Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 19, 2010

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THIS WEEK:

Drug Forfeiture

Williams v. State of Georgia, A09A1984

Appellant appealed from the forfeiture of over $40,000.00 in cash. The record showed that the trial of the case was set on February 11, within 60 days of service of the complaint pursuant to OCGA § 16-13-49 (o) (5). The trial was then continued from its original date of February 11 until April 2. This hearing was then continued because of the trial court's crowded docket until May 16. Once again the case was continued because of a crowded docket, but this time until July 24. OCGA § 16-13-49 (o) (5) provides that a hearing must be held within 60 days of service of the complaint and may only be continued for good cause. The Courts have interpreted the language of subsection (o) (5) to mean that if a continuance is granted for good cause, the trial must be rescheduled within 60 days unless again continued for good cause. The Court stated that while it has held that a crowded docket is good cause for a continuance, the July 24 hearing was rescheduled more than 60 days after May 16. Since nothing in the record showed that the appellant consented to this rescheduling outside of the mandated 60 day period, the complaint should have been dismissed.

Ineffective Assistance of Counsel

Wadlington v. State, A09A1638

Appellant was convicted of armed robbery. He contended that the trial court erred in denying his motion for new trial because of ineffective assistance of counsel. The Court agreed, and reversed. The evidence showed that the victim, a convenience store employee, was robbed at gunpoint by two men. A video surveillance tape of the incident was viewed by a detective. The detective was then alerted two days later to a person allegedly matching the description of one of the robbers. He repeatedly testified, without objection, that when he saw appellant, he knew from his review of the video that this was the guy.

Citing *Grimes v. State*, 291 Ga. App. 585 (2008), the Court held that it is improper to allow a witness to testify as to the identity of a person in a video or photograph when such opinion evidence tends only to establish a fact which average jurors could decide thinking for themselves and drawing their own conclusions. The trial court found that *Grimes* was inapplicable because the testimony of the detective was admissible to explain his conduct. But, the Court stated that it is only the rare instance in which the conduct of an officer must be explained and this was not one of those instances. Since the trial court did not find that the defense attorney made a strategic decision in not making an objection, his failure to object to the detective's repeated testimony constituted deficient performance.

The Court also held that given the circumstances of this case, there was a reasonable probability that the outcome might have been different but for defense counsel's deficient performance. Although the surveillance tape was grainy and of poor quality, the detective testified that he was positive and 100 percent sure that appellant was the man in the tape. The victim saw the robber for mere seconds, gave an inaccurate physical description of the robber immediately after the robbery, had difficulty identifying the robber in a lineup two days after the robbery, but "surprisingly" certain of his identification at trial over one year later. No physical evidence linked appellant to the armed robbery other than a common blue shirt and blue baseball cap. "Based on this less than overwhelming identification evidence, as well as the fact that appellant's defense was that he had been misidentified, a reasonable probability exists that the outcome might have been different if counsel had objected to the detective's repeated assertions that he was positive that [appellant] was the man in the surveillance tape."

Speedy Trial

Lambert v. State, A09A1872

Appellant appealed from the denial of his motion to dismiss the indictment for violating his constitutional right to a speedy trial. The record showed that on April 16, 2002, appellant and five others were indicted on various charges, including malice murder, felony murder, kidnapping with bodily injury, and concealing the death of another. In October, 2003, a jury acquitted him of malice murder, felony murder and concealing the death of another, and deadlocked on the kidnapping count. He was released on bond in December 2003. On July 12, 2004, he filed a plea in bar asserting that a retrial on the kidnapping charge was barred on double jeopardy grounds. The trial court granted the motion on August 23, 2004, but the Court of Appeals reversed, and the remittitur was returned to the superior court on June 9, 2006. Appellant then successfully moved to sever his case from that of his remaining co-defendant. On November 13, 2007, the trial court elected to try the co-defendant first and that trial ended with a conviction in April 2008. The State reindicted appellant on June 10, 2008, but the indictment was dismissed on August 8, 2008 due to defects in its form. Appellant was reindicted under the current indictment on October 24, 2008, and his case was specially set to be tried on December 15, 2008. Appellant then filed a motion to dismiss the indictment on November 14, 2008, asserting that he was denied the right to a speedy trial.

Utilizing the *Barker v. Wingo* factors, the Court held that the length of the delay must be computed from the most recent remittitur to the trial court and this 29-month delay was presumptively prejudicial. The reasons for the delay were twofold: 1) the trial court's desire to try the incarcerated co-defendant first because appellant was out on bond; and 2) the State's reindictments of appellant. The Court found that both weighed against the State, but were relatively benign. As to the assertion of his rights, the Court noted that appellant waited nearly five years before asserting his rights and this failure to timely assert his rights was entitled to strong evidentiary weight against him.

Finally, appellant argued he was prejudiced because he suffered stress and anxiety in the delay of his trial, and that he suffered prejudice because of the impairment of witnesses' memories. The Court found that much of appellant's testimony showed only that his anxiety was the result of his being charged with murder and jailed during the pendency of the first trial, but his testimony that he lost two jobs because he had to travel to court on multiple occasions was evidence of anxiety and concern. However, appellant chose not to alleviate his anxiety and concern by filing a speedy trial demand for five years following the mistrial on the kidnapping charge. As to his concern about the memories of witnesses, merely asserting that memories have faded over time does not satisfy this requirement, and appellant failed to present any actual evidence to show that his defense would be impaired, which is the most important component of the prejudice factor. Therefore, in balance, the Court upheld the decision of the trial court denying the motion to dismiss.

Merger

McKenzie v. State, A09A1972

Appellant contended that his sentence was void because his convictions for armed robbery, aggravated assault and possession of a firearm during the commission of a felony should have merged. The evidence showed that appellant entered a Waffle House and robbed the waitress at gunpoint. After receiving the money, he asked if any more was in the lockbox. When the waitress said no, appellant put the gun to her neck and asked if she wanted to die. He then fled.

The Court held that no merger occurred. The crime of armed robbery was complete when appellant entered the restaurant and, with the use of a handgun, demanded and took money from the waitress. After the armed robbery had been completed and appellant did not like the waitress's response to his question regarding the lockbox, he pushed his gun against the waitress's neck and asked her whether she wanted to die. This conduct formed the basis of his aggravated assault conviction. Because his convictions on these two independent crimes were based upon separate and distinct conduct, they did not merge for sentencing purposes. Also, his conviction for possession of a firearm during the commission of a felony also did not merge into the other two offenses because OCGA § 16-11-106 (b) (1) renders it a distinct offense to commit with a firearm a crime "against or involving the person of another."

Merger; Recidivist Sentencing

Dobbs v. State, A10A0494

Appellant was convicted of four counts of aggravated assault on a police officer, four counts of obstruction of a police officer, and several drug and traffic offenses. Appellant argued that the trial court erred in failing to merge the convictions for obstruction into the convictions for aggravated assault. Obstruction of a police officer is "included in" the crime of aggravated assault on a police officer when the former is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the latter. The Court found that each count of the crime of obstruction was established by proof of the same or less than all the facts required to establish each count of the crime of aggravated assault. Also, the State conceded that the trial court erred in failing to merge the convictions for obstruction into the convictions for aggravated assault on a police officer.

Appellant also argued that the trial court erred in sentencing him as a recidivist based

on purported prior guilty pleas pursuant to OCGA § 17-10-7 (c). When the State seeks recidivist sentencing based on a prior guilty plea, the burden is on the State to prove both the existence of the prior guilty plea and that the defendant was represented by counsel in all felony cases and those misdemeanor proceedings where imprisonment resulted. Here, the State again conceded that it did not introduce any evidence that appellant had previously pled guilty or been convicted of any crime. Therefore, the trial court erred in sentencing appellant as a recidivist.

Search & Seizure

Langston v. State, A09A2142

Appellant was convicted of trafficking in cocaine. He argued that the trial court erred in denying his motion to suppress. The evidence showed that appellant was stopped for speeding. The officer asked him to step out of the vehicle. After conducting a brief pat-down of appellant, the officer asked to see appellant's license and registration. Appellant had a license and an expired car rental agreement. The officer called in for a license check and while waiting for that to come back, walked his dog around the vehicle. The dog alerted and a search of the vehicle resulted in the discovery of the cocaine.

Appellant contended that the officer unlawfully detained him by asking him to step out of his vehicle and otherwise unreasonably prolonged the traffic stop. The Court disagreed. Once a vehicle has been lawfully detained for a traffic violation, an officer may order the driver to get out of the vehicle without violating the Fourth Amendment. The officer was also authorized to detain appellant to investigate whether he was in lawful possession of the vehicle given the expired rental agreement. Furthermore, the officer did not prolong the stop in order to conduct an open air search because he did not receive the results of the license check until after the dog had alerted on the vehicle. Once the dog alerted, probable cause existed to search the vehicle. Finally, the Court added in a footnote, even if unjustified, the pat-down did not taint the subsequent search of the vehicle.

Hunt v. State, A09A2155

Appellant was convicted of VGCSA. He contended that the trial court erred in denying his motion to suppress. The evidence showed that law enforcement received an anonymous tip that drugs were being sold out of a house. Eight to ten officers went straight to the house and two went up to the door for a "knock and talk." Hutchinson answered the door. Hutchinson did not own the house or live there. He let the officers into the house. Once inside, the officers saw a gun and some marijuana. They then used this information to get a search warrant, which revealed much more controlled substances in the home. Appellant then came home and made a full confession to possession of the contraband.

Appellant contended that Hutchinson did not have the authority to allow the officers entry into his home. The Court held that where officers obtain consent from a third party to search, the State has the burden to prove not only that the consent was voluntary but that the third party had authority over, and other sufficient relationship to, the premises sought to be inspected. The issue to be determined is whether the objective facts available to the officer at the time would warrant a person of reasonable caution to conclude that the third party had authority over the premises. The officer's belief that the third party has authority over another person's property to consent to search should be based on information previously obtained in his investigation as well as facts and circumstances existent at the time of the search.

Here, the State failed to meet its burden. It was undisputed that the officers did not know who owned the home or resided there before knocking on the door and had made no effort to make such a determination before embarking on their knock and talk. After arriving at the residence, it was undisputed that they made no effort to determine whether Hutchinson had authority to give consent before asking if they could enter. Indeed, the Court noted, the record showed that the officers may have known *before* entering the home that Hutchinson did not have sufficient authority. Consequently, the search warrant was obtained from observations made during the officers' illegal entry into appellant's home and that his confession resulted from the officers' presence in his home. Because the police obtained all of their evidence against him during a short period of time after their illegal entry and there were no intervening circumstances that attenuated the causal chain, all of the evidence obtained by the police was "fruit of the poisonous tree" that should have been suppressed.

Watson v. State, A09A2212

Appellant was convicted of child molestation, aggravated child molestation, and distribution of cocaine. He contended that the trial court erred in denying his motion to suppress. The evidence showed that the police were searching for a runaway 15 year old girl. They went to appellant's trailer because the girl's mother "felt like" she might be there. The officers noticed two trucks parked outside. The officers knocked on the front door but got no response. They then walked around to the back door and knocked. Again no response, so they tried the door and it was unlocked. They opened the door and announced they would be coming in if no one answered. At this point, appellant came to the back door and let them in. He told them the girl was not there, but let the officers look around. The girl was located in a closet. The officers took her to the station. They interviewed her, but she said nothing incriminating about appellant. She then left with her father. Shortly thereafter, she returned and told the officers that she had sex with appellant and that they smoked crack together. The officers obtained a search warrant based on these statements.

The Court held that the police validly responded to the request to locate a missing person by entering appellant's private property to the extent of knocking on his outer doors. But, the Court stated, while it was understandable that the police were concerned about the girl's welfare, they had no probable cause to believe that she was in appellant's trailer and no evidence of any exigent circumstances to support a warrantless search. Accordingly, the police had no authority to open appellant's door. Furthermore, Appellant's consent to search was invalid because the consent was not sufficiently attenuated from the illegal entry and misrepresentation of authority. Instead, it was an immediate response to it. Thus, the consent was merely a submission to an apparent legitimate display of legal authority to which all are required to submit and therefore not voluntary.

Nevertheless, the Court found the evidence admissible under the independent source rule and the inevitable discovery rule.

The independent source doctrine allows admission of evidence that was discovered by means wholly independent of any constitutional violation, while the ultimate or inevitable discovery doctrine allows admission of evidence that was discovered as a result of police error or misconduct if the State establishes by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, without reference to the police error or misconduct. First, although the girl was originally taken into custody as a result of the illegal search, she was initially questioned and released by police. She said nothing in the first interview to implicate appellant in the crimes at issue. It was only in her second interview, after she left with her father, that she made the statements upon which the warrant was based. Thus, the girl's second statement had only an attenuated link to the earlier illegality and came from an independent, lawful source.

The evidence was also admissible under the inevitable discovery doctrine. To establish this exception, the record must show a reasonable probability that police would have discovered the evidence by lawful means and they must have possessed and been actively pursuing these lawful means prior to the occurrence of the illegal conduct. Here, the police were actively searching for the girl as a part of a legal investigation of a reported runaway and knew that her mother had reason to believe that she was spending time with appellant. While the evidence that police discovered the girl in appellant's trailer should have been suppressed, a reasonable probability existed that anything she said about her whereabouts or her dealings with appellant would have ultimately been discovered during the police's legal investigation of a reported runaway.

State v. Crumpton, A09A2387

Appellant was charged with VGCSA. The State contended that the trial court erred in denying Crumpton's motion to suppress. The evidence showed that an officer saw Crumpton driving alone. He knew Crumpton's criminal history and after watching him for a while, pulled Crumpton over for a broken tail light. Upon approaching, the officer noticed the manner in which Crumpton was sitting and suspected he was concealing something, perhaps even in his anal cavity. He wrote a warning ticket for the tail light violation and then questioned Crumpton concerning whether he had any illegal substances or stolen property in the vehicle. Crumpton said no and he refused consent to search. A canine unit was called. The dog alerted twice on the car, but a search revealed no drugs. The officer then told Crumpton that he would search him because of the dog alert. Crumpton consented and the officer began his search. When the officer asked to look in his "butt-crack" appellant refused. Appellant was then arrested. At the station, a fecal covered bag of cocaine was discovered near Crumpton.

The Court affirmed the trial court, finding that the officer lacked probable cause for arrest. Although the arresting officer knew of Crumpton's prior criminal history, that information apparently included only one incident in which Crumpton was suspected of illegal activity involving drugs and no arrest or charges arose out of the incident. And even if Crumpton consented to a search of his person and even allowed the officers to view his genital area, consent to search does not normally encompass a body cavity search, and refusal to allow a more invasive search did not give the officer probable cause to arrest Crumpton. As to the drug dog's alert, no contraband was found in either location. Lastly, although the dog alerted on the seat where Crumpton was seated, the dog was not allowed inside the vehicle until after Crumpton was handcuffed; thus, that alert was not one of the circumstances known to the officer at the time of the arrest.

Forgery

Nelson v. State, A10A0023

Appellant was convicted of forgery in the second degree and sexual battery (as a lesser included offense of child molestation). The evidence showed that when appellant was arrested, an inventory was taken of the contents of his wallet. Inside, the officers found a counterfeit $100.00 bill. The officers laughed at how bad the color of the bill was. Appellant responded that "[the police] couldn't charge him with it because he only possessed one of them." Although appellant testified at trial, the State did not question him concerning the bill.

Appellant contended that the evidence was insufficient to support his forgery conviction. The Court agreed and reversed his conviction. OCGA § 16-9-2 (a) provides that a person commits the offense of forgery in the second degree "when with the intent to defraud he knowingly makes, alters, or possesses any writing in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority." Citing *Velasquez v. State*, 276 Ga. App. 527 (2005), the Court found that the State must prove an intent to defraud, which may be proved by showing delivery or use of the writing, or some other associated writing. But here, the State did not present evidence that appellant had ever presented or attempted to negotiate the bill to anyone at any time; all that was shown was mere possession.

Opinion Evidence; Value

Partin v. State, A10A0063

Appellant was convicted following a bench trial of theft by taking (felony). The evidence showed that he stole building materials, including lumber and "jigs" (wooden forms used in making porches) which the victim had built. According to the victim, the cost of the materials and lumber was $450, and the cost of the labor to construct the jigs was approximately $200, bringing the total value of the stolen property to $650.00. Appellant contended that the record was devoid of evidence of the fair market value of the property because the victim only testified to the purchase price of the materials and the labor costs of building the jigs may not be considered in assessing value.

The Court held that an owner does not have to be an expert to testify as to the value of his property, provided he has experience or familiarity with such values. Here, the State established that he had knowledge, experience and familiarity with the value of the property and thus established his reasons for the value, having an opportunity for forming such an opinion. The victim testified that at the time of the theft, he had been building houses for five or six years; that he oversaw the purchase of lumber and materials for the homes he builds; that he kept up with the cost of lumber because it affects his profits and losses; that the value of lumber fluctuated from week to week; and that he assessed its value as of the day it was taken. The victim also described in detail the manner

in which the stolen jigs were constructed and value of the labor that went into them. The trial court was permitted to consider his testimony concerning the cost of the labor to build the jigs. The evidence was therefore sufficient for the court to determine that the fair cash market value of the property at the time and place of the theft exceeded $500.

Evidence; Bolstering

McGowan v. State, A09A2288

Appellant was convicted of rape, aggravated sodomy, kidnapping with bodily injury, cruelty to children in the first degree and three counts of child molestation. The victim was a 5 year old girl. Appellant contended that the trial court erred in allowing the victim's mother and the nurse and doctor who treated the victim at the hospital to offer testimony that improperly bolstered the victim's credibility. At trial, the victim's mother testified that when she noticed the victim's injuries and dishevelled appearance, she asked the victim what happened. Over defense counsel's objection, the victim's mother stated that the victim's response did not appear to be "rehearsed" or "coerced." Similarly, despite defense counsel's objections, a nurse who interviewed the victim at the hospital testified that when she asked the victim what had happened, the victim's responses appeared to be spontaneous and not rehearsed, and the victim's treating doctor testified that the victim's answers to his questions did not appear rehearsed.

The Court held that the credibility of a witness is to be determined by the jury, and the credibility of a victim may not be bolstered by the testimony of another witness. Thus, a witness may not give an opinion as to whether the victim is telling the truth. But here, the victim's mother, treating nurse and doctor did not express their beliefs as to the veracity of the victim. Rather, their testimony was addressed to the issue of whether they saw any indications in the victim's manner of responding that others had told the victim what to say. Such testimony does not impermissibly address the ultimate issue before the jury or bolster the victim's credibility.