

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 17, 2012

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THIS WEEK:

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Habeas Corpus; Effective Assistance of Counsel

Collier v. State, S11A1306 (02/06/12)

Appellant filed a petition for habeas relief asserting, among other things, that he was denied effective assistance of appellate counsel. The habeas court scheduled a hearing for May 12, 2010, per appellant's request. On that date, the court entered an order stating that appellant did not appear at the call of the case and did not contact the court to explain his absence. The court denied relief on the claim for ineffective assistance of appellate counsel for failure to prosecute.

The Court granted appellant's application for certificate of probable cause to assess the propriety of the habeas court's ruling. The ineffective assistance of appellate counsel claim could not be resolved by looking solely at the face of the petition. When defendant claims ineffective assistance of appellate counsel for failure to assert an error on appeal, the ha-

beas court must determine whether appellate counsel's decision was a reasonable tactical move which any competent attorney in the same situation would have made and whether there was a reasonable probability that, but for appellate counsel's errors, the outcome of the appeal would have been different. Thus, the habeas court was required to conduct a hearing to resolve this claim. OCGA § 9-14-47. Although it was not necessary for appellant to be at this hearing, "[h]is failure to arrange to be present at the hearing set by the habeas court [made him] subject . . . to the same sanctions that could be imposed against any other petitioner for civil relief, including a *dismissal* for failure to prosecute under OCGA § 9-11-41 (b)." Pursuant to OCGA § 9-11-41 (b), an action may be dismissed "[f]or failure of the plaintiff to prosecute" his or her action, but the statute makes clear that "[a] dismissal for failure of the plaintiff to prosecute does not operate as an adjudication upon the merits." The Court noted that the habeas court purported to deny the claim solely based on appellant's failure to prosecute it. While the habeas court was authorized to either deny the claim on the merits following a hearing or dismiss it without prejudice based on appellant's failure to prosecute it, it was not authorized to deny appellant's claim on the merits based on his failure to prosecute it. The Court therefore reversed the decision of the habeas court to the extent that it denied appellant's ineffective assistance of appellate counsel claim on the merits.

Similar Transactions

Newton v. State, A11A2141 (02/03/12)

Following a jury trial, appellant was convicted of criminal attempt to manufacture

methamphetamine. Appellant argued that the court erred by allowing the State to introduce his prior drug conviction as similar transaction evidence. The trial court ruled that appellant's prior drug conviction was admissible for the purpose of showing appellant's bent of mind and his course of conduct.

Appellant argued that the trial court abused its discretion in admitting evidence of his prior guilty plea and conviction because (a) introduction of similar transaction evidence for the purpose of showing "bent of mind" was improper; (b) the probative value of the similar transaction evidence did not outweigh its prejudicial effect; and (c) the similar transaction evidence was not necessary for the State to prove its case. Relying solely upon the new Georgia Rules of Evidence, appellant asserted "that 'bent of mind' evidence is wholly prejudicial to the defendant, rarely is relevant to the facts of an underlying case, and is basically admitted for the purpose of showing that the defendant is a criminal." However, the Court found, the new Georgia Rules of Evidence do not go into effect until January 1, 2013. At the time of the court's finding, course of conduct and bent of mind were appropriate purposes for which similar transaction evidence could be introduced.

Thus, based on appellant's position that he was not involved with the methamphetamine laboratory and the similarity of his prior crime, the Court discerned no abuse of the trial court's discretion in admitting the evidence of appellant's prior attempts to manufacture methamphetamine for the purpose of showing his bent of mind and course of conduct in this case. The trial court was also authorized to find that the probative value of the similar transaction evidence outweighed its prejudicial effect. Appellant's prior drug conviction was relevant and admissible to prove his bent of mind and course of conduct.

Appellant contended that the court erred in admitting similar transaction evidence that was not "needed by the State," asserting that the State's case against him "was very solid and the State did not need this similar transaction evidence in order to present sufficient evidence to support a conviction." The Court found that appellant disclaimed any involvement with or knowledge of the methamphetamine laboratory contained in the outbuilding and thus, the State needed the evidence of his prior conviction to show his

bent of mind and course of conduct with respect to the methamphetamine offense at issue.

Obstruction; Search & Seizure

Walker v. State, A11A1640 (02/09/12)

Appellant was convicted of felony obstruction of an officer for head-butting a deputy. He argued that the trial court erred in denying his motion to suppress. The evidence showed that a deputy went to serve a criminal trespass warning on appellant at an apartment complex. A scuffle arose from when the officer took hold of appellant's arm as appellant attempted to leave the apartment where he was visiting a female resident. According to appellant, the deputy unconstitutionally detained him, tainting all evidence gathered from that point onward. Specifically, he contended that when the deputy first held onto his arm to prevent him from leaving the apartment, their encounter escalated to a second-tier detention requiring a showing of reasonable suspicion of criminal activity. Among other things, appellant argued that there was no showing of reasonable suspicion because the deputy only had a generalized suspicion that he had previously been involved in a "domestic disturbance" without any knowledge that it was criminal in nature rather than simply a heated verbal argument.

The Court agreed that appellant's encounter escalated to a second-tier detention when the deputy held onto his arm in an attempt to prevent him from leaving the apartment before showing his identification. Further the Court stated that it may well be that the deputy did not have sufficient particularized information communicated to him regarding the prior "domestic disturbance" involving appellant to create reasonable suspicion. Nevertheless, premitting whether appellant's initial detention by the deputy was unlawful, the Court concluded that testimony about appellant's conduct after that allegedly illegal detention was not "fruit of the poisonous tree."

When examining whether evidence is inadmissible as fruit of an illegal detention, the Court asked whether the evidence was obtained "by exploitation of [the prior] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *State v. Nesbitt*, 305 Ga. App. 28, (2010). A defendant's commission of a new crime in the presence of law enforcement is an intervening act of free

will that purges the taint of any prior illegality.

Appellant's violent reaction in response to the deputy merely taking hold of his arm at the doorway of the apartment constituted an intervening act that purged the taint of any illegal detention. The record showed that in response to the deputy simply holding onto his arm at the doorway of the apartment, appellant aggressively "latched" onto the deputy and began fighting him, to the point that they ended up on the ground "scuffling" with one another, and a staff member from the apartment complex had to come to the assistance of the officer. Thus, the court did not err in admitting into evidence the officer's testimony about appellant's conduct after his allegedly unlawful detention at the doorway of the apartment, and, therefore, did not err in denying appellant's motion to suppress.

Batson

Raines v. State, A11A1664 (02/03/12)

Appellant asserted that the State used its peremptory strikes in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U. S. 79. Appellant was an African American, and 15 of the 36 members of the jury pool were African American. After voir dire, the State struck eight jurors, all of whom were African American, and appellant struck nine jurors, all of whom were white, leaving a jury of four African Americans and eight whites, with an alternate who was white. Appellant objected to the jury panel, contending that the State exercised its peremptory strikes in a racially discriminatory manner. The trial court agreed that appellant presented a prima facie case of discrimination, and the burden shifted to the State to explain why its strikes were racially neutral. The State explained the reasons for striking each juror, and the court concluded that the State gave sufficient race-neutral reasons for all of its strikes.

Upon review, the Court agreed with the trial court that the State gave sufficiently race-neutral reasons for its jury strikes. Appellant accepted at trial the State's reason for striking one of the jurors, who had not admitted on voir dire that he had two felony convictions and numerous misdemeanor convictions. The State struck one juror because he expressed concern that he would have a difficult time being an impartial juror. The next juror was struck because she regularly watched CSI

on television and the prosecutor had been involved in a case that ended with a mistrial because a juror who was a CSI fan felt that the scientific evidence presented did not measure up to “CSI standards.” Another struck juror had served on a jury that was unable to reach a verdict, two jurors had known appellant all of their lives, and another juror had gone to school with him. Finally, the last juror struck had a prior felony conviction. The Court affirmed that these reasons were racially neutral and that the trial court did not err in concluding that defendant failed to carry his burden of persuasion regarding a racially discriminatory intent in making the jury strikes.

Search & Seizure, Miranda

State v. Hammond, A11A1724 (02/03/12)

The State appealed from the grant of a motion to suppress. The evidence showed that Hammond was riding his bicycle through downtown Atlanta close to midnight, in an area known for drug activity. An officer observed Hammond traveling in the wrong direction down a one-way street and riding without a headlight in violation of OCGA § 40-6-296. The officer stopped Hammond to inquire about the headlight and his direction of travel, and to request identification. The officer then asked for Hammond’s age, to which he responded that he was 52; however, according to the date of birth provided, Hammond was actually 53. Additionally, the officer observed that Hammond was abnormally nervous and “fiddling” with something in his pocket, and thus, believed that Hammond was under the influence of drugs.

The officer asked Hammond whether he was in possession of anything that the officer “needed to know about.” The officer explained that he would not arrest Hammond if he merely had a crack pipe because “everybody out here has a crack pipe.” Hammond responded that he did have a crack pipe and handed it over to the officer. The officer then asked Hammond if he was in possession of crack, and Hammond hesitated before responding in the affirmative. Upon hearing this, the officer told Hammond that the two of them were “going to talk about this, but I have to detain you right now,” and he attempted to place Hammond in handcuffs. As this transpired, Hammond reached into his pocket and discarded a pill bottle containing what was later shown to be eight pieces of

crack cocaine before grabbing for the officer’s gun and struggling. The scuffle between the officer and Hammond escalated and continued until backup arrived, when Hammond was finally subdued and fully handcuffed. Hammond filed a motion to suppress “all evidence resulting from the police officers’ search and seizure . . .” The Court agreed with the trial court that Hammond was subjected to a second tier *Terry*-type investigative detention, but found that Hammond was not “in custody” for purposes of *Miranda* .

As to Hammond’s detention, the officer observed Hammond traveling in the wrong direction on a one-way street while riding a bicycle without the required headlight, providing probable cause to initiate a stop. After briefly questioning Hammond about the bicycle infractions and inquiring as to his identification, the officer asked Hammond whether he possessed drug paraphernalia, because Hammond “was acting very nervous” and “seem[ed] high.” Additionally, the officer stopped Hammond late at night in an area known for high drug activity, and observed that Hammond acted “above average nervous” and fidgeted with an object in his pocket. The Court thus found that Hammond was detained for a reasonable time to investigate in conjunction with the valid stop, which included a check of Hammond’s name and date of birth. Having determined that Hammond was lawfully detained, the Court next resolved whether Hammond was nevertheless “in custody” for purposes of *Miranda* warnings which were never read to him during the encounter.

The Court held that since the officer informed Hammond that he would not be arrested if he merely possessed a crack pipe, no reasonable person, having been told that he or she would *not* be arrested could believe that he or she was *currently* in custody. Thus, Hammond was not “in custody” for purposes of *Miranda* and the trial court erred in finding that all the evidence should be suppressed.

Search & Seizure; No-knock Warrants

State v. Barnett, A11A1755 (02/07/12)

The State appealed from the grant of a motion to suppress. The evidence showed that a narcotics agent obtained a “no-knock” warrant to search a house. In the affidavit in support of the warrant, he stated that he searched

the trash receptacle on the curb in front of the residence and found marijuana, “blunt” wrappers, and rolling papers containing marijuana residue. In support of the “no-knock” provision of the warrant, the agent stated: “It has been the experience of this affiant that subjects package there [sic] illegal narcotics in ways to be easily destroyed. It has also been the experience of this affiant that subjects often possess weapons to protect there [sic] illegal narcotics. To save the illegal narcotics from being destroyed and for the safety of the officers involved the affiant would ask for a No-Knock Provision to be added to the search warrant. Based on investigation and background information from the affiant, a search warrant is requested for the above address.”

The no-knock warrant was executed and marijuana was found on the premises. The return on the warrant did not show that any firearm was discovered. Defendants were charged with misdemeanor possession of less than one ounce of marijuana. The trial court granted their motion to suppress, finding that the presence of illegal drugs alone was insufficient to support a no-knock provision, that the information regarding a firearm was stale, and that no exigent circumstances justified a no-knock search.

The Court found that the fact that the warrant was issued in a felony drug investigation, standing alone, was insufficient to support a “no knock” provision and an affidavit based on the general ease of destruction of drug evidence and an officer’s prior experience is insufficient to support a no-knock provision. An invalid no-knock provision will render the execution of the warrant illegal and support the trial court’s grant of a motion to suppress.

The affidavit supported the request for a no-knock warrant with “boilerplate” language based on the agent’s general experience that drug evidence was likely to be destroyed and that drug suspects often possess weapons. While the affidavit stated elsewhere that a firearm was observed by a school social worker at the residence, that information was received over five months earlier. In addition, the agent acknowledged that he had the residence under surveillance from March until August of 2010, but no firearm was observed during that time. The Court held that a single report of the presence of a firearm over five months before the warrant issued, uncorroborated despite continued surveillance and investigation

during that time, was stale. Furthermore, no evidence was presented at the hearing of any exigent circumstances; in fact, the witnesses did not testify at all regarding the execution of the warrant. Therefore, the trial court properly granted the motion to suppress.

DUI, Implied Consent

State v. Sauls, A11A1859 (02/08/12)

The State appealed from the trial court's grant of Sauls's motion to suppress evidence of his refusal to submit to State-administered chemical testing following his arrest for DUI. The trial court granted the motion because the arresting officer omitted the portion of the implied consent notice informing Sauls that his refusal to submit to testing could be offered as evidence against him at trial. The Court reversed the trial court's decision.

The facts briefly stated are as follows: An officer received a report about a driver driving all over the road, located the vehicle, executed a traffic stop, administered several field sobriety tests and arrested Sauls for driving under the influence to the extent he was a less-safe driver, open container, and driving with a suspended license. After placing Sauls under arrest, the officer began reading to Sauls the implied consent notice from his "Implied Consent" card. A video recording of the stop revealed, and the parties did not dispute, that the officer omitted the line of the notice informing Sauls that his refusal to submit to testing could be used against him at trial. See OCGA § 40-5-67.1 (b) (2). The officer stated that he was not aware at the time he read the notice that he omitted this line and was only made aware of the omission two days before the hearing on the motion to suppress. The trial court concluded that the implied consent notice read to Sauls was incomplete and therefore the substance of the notice was materially altered. The court ruled that because Sauls was not properly informed of his implied consent rights, his failure to submit to testing must be suppressed.

The Court found no Georgia precedent or statutory provision explicitly addressing the effect of the failure to inform a DUI arrestee that such a refusal could be used against him at trial. The Court concluded that due process does not require that the arresting officer inform the driver of all the consequences of refusing to submit to testing because the officer has made it clear that refusing the test was

not a safe harbor, free of adverse consequences. Thus, the trial court erred in suppressing the evidence of Sauls' refusal to submit to chemical testing.

Possession of a Knife during the Commission of a Felony

Brown v. State, A11A2373 (02/03/12)

Appellant was convicted of aggravated assault and possession of a knife during the commission of a felony. Construed in favor of the trial judge's findings of facts, the evidence showed that appellant was at a bar and became involved in a verbal altercation with another bar patron. Appellant was drinking heavily, "yelling and screaming," and the bar manager asked him to leave. Appellant left, but threatened to return. When he came back about ten to twenty minutes later, the manager saw him reach into his back pocket and retrieve a folding knife. The manager testified, "I thought he was gonna stick me." The manager again asked appellant to leave, but he refused and threatened to "get" the other patron. When appellant lunged toward the patron, the manager wrestled appellant for the knife. During the struggle with appellant, the manager received a cut on his finger. The State conceded that the evidence was insufficient to convict appellant of possession of a knife during the commission of a felony based upon the length of the blade of the knife. Indeed, the length of the knife's blade was less than three inches long. OCGA § 16-11-106 (b) (1) pertinently provides: "(b) Any person who shall have on or within arm's reach of his or her person a . . . knife having a blade of three or more inches in length during the commission of, or the attempt to commit: (1) [a]ny crime against or involving the person of another; . . . and which crime is a felony, commits a felony. . . ." Thus, the Court reversed the conviction for possession of a knife during the commission of a felony.

Cross-Examination

Salazar v. State, A11A2118 (02/09/2012)

Appellant was convicted of aggravated stalking. She contended that the trial court erred in restricting her cross-examination of the victim, her husband, regarding his immigration status, which she argued would have shown his bias against her. A month after ap-

pellant's arrest, the victim received notice that his application for lawful resident status in the United States had been denied because he had prior convictions for simple battery domestic violence against appellant. At the time of the trial, the victim was trying to change his immigration status under the Federal "Violence Against Women Act" ("VAWA") by asserting that he was a victim of domestic violence by appellant. The trial court sustained the State's objections to some of appellant's questions on cross-examination of the victim related to the reason his application was denied and whether a conviction against appellant would bolster the victim's attempt to adjust his immigration status.

The record showed that appellant was allowed to cross-examine the victim and elicit the following information: Around the time of the appellant's arrest, the victim received information from federal immigration officials that they were denying his application to adjust his immigration status; that since then, he had reapplied in order to "fix" his immigration status; that he reapplied under the Violence Against Women Act about a month before trial; and that under that Act, he had to show that he is or has been the victim of domestic violence. Accordingly, appellant had sufficient evidence to argue to the jury that the victim was lying to improve his immigration status.

Appellant also argued that she should have been able to ask the victim about the fact that his application to alter his immigration status had been denied because of his conviction 10 years before of simple battery against appellant. But, the Court found, prior convictions are certainly prejudicial, and the trial court had to balance that prejudice against the possible value of admitting the evidence to show that the victim was biased and fabricating the current charges, over ten years later, in order to affect his then-pending immigration matter. Further, the immigration status of the victim was not an issue relevant to the matter being tried; i.e., whether appellant committed the crimes charged. Thus, the Court held that the trial court did not abuse its discretion in limiting the scope of appellant's cross-examination of the testifying victim.