Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 7, 2014

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THIS WEEK:

- Sentencing; Rule of Lenity
- Search & Seizure; Implied Consent
- Sentencing; Void Sentences
- Right to Counsel; Right of Self-Representation
- Search & Seizure; Common Authority Over Premises
- Sealing Juvenile Records; "Final Discharge"

Sentencing; Rule of Lenity

Myrick v. State, A13A1973 (1/24/14)

Appellant pled guilty to aggravated assault, aggravated stalking and other offenses. He contended that the rule of lenity should have applied to reduce his sentence because "aggravated assault and aggravated stalking allow more than one sentence for the same offense and it is axiomatic that any ambiguities must be construed most favorably to the defendant." The Court disagreed.

The Court noted that the rule of lenity applies where two or more statutes prohibit the same conduct while differing only with respect to their prescribed punishments. According to the rule, where any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of the two penalties administered. However, the rule does not apply when the statutory provisions are unambiguous. A person may be found guilty of aggravated assault if the State proves (1) an assault and (2) aggravation by use of "any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury." O.C.G.A. § 16-5-21(a)(2). The State may prove an assault by showing that the defendant committed an act that placed the victim in reasonable apprehension of immediately receiving a violent injury. Here, the indictment averred that appellant committed aggravated assault by doing an act that placed the victim in reasonable apprehension of immediately receiving a violent injury, namely, by striking the victim with a motor vehicle, an object which, when used offensively against a person, is likely to result in serious bodily injury.

In contrast, a person may be found guilty of aggravated stalking if the State proves that, in violation of a bond "prohibiting the behavior described in this subsection, [he] . . . contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person." O.C.G.A. § 16-5-91(a). The Court found that in two separate counts, the indictment averred that appellant committed aggravated stalking on two sequential dates by unlawfully contacting the victim at her residence in violation of a bond order, without the consent of the victim, and for the purpose of harassing and intimidating her.

Therefore, the Court found, the aggravated assault and aggravated stalking statutes do not define the same offense and do not address the same criminal conduct, the former offense addressing an assault with an object likely to result in serious bodily injury, and the latter offense addressing the harassment and intimidation of a victim in violation of a bond condition. Thus, no ambiguity existed regarding the statutory provisions at issue, the rule of lenity did not apply, and the trial court committed no error in refusing to modify appellant's sentence.

Search & Seizure; Implied Consent

McAllister v. State, A13A1897 (1/22/14)

Appellant was charged with two counts of DUI. He contended that the trial court erred in denying his motion to suppress. The evidence showed that after appellant was stopped at a roadblock, he was asked to perform several field evaluations, and then was placed under arrest for DUI. He refused after being read his implied consent rights, so the officer obtained a search warrant and the results of his blood test established a blood alcohol level of 0.127 grams.

Appellant argued that the trial court erred by finding that the search warrant was valid because he had refused testing under O.C.G.A. § 40-5-67.1, and therefore, the officer was prohibited from applying for a warrant. The Court disagreed, noting that in 2006, the Legislature amended O.C.G.A. § 40-5-67.1, adding subsection (d.1), which states that "[n]othing in this Code section shall be deemed to preclude the acquisition or admission of evidence of a violation of Code Section 40-6-391 if obtained by voluntary consent or a search warrant as authorized by the Constitution or laws of this [S]tate or the United States." The plain meaning of this language and its addition to O.C.G.A. § 40-5-67.1 on the heels of the Supreme Court's decision in *State v. Collier*, 279 Ga. 316, 317-318 (2005) (Former version of O.C.G.A. § 40-5-67.1 did not permit State to seek a search warrant after refusal of implied consent) supported the State's argument that the search warrant used to take appellant's blood was valid under the implied consent statute.

Nevertheless, appellant asserted, this reading of the statute render*s* meaningless the language of O.C.G.A. § 40-5-67.1(d): "no test shall be given" if a driver refuses to submit to chemical testing after an officer reads the implied consent notice. The Court again disagreed, noting that the Legislature's addition of Subsection (d.1) clarified that this language applies only to warrantless chemical tests given by the State in the event that a driver has refused such testing after the implied consent warning. And, the Court stated, practically speaking, the language is not meaningless simply because the State may now apply for a warrant to perform the test because it is only a possibility, and in the face of a refusal the officer must be able to present sufficient evidence of probable cause to a magistrate in order to obtain a warrant for the test. Thus, if the officer does not have sufficient cause to obtain the warrant, then no warrant could be issued and such a test will not be authorized.

Sentencing; Void Sentences

Leonard v. State, A13A1780 (1/21/14)

Appellant appealed from the denial of his motion to correct a void sentence. The record showed that in 1994, appellant was found guilty of eleven counts of armed robbery stemming from a series of robberies. He was sentenced as follows: life imprisonment for Count 1, twenty years suspended sentence for Count 2, and twenty years on each of the remaining nine counts to be served concurrent with each other and consecutive to the life sentence from Count 1. Appellant then unsuccessfully pursued a direct appeal and habeas relief. In 2013, Appellant appealed from an unsuccessful "Motion to Correct Void and Ambiguous Sentences."

The Court noted as a general matter, the Legislature has established a specific time frame during which a trial court has jurisdiction to freely modify a criminal sentence. Pursuant to O.C.G.A. § 17-10-1(f), a court may correct or reduce a sentence during the year after its imposition, or within 120 days after remittitur following a direct appeal, whichever is later. Once this statutory period expires, a trial court may only modify a void sentence. A sentence is void if the court imposes punishment that the law does not allow. To support a motion for sentence modification filed outside the statutory time period, therefore, a defendant must affirmatively demonstrate that the sentence imposes punishment not allowed by law.

Appellant argued that his sentence as to Count 2 was void and not authorized by law in light of former O.C.G.A. § 16-8-41(d), which provided as follows: "Adjudication of guilt or imposition of sentence shall not be suspended, probated, deferred, or withheld for any offense punishable under subsection (a), (b), or (c) of this Code section [defining armed robbery]." The Court noted that in *State v. Stuckey*, 145 Ga.App. 434 (1978), it held that a superior court lacked authority to probate a sentence imposed on conviction of armed robbery, and such a sentence was deemed "absolutely void." Similarly, here the superior court suspended appellant's sentence for armed robbery as prohibited by O.C.G.A. § 16-8-41(d). Thus, the Court concluded, the suspended sentence on Count 2 was unauthorized by law and therefore void. Accordingly, the posture of this case was that the defendant had been validly convicted but had a void sentence imposed which in law amounts to no sentence at all as to Count 2. Accordingly, the Court remanded for resentencing as to Count 2 only.

Right to Counsel; Right of Self-Representation

Mason v. State, A13A2296 (1/24/14)

Appellant was convicted of one count of burglary, one count of criminal trespass, two counts of possession of tools for the commission of a crime, one count of felony theft by taking, and two counts of forgery in the second degree. He argued that the trial court erroneously denied his right to self-representation and failed to discharge his trial counsel. The record showed that over the course of the case, appellant and his appointed counsel had a strained relationship. In a letter to the trial court before trial, appellant complained that his appointed counsel had tried to "muzzle" him during a hearing on his motion to suppress; expressed that he "no longer [felt] comfortable with his counsel;" and stated that he wanted his counsel "replaced immediately." Later, during the State's case-in-chief, appellant requested that his counsel be discharged from the case after the two had a heated argument over issues of trial strategy, but the trial court denied his request. Then, on the beginning of the third day of trial, appellant requested that he be permitted to represent himself. The trial court denied his request but appointed additional stand-by counsel to assist the defense. Subsequently, appellant complained to the trial court after his counsel got angry with him for asking so many questions and said to him, "I don't want to hear any more questions, I'm sick of you," but he did not request any relief from the court at that point.

Appellant first contended that he unequivocally asserted his constitutional right to represent himself at the beginning of the third day of trial and that the trial court erred in denying his request. The Court noted

that both the federal and state constitutions guarantee a criminal defendant the right to self-representation. But to be timely, a request for self-representation must be made before trial. Therefore, since appellant's request to represent himself was made in the middle of trial, the trial court did not err in denying it.

Appellant also contended that the trial court should have discharged his trial counsel (and presumably appointed new counsel) because the record demonstrated a "complete breakdown of communication" between them. The Court again disagreed. The Sixth Amendment guarantees effective assistance of counsel, not preferred counsel or counsel with whom a meaningful relationship can be established. An indigent defendant is not entitled to have his appointed counsel discharged unless he can demonstrate justifiable dissatisfaction with counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between counsel and client.

A breakdown in communication between a defendant and his counsel must be extreme before it mandates that the trial court remove appointed counsel. Tension in the attorney-client relationship, disagreements over trial strategy, and a general loss of confidence or trust in counsel are insufficient, without more, to demonstrate the type of complete breakdown in communication necessary to mandate the removal of counsel from a case. Here, the Court found, the record reflected that appellant and his appointed counsel had a strained relationship and had several heated disagreements over trial strategy during the course of the case. Nevertheless, there was no evidence that these disagreements prevented appellant from having his version of events heard by the jury or otherwise inhibited counsel from providing an adequate defense on behalf of appellant. Indeed, the record reflected that appellant communicated his version of events to trial counsel "from the beginning" and that counsel then tried to construct a defense around that version of events despite counsel knowing that "there was a mountain of evidence against [appellant]." In fact, appellant's counsel ultimately was able to persuade the jury to convict appellant of the lesser included offense of criminal trespass rather than burglary on one of the two burglary counts. Under the circumstances, the Court concluded, the evidence did not establish a complete breakdown of communication between appellant and his counsel, and the trial court acted within its discretion in refusing to discharge counsel from the case.

Search & Seizure; Common Authority Over Premises

Niles v. State, A13A2297 (1/24/14)

Appellant was found guilty of possession of cocaine and misdemeanor possession of marijuana. He contended that the trial court erred in denying his motion to suppress. The evidence showed that officers responded to an anonymous complaint that illegal narcotics sales might be occurring at a residence. Officers went to the residence intending to knock on the front door to investigate the complaint. As they approached the residence, they saw a man exiting the front door who identified himself as Terrance Grant. During a conversation outside the residence, the officers asked Grant if he lived at the residence. Grant responded that his brother, appellant, lived at the residence, and that, although he (Grant) did not sleep there, he had keys and access to the residence and had a bedroom at the residence where he stored his work tools. Grant told the officers that he was there to pick up some work tools. The officers asked Grant if appellant was present at the residence, and Grant said no. At that point, police asked Grant for consent to walk through the residence for the purpose of ensuring that no one else was present at the residence, and Grant consented. Pursuant to Grant's consent, police walked through the residence and in doing so, noticed in plain view suspected crack cocaine and marijuana. They immediately applied for a warrant to search the residence and upon execution of the warrant, seized the cocaine and marijuana.

Appellant contended that the trial court should have granted his motion to suppress because his brother, Grant, lacked authority (or apparent authority) to give consent for the police to enter his residence to do the initial walk-through. Accordingly, appellant argued, because the officers were illegally in the residence for the walk-through when they saw the cocaine and marijuana in plain view, there was no legal basis to use this information to obtain the subsequent search warrant.

The Court stated that the Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched, or from a third party who possesses common authority over the premises. Common authority justifying third-party consent for police to enter the premises rests on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched. The State has the burden to establish that the consenting third party has such common authority. But even if the consenting third party did not in fact have authority to give consent to enter, where police reasonably believed that the third party had such authority, this constitutes apparent authority which validates the entry. Review of the determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises? If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid.

The Court found that the State carried the burden of establishing that Grant did in fact have authority to consent for police entry to the residence and the common hallway in the residence from which the contraband was seen in plain view. In response to police inquiry, Grant told the officers that he had a key and access to the residence; had a bedroom at the residence where he kept his work tools; and that his brother, appellant, lived at the residence. Although this information may not have been a sufficient basis to show that Grant had common authority over any portion of the residence exclusively occupied by appellant, it was sufficient to establish that Grant had common authority or joint access or control for most purposes over common areas in the residence such as the hallway. Given that Grant had a key and access to the residence and use of a bedroom at the residence, it was reasonable to conclude that he had joint access with appellant to the common areas in the residence; authority to permit police

entry into those areas; and that appellant assumed the risk Grant might consent to such entry. Because the officers were lawfully in the common hallway pursuant to valid consent, they were lawfully in a position to see the contraband in plain view in the open closet. Therefore, the officers used lawfully obtained evidence of the contraband seen in the residence as a proper basis for obtaining the warrant to enter and search the entire residence.

Sealing Juvenile Records; "Final Discharge"

In the Interest of L. T., A13A1848 (1/23/14)

Appellant, a 13 year old at the time of arrest, was adjudicated a delinquent on two counts of aggravated child molestation. He received 30 days' detention in a RYDC, two years' probation with one year of house arrest, and he was ordered to complete Project Pathfinder and juvenile sex offender treatment. During the adjudication proceedings, appellant filed a motion to seal the juvenile court record, which the juvenile court denied. Following adjudication and during the pendency of probation, appellant filed three additional motions to seal the juvenile-court record. The juvenile court denied each motion based, in part, upon the court's determination that the motions were filed prematurely under the terms of the relevant statute, O.C.G.A. § 15-11-79.2(b), but the court expressly stated that it would consider sealing the record at a later date.

Appellant argued that the juvenile court erred in its interpretation of the statutory requirements of O.C.G.A. § 15-11-79.2(b), which provides as follows: "On application of a person who has been adjudicated delinquent or unruly or on the court's own motion, and after a hearing, the court shall order the sealing of the files and records in the proceeding . . . if the court finds that: (1) [t]wo years have elapsed since the final discharge of the person; (2) [s]ince the final discharge of the person he or she has not been convicted of a felony or of a misdemeanor involving moral turpitude or adjudicated a delinquent or unruly child and no proceeding is pending against the person seeking conviction or adjudication; and (3) [t]he person has been rehabilitated." The Court stated that the appeal turned on the meaning of the phrase "final discharge" in the context of subsection (b)(1). The juvenile court concluded that the statute requires that at least two years elapse from the time appellant completes the terms of his sentence and is released from probation before he is entitled to a sealed record. Appellant contended that "final discharge" refers to the date of adjudication (i.e. the date on which appellant was discharged from the delinquency petition) or, alternatively, the date on which appellant was released from detention at the RYDC.

The Court concluded that the juvenile court was correct in its determination that appellant's motions were prematurely filed. Although the General Assembly did not define the phrase "final discharge" in the statute, it used this same phrase in subsection (c) of the statute, noting that "[r]easonable notice of the hearing required by subsection (b) of this Code section shall be given to . . . [t]he authority granting the discharge if the final discharge was from an institution or from parole . . . ." O.C.G.A. § 15-11-79.2(c). Moreover, the language would have absolutely no meaning if a child was considered to have been granted a final discharge upon the adjudication of delinquency. Furthermore, the Court found, the General Assembly's inclusion of "parole" in subsection (c) indicated that it did not intend to limit its reference to "final discharge" from confinement, but instead sought to include the State's continued exercise of supervision or control over a child. Consequently, appellant's motions to seal the record were premature and the juvenile court did not err in denying them.