while the officer could have done a more thorough job investigating the information he received, he was entitled to credit the FBI's report and considering the totality of the circumstances, the agent's affidavit provided sufficient probable cause for the warrant.

Finally, in so holding, the Court rejected appellant's claim that the 19 month delay between when the images were accessed and the application for the search warrant meant the information was state, thus negating probable cause. The Court stated that even supposing that the images were viewed and cached, rather than downloaded, they still would have been retrievable for a time. Thus, based on the character of the evidence sought, and the officer's affidavit indicating the

propensity of those using child pornography to store, save, and hide their information, the warrant was not based on stale information.

Obstruction of an Officer; Speech Alone Sufficient

Johnson v. State, A14A1302 (11/21/14)

Appellant was convicted of misdemeanor obstruction. The evidence showed that while the officers were conducting a search warrant at a residence, appellant came over and was verbally abusive. An officer told him three times to calm down before arresting him for obstruction. Appellant contended that the evidence was insufficient to support his conviction because the State failed to prove that his "speech rose to the level of obstruction as defined by law." The evidence established that he never physically obstructed the officer, and therefore, he argued, his words in and of themselves could not reasonably be considered obstruction. The Court disagreed.

The Court stated that speech alone can constitute obstruction and here, a rational trier of fact could have concluded from the evidence presented by the State that appellant knowingly and willingly hindered the officer in the lawful discharge of his official duties. In so holding, the Court rejected appellant's argument that speech alone cannot constitute obstruction unless its content could reasonably be interpreted to constitute a threat of violence to the officer, because "a mere verbal exchange with an officer" unaccompanied by threats of violence is not obstruction.