Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 11, 2016

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THIS WEEK:

Rule of Lenity; Habeas Corpus

Rollf v. Carter, S15A1505 (3/7/16)

In 2008, appellant assaulted his wife with a knife with the intent to kill her. He was convicted of attempted murder. On direct appeal, he claimed that the rule of lenity ought to have been applied and he should have been convicted of aggravated assault, not attempted murder. In *Rollf v. State*, 314 Ga.App. 596, 598(2)(a) (2012), the Court of Appeals held that even if attempted murder and aggravated assault were the same offense, the rule of lenity did not apply as between two felony punishments. However, the Supreme Court ruled a year later that the rule of lenity may be applied to two felony convictions. *McNair v. State*, 293 Ga. 282, 285 (2013), disapproving of *Rollf v. State*. Appellant then filed a petition for writ of habeas corpus asserting that the rule of lenity should have been applied in his case. The habeas court disagreed, finding that the issue was res judicata.

Appellant contended that that *McNair* represented a change in the applicable law and therefore his rule of lenity argument was not procedurally barred. The Court disagreed. It cannot be said that a decision of the Court amounts to a change in the law if the decision was dictated by its own precedents. Thus, the Court noted, decades before its decision in *McNair* — and long before the Court of Appeals decided *Rollf* — the Court actually applied the rule of lenity to resolve a dispute about two arguably conflicting statutes that were concerned only with the punishment of felonies. Thus, *McNair*, because it was dictated by the Court's earlier precedents, marked no change in the law. Accordingly, because there was no change in the applicable law or facts, the earlier decision in *Rollf* is res judicata and the habeas court did not err in denying appellant's petition.

Party to a Crime; Murder

Downey v. State, S15A1681 (3/7/16)

Appellant was convicted of murder and related crimes. The evidence showed that after appellant heard about an altercation in a neighboring town, he gathered a group of men and headed to the area where the altercation took place. He was accompanied in his car by Browder while the other men followed in another car. A crowd — some of whom were carrying bats and sticks — gathered in the neighboring town, and appellant asked Browder if he had a gun ready. Appellant stopped his car, and the victims approached on foot, Browder

fired two shots from the passenger seat of the car toward the approaching group, killing one of them. Appellant and Browder then sped away.

Appellant contended that the evidence was insufficient to sustain his conviction as a party to the crime of murder. Specifically, he argued that because Browder acted recklessly in firing his weapon into the crowd, he could not share a common criminal intent with another who acts with only criminal recklessness. The Court disagreed.

The Court stated that it is true that a conviction as a party to a crime requires proof that the defendant shared a common criminal intent with the principal perpetrator of the crime. And appellant undoubtedly was correct that a principal acting only with criminal recklessness has no specific intent in which an accomplice might share. But criminal intent does not always require specific intent. A reckless principal may lack a specific intent, but by definition, he has a general intent to act in a way that exposes others to a risk of harm of which he is aware, but that he chooses to disregard.

As appellant conceded, the evidence was sufficient to show that Browder fired shots with recklessness sufficient to imply malice, meaning that Browder intentionally fired shots in conscious disregard of the substantial risk of harm to which the shots exposed others. If appellant, similarly aware of the risk of harm, also intended that Browder fire shots in disregard of that risk — thereby warranting an implication of malice on the part of appellant as well — then appellant and Browder shared a common criminal intent. Together with proof that appellant intentionally aided and abetted Browder in the firing of the shots, or that he intentionally encouraged Browder to fire the shots, such evidence of a common criminal intent would be sufficient to authorize a jury to find appellant guilty as a party to the crime of malice murder. Viewing the evidence in the light most favorable to the verdict, it was sufficient to permit a rational jury to find beyond a reasonable doubt that appellant was guilty of the murder and other crimes of which he was convicted.

Other Acts Evidence; Rule 404(b)

Brooks v. State, S15A1480 (3/7/16)

Appellant was convicted of murder and other offenses. The evidence showed that he and an accomplice posed as employees of a meat packing plant to break into coin and vending machines. The victim, a security guard, saw them and they killed the victim by shooting him seven times as he was lying face down on the floor. The State also was allowed to admit other acts evidence to show identity, motive and course of conduct. Specifically, seven years after the victim's murder, appellant and another accomplice, after escaping from a Georgia prison, murdered a Mississippi state trooper after the trooper pulled them over for a traffic stop. He was found lying face down and shot twice in the back of the head. Appellant pled guilty to that crime.

Appellant contended that the trial court erred in admitting this other acts evidence. The Court agreed and reversed his conviction. First, the Court looked at identity as a reason to allow in this evidence. The Court found that although the Mississippi murder and the murder here bore similarities, evidence of the Mississippi murder was not admissible to prove identity because the crimes were not so similar as to mark the murders as the handiwork of appellant. On the contrary, the modus operandi for each murder was relatively commonplace — these were not signature crimes. Moreover, the Court stated, it must now consider dissimilarities as well as similarities in determining whether other acts evidence is admissible to show identity. In this regard, the Court noted that the murders in this case were committed seven years and hundreds of miles apart. One victim was bound before he was forced to lie down and shot seven times; the other victim was not bound and only shot twice. One murder stemmed from an attempted theft; the other came on the heels of a prison break. In sum, the dissimilarities were stark and militated against the supposition that the murders were committed by the same person.

Next, the Court looked at motive. To be admitted to prove motive, extrinsic evidence must be logically relevant and necessary to prove something other than the accused's propensity to commit the crime charged. And here, the Court found, the other acts evidence in this case did not meet the logically relevant and necessary test. Simply put, evidence of the murder of a Mississippi state trooper during a prison escape was unrelated and unnecessary to prove why appellant murdered a security guard in the course of a theft seven years earlier.

Finally, the Court looked at course of conduct. The Court stated that the term "course of conduct" is noticeably absent from the list of purposes set forth in O.C.G.A. § 24-4-404(b), and, although by its own terms that list is not exhaustive, *McMullen v. State*, 316 Ga.App. 684, 692, n. 30 (2012) correctly observed that the "course of conduct" and "bent-of-mind" exceptions, formerly an integral part of our law of evidence, have been eliminated from the new Evidence Code. Therefore, the trial court erred in admitting the Mississippi murder to show course of conduct.

Having determined the admission of the other acts evidence was an abuse of discretion, the Court found that the admission was not harmless. Accordingly, the Court reversed appellant's conviction because it could not conclude it was highly probable that the erroneous admission of the challenged other acts evidence did not contribute to the verdict.

Sentencing; Merger

Crayton v. State, S15A1506 (3/7/16)

Appellant was indicted on charges of malice murder, felony murder (aggravated assault), felony murder (possession of a firearm by a convicted felon), aggravated assault, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. The jury found him guilty of the lesser included offense of voluntary manslaughter in regard to the malice murder count, and guilty on all other charges in the indictment. Appellant contended the trial court made merger and sentencing errors. Specifically, he argued that his conviction for felony murder predicated on possession of a firearm must be vacated under the modified merger rule announced in *Edge v. State*, 261 Ga. 865 (1992) and that his conviction for aggravated assault should have merged with the felony murder conviction predicated on aggravated assault.

The Court disagreed. First, the Court noted that it has held for the past two decades that the modified merger rule announced in *Edge* is inapplicable to felony murder predicated on possession of a firearm by a convicted felon. Therefore, appellant's conviction and sentence for felony murder predicated on possession of a firearm by a convicted felon was sustained. Second, when appellant was convicted of voluntary

manslaughter as a lesser included offense of malice murder, the charge of felony murder (aggravated assault) was vacated per *Edge*. However, when a defendant is convicted of voluntary manslaughter as a lesser included offense of murder and convicted of felony murder (possession of a firearm by a convicted felon), the voluntary manslaughter charge must be vacated. The aggravated assault conviction, which was still viable after the felony murder (aggravated assault) conviction was vacated, did not merge for sentencing purposes. Accordingly, there was no error when the trial court sentenced appellant for aggravated assault.

Nevertheless three Justices dissented and would have held that the aggravated assault and felony murder conviction should have merged.

Indigency; Right to Free Transcript

Robertson v. State, A15A1735 (2/8/16)

Appellant was convicted of family-violence simple battery. She was represented at trial by a public defender. After trial, she filed a notice of appeal together with an affidavit of poverty asserting she was "unable to pay the fees and costs normally required." She subsequently moved to obtain a free transcript due to her indigency. The trial court, however, held a hearing on the motion because testimony at trial suggested appellant may not be indigent. When appellant failed to make any attempt to prove her indigent status, the court denied the motion.

Appellant contended that the trial court erred in not providing a free transcript. The Court noted that O.C.G.A. § 9-15-2(a)(2) provides as follows: "The judgment of the court on all issues of fact concerning the ability of a party to pay costs or give bond shall be final." Accordingly, the Court found, the trial court's decision regarding appellant's ability to pay for a trial transcript must be affirmed.

Nevertheless, appellant argued, O.C.G.A. § 17-12-24(a), which is part of the Georgia Indigent Defense Act of 2003 (the "IDA"), provides that the decision whether an arrested person is indigent for the purpose of obtaining representation by an attorney under the IDA rests with the public defender's office. And here, the public defender determined that she was indigent and therefore, the trial court was required to accept this determination and provide her with a free transcript. The Court disagreed. The Court noted that although the IDA requires the Georgia Public Defender Standards Council to pay the costs of defense for an indigent defendant, it has previously held that the cost of a trial transcript is not a cost of providing a defense under IDA and is to be borne, therefore, by the county. Thus, although the IDA provides that the public defender offices established by the IDA are required to determine whether a defendant is indigent for the purpose of providing a defense, that determination does not control a county's obligation to provide an appellate transcript. And because the IDA does not pertain to a determination of indigence for the purpose of providing a transcript free of charge to indigent defendants, it follows that the trial court retains discretion to determine whether a defendant is indigent for the purpose of holding a county responsible for the cost of a transcript. Thus, the Court found, because the court was concerned that appellant's indigent status was suspect, the court held an evidentiary hearing, as it was authorized to do, on whether appellant was entitled to a trial transcript at county expense and that decision is not subject to review. According, the Court affirmed.

Jury Polling After Verdict; Motions for Mistrial

Jones v. State, A15A1825 (2/5/16)

Appellant was convicted of rape, aggravated child molestation, child molestation, and aggravated sodomy. He contended that the trial court erred in not granting a mistrial after a juror informed the trial court that the verdict of guilty was not her verdict. The record showed that after the jury announced its verdict of guilty on all four counts, the jury was polled. When the judge got to Juror 6, she stated that it was not her verdict. After questioning the foreman of the jury, the defense moved for a mistrial on the basis that the alternates heard the verdict. Thereafter Juror 6 was questioned individually and thereafter allowed the jury to continue deliberations and denied the motion for mistrial. Approximately 45 minutes into those deliberations, the jury reached a unanimous verdict of guilty on all four counts and upon polling, all jurors agreed with the verdict.

The Court stated that where a poll of the jury discloses other than a unanimous verdict, the proper procedure is for the trial court to return the jury to the jury room for further deliberations in an effort to arrive at a unanimous verdict. Thus, the trial court properly returned the jury to the jury room for more deliberations.

Nevertheless, appellant contended, the polling of the jury was coercive to Juror 6 and warranted a mistrial. The Court disagreed. In polling the jury, the trial court was protecting appellant's rights, in that a juror who stated the guilty verdict was not her own was discovered, and the jury was appropriately sent back for further deliberations. But, appellant argued, the totality of the circumstances showed this practice was coercive because the identity of the dissenting juror was known, and the trial court ordered the jury to continue deliberating after the dissenting juror indicated she disagreed with the verdict. But, the Court found, the record did not make it clear that the juror was in fact dissenting. Instead, when asked whether she agreed with the verdict of guilty on any of the counts, Juror 6 replied that she had "agreed to about two of the charges." At no time did Juror 6 ever state that further deliberations would be futile, or that her opinion was unlikely to change. And, when polled for the second time, Juror 6 affirmed that the verdict was hers as given in the jury room, was freely and voluntarily given, and was still her verdict. Furthermore, the fact that the other jurors, the judge, and the parties knew that it was Juror 6 who had disagreed with the verdict did not add any coercive element, because had the Juror disagreed with the verdict, she could have said so upon the second polling of the jury. Accordingly, the trial court did not abuse its discretion in denying the motion for mistrial.

Intrinsic Evidence vs Extrinsic Evidence

Baughns v. State, A15A2242 (2/5/16)

Appellant was convicted of four counts of burglary in the first degree and aggravated assault. The evidence showed that appellant and two co-conspirators committed 11 burglaries within a two-week period in the county. The State charged all three of them in a single indictment, which included six counts of burglary that named appellant as a perpetrator and five counts of burglary that did not name him as a perpetrator. At appellant's separate trial, and over appellant's objections, the State introduced evidence of all 11 burglaries.

Appellant argued that the five burglaries charged in the indictment that did not name him as a perpetrator were extrinsic acts that were irrelevant to his guilt as to the six counts of burglary that did name him and therefore, the evidence could only be admitted under Rule 404(b). The Court disagreed. The Court stated that under longstanding Georgia law, all the facts and circumstances surrounding and constituting the res gestae are admissible, despite the fact that they may reflect poorly on a defendant's character. This rule carried forward to the new Evidence Code under the concept of "intrinsic facts" evidence, as compared to evidence of "extrinsic acts" which are generally inadmissible pursuant to O.C.G.A. § 24-4-404(b). Citing federal law, the Court stated that evidence is intrinsic to the charged offense, and thus does not fall within Rule 404(b)'s ambit, if it (1) arose out of the same transaction or series of transactions as the charged offense; (2) is necessary to complete the story of the crime; or (3) is inextricably intertwined with the evidence regarding the charged offense.

And here, the Court found, the uncharged offenses were part of a crime spree committed by a burglary crew of which appellant was a part, even if there was no evidence that he directly participated in those offenses. All of the offenses were committed in a similar way, within a two-week period and in the same area of the county, and included overlapping participants. Consequently, the trial court did not abuse its discretion in admitting evidence of the uncharged burglaries.

Mistake of Fact; Entrapment

Murray v. State, A15A2197 (2/9/16)

Appellant was convicted of possession of marijuana with intent to distribute and providing a false name to law enforcement. The evidence, briefly stated, showed that a UPS package arrived from California at the home of woman in Georgia. The package was addressed to her, although she was not expecting it and did not know anyone in California. When she opened the package and found green leafy material, she called the police. Appellant showed up the next day at her home and using a false name, claimed that the package was delivered to the woman's house by mistake. The police set up a controlled pick-up and appellant was arrested. Once arrested, he gave conflicting stories as to what was in the package and why he used a false name.

Appellant first contended that the trial court erred in failing to sua sponte charge on mistake of fact. He argued that the charge was warranted because he thought the package contained a teddy bear and cash. The Court disagreed. Mistake of fact represents an affirmative defense, under which a person shall not be found guilty of a crime if the act constituting the crime was induced by a misapprehension of fact which, if true, would have justified the act or omission. Appellant did not affirmatively request a charge on mistake of fact or object to the omission of the charge; however the trial court must charge the jury on the defendant's sole defense, even without a written request, if there is some evidence to support the charge. But, the Court stated, even assuming that appellant's assertion during his trial testimony that he never possessed the package, and the evidence could be construed to raise the affirmative defense of mistake in fact, the Court found no error in the trial court's failure to sua sponte give the charge because a trial court need not specifically charge on an affirmative defense when the entire charge fairly presents the issues, including the defendant's theory, to the jury. And here, the Court reviewed the entire jury charge and found that that it did so.

Appellant also contended that the trial court failed to instruct the jury on the affirmative defense of entrapment. Although he did not assert a defense of entrapment at trial, request that it be charged, or admit to committing the crime, he nevertheless contended that the sole evidence of entrapment stemmed from the State's evidence and thus there was no requirement that he admit to the commission of the crime. Again the Court disagreed.

Entrapment requires proof that (1) the idea of the crime originated with the state agent; (2) the agent's undue persuasion, incitement or deceit induced the crime; and (3) the defendant was not predisposed to commit the crime. There is no entrapment where the agent merely furnishes an opportunity to a defendant who is ready to commit the offense. And here, the Court found, the evidence demonstrated that while the police provided the opportunity for appellant to pick up the package, they did not put the contraband in the package, mail the package, or induce appellant to track the package down. Appellant visited the woman's home several times and left his number for her to contact him so that he could pick up the package. Thus, the Court determined, this evidence does not demand a finding of entrapment, and accordingly, the trial court did not err in failing to charge the jury on this defense.

Statute of Limitations; O.C.G.A. § 17-3-3

Johnson v. State, A15A1813 (2/10/16)

Appellant was convicted of burglary and four counts of theft by taking. The record showed that appellant was originally indicted for crimes committed in November 2007 and alleged the victim as "Reid and Reid Construction." On June 7, 2103, the trial court granted appellant's special demurrer alleging an improper reference to the victim. Three days later, the State filed another indictment, but this time alleging the victim as "Reid and Reid Contractors, LLP, comprised of partners Danny L. Reid and Bradley M. Reid." Appellant was subsequently convicted on this indictment.

Appellant argued that the second indictment was defective because it was filed outside the four-year statute of limitation, and it failed to allege any exception to the statutory deadline. The Court disagreed. First, it held that under O.C.G.A. § 17-3-3, the statute of limitations was extended for six months after the first indictment was quashed and the second indictment was well within this six-month extension. Second, the State did not have to allege an exception to the statute of limitations in its second indictment because, with the extension of time provided under O.C.G.A. § 17-3-3, appellant was prosecuted within the applicable statute of limitation for all the charged offenses.

Nevertheless, appellant argued, the original indictment was void, so that so the State could not rely on it to qualify for the six-month extension in O.C.G.A. § 17-3-3. The Court disagreed. The Court noted that appellant's first indictment was quashed due to his special demurrer, which essentially pointed to a flaw in the way the victim was identified, as opposed to showing that the indictment was void altogether, as would be asserted in a general demurrer. In other words, appellant's challenge to the first indictment was not that it failed to allege any crime; it was merely that

the State failed to name the theft victim with sufficient particularity. Accordingly, the first indictment, while perhaps not perfect in form, was not void. Therefore, under O.C.G.A. § 17-3-3, the statute of limitation was extended by an additional six months after the first indictment was quashed, and the State did not need to allege any exception to the limitation period in the second indictment.

Search & Seizure

Sims v. State, A15A1836 (2/9/16)

Appellant was charged with misdemeanor obstruction and possession of marijuana. The trial court denied his motion to suppress and the Court of Appeals granted him an interlocutory appeal. The evidence, briefly stated, showed that the arresting officer worked off-duty at an apartment complex located in a high crime area plagued by burglaries, robberies, and illegal drug sales. He worked in uniform and drove a marked police vehicle. A few days prior to this incident, the officer encountered appellant in an apartment in which the officer smelled marijuana. The officer determined that appellant did not live at the apartment complex. A couple of days later, the officer noticed appellant and another person he did not recognize coming out from behind different buildings on the apartment complex property over a period of time. He attempted to stop appellant because he suspected criminal activity. Appellant told his companion not to answer the officer's questions; continued to walk away from the officer while cursing at him; and then fought with the officer when he tried to handcuff him. The officer found marijuana on appellant following his detention.

Appellant contended that the encounter with the officer was a first tier one and therefore, he was merely exercising his constitutional rights by walking away from the officer. The Court disagreed. Instead, the Court agreed with the trial court that this was an attempted tier two encounter in which the police officers tried to stop and detain appellant based on reasonable suspicion of criminal wrongdoing. Specifically the officer had had a reasonable suspicion that appellant was, or was about to be, engaged in criminal activity on apartment property. The officer saw appellant, who he knew was not a resident, and another person he could not identify as a resident, moving about in unusual ways behind various buildings on the apartment complex property. Although it was certainly possible that the two men were engaged in innocent conduct, the officer also knew of appellant's recent involvement with marijuana on the apartment property, knew of continuing problems with non-residents engaged in criminal activity on the property, and knew of recent burglaries and illegal drug sales on the property. All of this knowledge, along with the officer's observations, supported reasonable inferences that led him to suspect that appellant and the person with him were engaged in criminal activity on the property. Moreover, when the officer approached appellant and the other person and attempted to determine if the other person was a resident of the apartment property, appellant told the other person not to answer the officer. This conduct was additional suspicious behavior. Taken together, the circumstances were sufficient to give the officers a particularized and objective basis for reasonable suspicion to stop appellant and the other person to investigate.

Accordingly, the Court held, the facts showed that the officer had lawful authority under the Fourth Amendment to detain and question appellant in a tier two encounter, and that the officers attempted repeatedly to exercise that authority. Because the facts showed that appellant refused to submit to the assertion of that authority, appellant was not seized in a tier two encounter. Rather, appellant's continued resistance to the officers' lawful authority to conduct a tier two encounter provided the officers with probable cause to arrest him for obstruction. Therefore, that the trial court did not err in denying appellant's motion to suppress.

Probation Revocation; Sufficiency of the Evidence

Barfield v. State, A15A2071 (2/10/16)

Appellant appealed from the revocation of his probation. The trial court revoked his probation after finding that appellant committed the offense of armed robbery. The Court reversed.

The evidence showed that appellant entered a package store and asked the owner for a bottle of Patron. When shown a bottle of Patron, appellant expressed dissatisfaction with its size, thanked the owner, and left. Less than 2 minutes later, a different individual entered the store and proceeded to rob the owner at knifepoint. The owner was able to retrieve a gun and shot her attacker, who fled, climbed into the passenger side of a vehicle, which then sped off. Subsequently crime scene investigators collected evidence at the scene, which included a sunflower seed with appellant's DNA. The getaway vehicle was also located and in between the center console and the front passenger seat was a bag of sunflower seeds.

The Court found that the State's evidence failed to provide sufficient evidence to support the revocation, even under the more lenient standard of preponderance of the evidence which is applicable to a probation revocation. Thus, the Court found, the State showed only that appellant was in the package store moments before the armed robbery took place. While the sunflower seed with appellant's DNA placed him at the scene of the crime, appellant's presence was not in dispute. Furthermore, there was no evidence linking that particular seed with the bag of sunflower seeds found in the getaway car, none of appellant's DNA was found in the car, and none of his fingerprints were found in the car either. Thus, the evidence equally supported the reasonable hypothesis that appellant merely spat out a sunflower seed while shopping in the package store, moments before an armed robbery committed by someone else took place. There was also no dispute that appellant was not the person who actually held up the store.

Accordingly, because the evidence presented was insufficient under a preponderance of the evidence standard to exclude every other reasonable hypothesis save that of guilt, the trial court abused its discretion in revoking his probation.

Juveniles; Sentencing

In re D. D., A15A2345 (2/10/16)

Appellant was adjudicated delinquent for acts which, if committed by an adult, would have constituted involuntary manslaughter (O.C.G.A. § 16-5-3(a)) and battery. Appellant first contended that the juvenile court erred in expressly denying him credit for time served pending adjudication and disposition. The Court and State agreed. Citing O.C.G.A. § 15-11-604(a), the Court found that appellant must be given credit for the 90 days in restrictive detention while awaiting adjudication and

the additional nine days in detention after his adjudication, but before disposition of his case.

Appellant also contended that the juvenile court erred in placing mandatory conditions on his supervision when it ordered that he be committed to the custody and control of the Georgia Department of Juvenile Justice (GDJJ). The Court and State again agreed. When a juvenile is committed to the custody and control of the GDJJ, custody and control of the juvenile is thereby and thereafter exclusively in the GDJJ, which is charged with responsibility to diagnose each juvenile and to determine, implement, and periodically revise as needed an individualized plan of care and treatment for each one. Moreover, once a delinquent child is committed to the custody and control of the GDJJ, the juvenile court has no power to make further provisions dictating the disposition of the child. Here, the juvenile court ordered appellant to be committed to the custody of the GDJJ for two years. Having done so, the juvenile court lacked the power to place additional conditions on his supervision by the GDJJ. However, the Court noted, upon remand, if the juvenile court wants to ensure that appellant meets certain conditions upon his release from restrictive custody, the juvenile court can place him in an institution, camp, or other facility operated under the direction of the court or other local authority, rather than committing appellant to the custody and control of the GDJJ.

Finally, appellant argued that the trial court erred by ordering him to pay restitution without first holding a restitution hearing. The Court and State agreed on this too. Pursuant to O.C.G.A. § 15-11-601(7), a juvenile court may order a delinquent child to make restitution. In doing so, however, the juvenile court must follow the procedures set forth in O.C.G.A. §§ 17-14-1 et seq. These procedures include the requirement of holding a hearing to determine restitution. Consequently, the Court remanded for a restitution hearing.

Fatal Variance; Split Sentences

Moon v. State, A15A1636 (2/10/16)

Appellant was convicted of one count of aggravated child molestation, two counts of aggravated sexual battery, three counts of child molestation, and one count of sexual exploitation of children. He contended that there was a fatal variance between the indictment and the evidence presented at trial as to the offense of sexual exploitation of children. Specifically, appellant contended that a reversal of this conviction was required because the indictment alleged that he knowingly possessed and controlled "a photograph depicting a minor . . . under the age of 18 years, engaged in sexually explicit conduct," but the evidence showed instead that the child pornography he possessed was in the form of digital images. The Court stated that the fundamental test is to determine whether (1) the accused was definitely informed of the charges against him so as to enable him to present his defense and not to be taken by surprise, and (2) the accused was adequately protected against another prosecution for the same offense. The true inquiry is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the accused. Only in the latter cases is the variance considered fatal.

Here, the Court found, appellant was not subject to either of these dangers when he was indicted for possessing "a photograph" depicting a minor child engaged in sexually explicit conduct, rather than a "digital image" depicting the same. O.C.G.A. § 16-12-100(b)(8) provides that "[i]t is unlawful for any person knowingly to possess or control any *material* which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct." (Emphasis added.).Digital images are encompassed within the scope of the statute. Thus, the allegations of the indictment sufficiently apprised appellant of the charge against him and did not mislead him. Furthermore, the Court found, appellant is in no danger of a future prosecution for the same offense, particularly since the prosecutor made copies of and tendered into evidence screen shots of the pornographic images that formed the basis of the charge.

Appellant also contended, and the State conceded, that the trial court erred under O.C.G.A. § 17-10-6.2(b) by failing to impose a split sentence for his convictions on three counts of child molestation and one count of sexual exploitation of children, when the trial court sentenced him to 20 years to serve on each count. Therefore, the Court vacated appellant's sentence and remanded the case to the trial court with specific instructions to resentence him consistent with O.C.G.A. § 17-10-6.2(b).