

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 13, 2015

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THIS WEEK:

- **Sex Offender Registration; Petitions for Removal**
- **Guilty Pleas; Motions to Withdraw**
- **Rebuttal Evidence**
- **Probation Revocation; Double Jeopardy**

Sex Offender Registration; Petitions for Removal

Hawkins v. State, A14A2359 (1/23/15)

The trial court denied appellant's petition for removal from the sex offender registration requirements. The record showed that in 1991, appellant pled to attempted sexual battery in Florida. In Oct. 2013, he filed a petition for removal from sex offender registration requirements. The trial court dismissed the petition for failure to file a civil case initiation form pursuant to O.C.G.A. § 9-11-13(b). On December 31, 2013, the trial court denied appellant's subsequent motion to set aside the dismissal order. In January 2014, appellant filed a second petition for removal from sex offender registration requirements. Without addressing the merits of the case, the trial court dismissed the second petition pursuant to O.C.G.A. § 42-1-19(b)(3), which provides that "[i]f a petition for release is denied, another petition for release shall not be filed within a period of two years from the date of the final order on a previous petition."

Appellant argued that O.C.G.A. § 42-1-19(b)(3) did not apply and the Court agreed. O.C.G.A. § 42-1-19(b)(3) bars a person on the sex offender registry from filing a second petition for release from

registration requirements within two years from a final order on a previous petition, if the first petition for relief was denied. Here, Appellant's first petition was not denied. Instead, the trial court apparently treated the disposition of the first petition as a voluntary dismissal or, alternatively, a dismissal for failure to prosecute, neither of which operated as an adjudication on the merits of the first petition. Denial on the merits and dismissal are distinct dispositions. Thus, the trial court erred by dismissing appellant's second petition for release from sex offender registration requirements, and the Court vacated the trial court's order and remanded the case for adjudication on the merits.

Guilty Pleas; Motions to Withdraw

Barton v. State, A14A2006 (2/3/15)

Appellant appealed from the denial of his motion to withdraw his guilty plea based on lack of jurisdiction. The record showed that on November 1, 2013, the last day of the term, appellant entered a negotiated guilty plea to one count of sexual battery and one count of sexual battery against a child under the age of sixteen. The trial court entered a written sentence that same day. Appellant thereafter filed his motion to withdraw his plea six months later and well after the term had ended. Relying on *State v. Germany*, 246 Ga. 455-456 (1) (1980), appellant contended that the trial court retained jurisdiction because the trial court failed to orally announce his sentence at the plea hearing.

The Court stated that any motion to withdraw a guilty plea must be made during the same term of court in which the defendant

was sentenced. After that time, the trial court loses jurisdiction over the plea and therefore cannot order its withdrawal. The Court found that *Germany* does not grant a defendant the right to withdraw his guilty plea where the trial court simply neglects to pronounce orally the sentence at the plea hearing but does enter a written judgment of sentence. In such a case, a defendant loses his absolute right to withdraw his guilty plea at the time the written sentence is filed and any motion to withdraw the plea must be made in the same term of court in which the sentence was filed. Accordingly, because the record showed that the trial court accepted appellant's guilty plea and sentenced him on November 1, 2013, the trial court correctly found that it lacked jurisdiction over appellant's motion to withdraw his plea. Appellant's only remedy was to file a petition for writ of habeas corpus.

Rebuttal Evidence

Galvan v. State, A14A1758 (2/4/15)

Appellant was convicted of multiple counts of aggravated child molestation and child molestation. The record showed that at trial, the victim recanted her statements and testified that she fabricated it all because she was angry at appellant. Her mother and sister also testified that the victim told them that she had lied. According to the mother and sister, they and the victim had been ready to explain to the police that the allegations had been fabricated, but the police had not given them an opportunity to do so. The prosecutor was then called a former ADA who had the case initially to testify in rebuttal.

Appellant contended that the trial court erred in allowing the former ADA to testify to matters that went beyond rebuttal. The Court disagreed. A trial court's rulings concerning the scope of rebuttal testimony are subject to review only for an abuse of discretion. Here, the former ADA's testimony regarding his conversations with the victim and her family was properly introduced to impeach the victim's recantation with her prior inconsistent statement to the attorney, and to impeach the testimony of the mother and sister that they and the victim had been ready to explain that the allegations had been fabricated, but had not been given an opportunity to do so. Furthermore, the Court stated, even if the attorney's testimony at times went beyond

rebuttal of the victim and her mother and sister's testimony, it is well-established that a trial court may exercise its discretion to permit the State to introduce evidence after the defendant has closed his testimony, even if it was not strictly in rebuttal and could have been introduced during the State's case-in-chief. In other words, a trial court has discretion to allow relevant evidence even if such evidence tends to bolster the State's case more than to directly impeach defense evidence. Accordingly, the Court found no abuse of discretion by the trial court in this case.

Probation Revocation; Double Jeopardy

Harrison v. State, A14A2313 (1/30/15)

Appellant was convicted in January of 2009 for child molestation and sentenced to 15 years with 5 to serve. In 2012, the trial court amended its sentence so that the conditions of probation included the general condition that appellant violate no laws of any governmental unit. In 2014, the State filed a petition to revoke appellant's probation alleging that he committed felony theft by taking. The State later added an addendum to the petition alleging burglary. At the hearing, appellant, through his counsel, admitted to the felony theft by taking, but denied the burglary. During the hearing, the State proved that appellant took two trailers, one of which was valued at \$200 and the other at \$400. The trial court then revoked appellant's probation for 8 years. The Court of Appeals granted appellant a discretionary appeal.

Appellant contended that the trial court erred in revoking his probation for 8 years. The Court agreed. Pursuant to O.C.G.A. § 42-8-34.1(d), "[i]f the violation of probation . . . alleged and proven by a preponderance of the evidence or the defendant's admission is the commission of a felony offense, the court may revoke no more than the lesser of the balance of probation or the maximum time of the sentence authorized to be imposed for the felony offense constituting the violation of the probation." The Court noted that despite the fact that the State proved only misdemeanor theft by taking, appellant admitted to felony theft by taking. Consistent with the rule of lenity, the lowest range of punishment for felony theft by taking set forth in O.C.G.A. §

16-8-12(a)(1)(C) should apply. The maximum felony sentence under O.C.G.A. § 16-8-12(a)(1)(C) is five years. Therefore, under O.C.G.A. § 42-8-34.1(d), the trial court was permitted to revoke the lesser of the balance of appellant's probation or five years. The trial court therefore erred in revoking appellant's probation in full for a period in excess of eight years.

Appellant also argued that the trial court violated his right against double jeopardy by amending his conditions to probation to add, three years after his sentence, that he not violate any laws of any governmental unit. The Court disagreed. The Court stated that a condition of probation requiring compliance with the law is rehabilitative, not punitive, in nature. Such a condition simply encourages lawful conduct and requires of a defendant only what is expected of all citizens. Thus, even assuming that appellant had a legitimate expectation of finality in his sentence, the addition of the general condition that he not violate the laws of any governmental unit did not constitute an increase in punishment in violation of double jeopardy principles.