

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 1, 2013

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THIS WEEK:

- **Juveniles; Probation Revocation**
- **Statutory Rape; Jury Charges**
- **Sufficiency of the Evidence; Right to Be Present at Trial**
- **Search & Seizure**
- **DUI; Hearsay Exception**

Juveniles; Probation Revocation

In The Interest of M. A. I., A12A1993 (1/22/13)

Appellant appealed from a juvenile court's order extending his probation for a period of two years after he repeatedly failed to complete conditions of his probation. The record showed that following an adjudication of delinquency for possessing an imitation controlled substance with the intent to distribute, the juvenile court issued an order of disposition against appellant on March 18, 2010, finding that commitment was not necessary at that time and placing him on probation subject to certain terms and conditions. One such condition required appellant to attend a special evening reporting program for 60 to 75 days. Over the course of the next two years, appellant repeatedly violated the terms of his probation, resulting in adjudications of delinquency and the imposition of additional conditions to the original March 2010 order. These additional conditions included periods of short-term detainment by the Department of Juvenile Justice, referrals for psychological evaluation, orders for counseling, and an increase in the number of days that appellant

was required to report to the evening program. On March 16, 2012, pursuant to a motion to extend probation based on appellant's failure to complete all conditions of probation, the juvenile court extended the period of probation for an additional two years.

Appellant argued that the juvenile court erred by failing to give him credit for time he served in Regional Youth Detention Centers prior to the court's adjudications of delinquency for violating the terms of his probation. Specifically, he took issue with the juvenile court's orders from June 13, 2011, and August 2, 2011, arguing that the court ordered him to serve more than 30 days in detention in violation of O.C.G.A. § 15-11-66. The Court disagreed.

Although appellant relied on O.C.G.A. § 15-11-66, the Court noted that this statute was amended in 2010, and the portions of that statute upon which appellant relied, did not take effect until July 1, 2010. Appellant, however, was adjudicated in March of 2010 and therefore, the prior version of the statute applied to his case. Under the plain language of the prior version of the statute, appellant was not entitled to credit for any time served in detention prior to adjudication of delinquency for the probation violation.

Moreover, the 2010 amendment to O.C.G.A. § 17-10-11 did not require a different result because the plain language of that statute applies to criminal sentences, and an order of disposition from a juvenile court is "not a conviction of a crime." Instead, a juvenile court "disposes of the case after determining whether treatment, rehabilitation, or supervision is needed; it does not sentence the child."

Finally, the Court stated, reading O.C.G.A. § 15-11-65 and O.C.G.A. § 15-11-66 in pari materia, the plain language of

the statutes did not require the juvenile court to give credit for pre-disposition detention because the credit-for-time-served provision of O.C.G.A. § 15-11-66 applies to post-disposition detention. Following the dispositional hearing at issue, appellant was not ordered to further detention. Additionally, the plain language of O.C.G.A. § 15-11-65 clearly contemplates situations in which a child might be detained for more than 30 days between adjudication and disposition. Accordingly, the trial court did not err in not giving appellant credit for time served.

Statutory Rape; Jury Charges *Agan v. State, A12A1887; A12A1888 (1/17/13)*

Appellant was convicted of statutory rape, three counts of aggravated sodomy, four counts of aggravated child molestation, and three counts of child molestation involving three victims. He contended that the trial court erred in its jury instruction on statutory rape. The record showed that the court first charged the jury that “A person commits the offense of rape when he has carnal knowledge of a female under the age of 10. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. Insofar as the charge is concerned in this case, the State must prove beyond a reasonable doubt that the alleged victim was under the age of 10.” At the conclusion of the charge, both parties objected, the State particularly stating, “In charging on statutory rape, you gave the rape charge” and the correct charge “includes indication of slight penetration and corroboration.” The trial court disagreed but decided, however, that it should have charged the jury on statutory rape under the age of 16 instead of statutory rape under the age of 10. It then recalled the jury, informed them that it should have charged them “under the age of 16,” and advised that “[t]he rest of the definition is accurate” with regard to statutory rape. Neither the State nor defense counsel made any objection to the trial court’s recharge and the trial court did not solicit any additional objections or exceptions to the charge.

The Court noted that O.C.G.A. § 16-6-3(a) provides: “A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, *provided that no conviction shall be had for this offense on the*

unsupported testimony of the victim.” (Emphasis supplied.) This was error but because the defense did not object, it must be determined if it was plain error. The Court found that it met all four prongs of the plain error test: 1) the trial court’s charge was erroneous; 2) the error was clear and obvious; 3) it affected appellant’s substantial right to a charge that provided the jury with the proper guideline for determining his guilt or innocence; and 4) failing to remedy this error would seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Accordingly, the Court reversed appellant’s statutory rape conviction. The Court also vacated his sentence for child molestation and remanded for resentencing on that count because the trial court merged it into the statutory rape sentence. Finally, the Court noted that the State “laudably” conceded the trial court’s error.

Sufficiency of the Evidence; Right to Be Present at Trial *Smith v. State, A12A2032 (1/25/13)*

Appellant was convicted of rape and aggravated child molestation. He contended that there was a fatal variance between the indicted offense of aggravated child molestation and the court’s charge to the jury concerning that offense. The record showed that Count two of the indictment charged appellant with aggravated child molestation by committing an act of sodomy, specifically, the act of placing his penis “into and upon” the victim’s anus. In its charge to the jury, the trial court defined aggravated child molestation as an act of child molestation which involves sodomy or which physically injures the child, as set forth in O.C.G.A. § 16-6-4(c). Generally, inapplicable portions of a charged Code section are unnecessary and not harmful. However, the Court stated, a criminal defendant’s right to due process may be endangered when, as here, an indictment charges a defendant with committing a crime in a specific manner and the trial court’s jury instruction defines the crime as an act which may be committed in a manner other than the manner alleged in the indictment. The giving of a jury instruction which deviates from the indictment violates due process where there is evidence to support a conviction on the unalleged manner of committing the crime and the

jury is not instructed to limit its consideration to the manner specified in the indictment.

Upon reviewing the charge as a whole, the Court found that the jury was not instructed to limit its consideration to the commission of the crime as alleged in the indictment. Given the evidence, the Court concluded that there was a reasonable possibility that the jury convicted appellant of committing the crime of aggravated child molestation in a manner not alleged in the indictment. There was some evidence adduced that the victim was physically injured as a result of sexual intercourse with appellant. The victim testified that intercourse caused her pain and subsequent bleeding, evidence from which the jury could conclude that the victim was physically injured. Consequently, appellant’s conviction for aggravated child molestation was reversed.

Appellant also contended that the trial court denied him his constitutional right to be present at trial because, although he was present in the courtroom, the judge did not include him in off-the-record, side-bar conferences with counsel. We disagreed. Embodied within the constitutional right to the courts under Art. I, Sec. I, Par. XII of the Georgia Constitution of 1983 is the right of the criminal defendant to be present at any stage of a criminal proceeding that is critical to its outcome if the defendant’s presence would contribute to the fairness of the procedure. Thus, in a prosecution for a felony, the defendant has the privilege under the Fourteenth Amendment to be present whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge, but not when his presence would be useless, or the benefit but a shadow. Here, the Court noted, the record showed that several bench conferences occurred, and it appeared that the court and counsel discussed either housekeeping matters or the merits of evidentiary objections. The objections and the court’s rulings on those objections were made in the defendant’s presence and are preserved in the trial transcript. There was no evidence in the record suggesting that appellant’s presence at the bench during either housekeeping or legal discussions was necessary to defend against the charges, that his presence would have been useful to the resolution of any matter before the court, or that his absence from the sidebar conferences in any way affected the fairness of the trial procedure or caused appellant to lose

or waive any right or defense. Therefore, his absence during these sidebar discussions did not violate his due process right to be present during critical stages of the proceedings against him.

Search & Seizure

Sutton v. State, A12A2223 (1/25/13)

Appellant challenged the denial of his motion to suppress evidence seized pursuant to a search warrant executed at his home. He contended that the trial court erred in denying the motion based upon a finding that the affidavit accompanying the search warrant application was legally sufficient to establish probable cause. The Court agreed with appellant and reversed.

The record showed that an anonymous informant contacted an officer alleging that a person with a personal relationship with appellant told the informant that appellant was using and selling illegal drugs. Based solely upon the hearsay statements, the officer executed an affidavit and applied for a search warrant for appellant's home, which led to appellant's arrest. Appellant argued that there was no evidence to support the finding that, in the officer's affidavit supporting the search warrant request, the informant was a "concerned citizen," allowing for a preferred status regarding testing the informant's credibility. The Court found that appellant was not required to present evidence showing that the informant or the informant's source were unreliable thus negating the "concerned citizen" status, since appellant did not know the identity of either person. Next, the Court distinguished the cases that the trial court and the State cited in support of the finding that the informant was a "concerned citizen" and found that the affidavit was legally insufficient to demonstrate that either the informant or the source was a "concerned citizen" due to the complete lack of information about either, finding that they were instead "merely anonymous tipsters." Further, the Court held that the officer's failure to independently corroborate any of the information the source provided to the informant rendered the affidavit insufficient to establish the reliability of either source. The Court further noted, "Our decisions applying the totality of circumstances analysis have consistently recognized the value of corroboration of details of an informant's tip

by independent police work. In this case, the independent investigation done by the police in an effort to corroborate the information was insufficient. . . . [Thus, we find] that the uncorroborated statement of an unnamed third-party source, as filtered through a reliable informant to a police affiant, did not give rise to probable cause sufficient to support the issuance of a search warrant." Accordingly, the Court concluded that the officer's failure to independently corroborate any of the information provided by the unidentified third party to the anonymous tipster rendered his affidavit insufficient to establish the reliability of either source. Thus, the Court held, in the absence of a showing that the information in the affidavit was reliable, the trial court erred in denying appellant's motion to suppress.

DUI; Hearsay Exception

Stallings v. State, A12A1929 (1/23/13)

Appellant was convicted of DUI (per se). Appellant contended that the trial court erred in finding him guilty of the DUI offense and considering inadmissible hearsay evidence. The evidence showed that at approximately 1:00 a.m., an officer responded to a dispatch call reporting that a driver was passed out behind the steering wheel of a vehicle at a local intersection. Upon arriving at the intersection, the officer observed appellant's vehicle matching the reported description in a nearby parking lot. Appellant's vehicle was parked in an irregular manner outside of the marked parking spaces. Appellant was sitting in the driver's seat and was alone in the vehicle. The keys were inside the vehicle's ignition. The officer approached the vehicle and observed that appellant was visibly intoxicated. The officer observed that appellant had glassy eyes, disheveled clothing, and a slight odor of alcohol emanating from his breath. Appellant also staggered when he walked and informed the officer that he was coming from a jazz club and was on his way home. Appellant agreed to perform field sobriety evaluations, failed the field sobriety evaluations, and was arrested for DUI. Appellant consented to the State's intoxilyzer test. The test results showed that he had an alcohol concentration of .212 grams.

Appellant contended that the trial court erred in considering inadmissible hearsay during the trial. Specifically, he asserted that the trial court erroneously considered the dis-

patcher's description of his vehicle, along with statements that he had been unconscious at the intersection and that witnesses had to push his vehicle from the roadway. The Court found that this did not warrant grounds for reversal. The Court noted that the record showed that the dispatch description of the vehicle was admitted for the limited purpose of explaining the officer's conduct in responding to the dispatch call and investigating appellant's vehicle. As such, the admission of the dispatch description was not erroneous. Regarding statements that appellant was unconscious, appellant contended that the officer's testimony in this regard was inadmissible hearsay. However, the Court noted that pretermitted whether the trial court erred in admitting the reported information that appellant had been unconscious and unable to safely operate his vehicle, no harm was shown from the error in light of the other evidence establishing appellant's guilt of the DUI per se offense beyond a reasonable doubt. Notably, the most probative evidence establishing his guilt was the officer's personal observations that appellant was visibly intoxicated and was sitting in the driver's seat of the irregularly parked vehicle with the keys still in the ignition; appellant's failure of the field sobriety evaluations; and the intoxilyzer test results showing that appellant had an alcohol concentration of .212 grams, which greatly exceeded the legal limit. Thus, the Court found, in the context of the overwhelming properly admitted evidence establishing appellant's guilt of the DUI (per se) offense, the admission of the testimony in question must be considered harmless.