

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 5, 2010

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THIS WEEK:

- **Confessions; Admissions**
- **Merger**
- **Fatal Variance; Jury Charges**
- **Nolle Prosequi; OCGA § 17-8-3**
- **Juveniles; Restitution**
- **Sentencing**
- **Guilty Pleas**
- **Mistrial; Character of Defendant**
- **Search & Seizure**

Confessions; Admissions

Griffin v. State, A09A1916

Appellant had his probation revoked after the trial court found that he committed the offense of driving with a suspended license. The evidence showed that an officer observed appellant get out of a vehicle from the driver's side at a convenience store. The officer then stopped the vehicle when it left the convenience store, but appellant was now in the passenger seat. In response to the officer's request for a driver's license, appellant stated that his license was suspended. At the hearing, the only evidence of the suspension was appellant's statement. He argued that his statement was an uncorroborated confession and therefore, under OCGA § 24-3-53, could not, standing alone, support his conviction.

The Court held that a confession is a statement that admits all the elements of an offense. Here, the charge was driving with a suspended license. Appellant did not admit to the essential element of driving. Therefore, the

statement was an admission. While admissions are scanned with care, for what they are worth, along with other evidence, unlike confessions, it is not required that they be corroborated. Accordingly, the evidence was sufficient to support his probation revocation.

Merger

Wallace v. State, A09A1596

Appellant was convicted of armed robbery, aggravated assault, use of a firearm by a convicted felon, possession of a weapon during the commission of a crime, pointing a gun at another, carrying a concealed weapon, and carrying a pistol without a license. He contended that the conviction of pointing a gun at another and the armed robbery should have merged. The Court and the State agreed. Here, the crime of armed robbery was established by proof that appellant drew a gun, aimed it at the victim with intent to commit theft, and demanded his wallet. The crime of pointing a pistol was established by proof that appellant aimed the gun at the victim with intent to commit theft, which establishes the lack of legal justification. Thus, under the facts of this case, the offense of pointing a gun at another was included in the armed robbery; it therefore merged as a matter of fact with the greater crime.

Fatal Variance; Jury Charges

Brown v. State, A09A1911

Appellant was convicted of theft by taking. She argued that the trial court erred in failing to grant her motion for directed verdict based on a fatal variance between the indictment and the evidence at trial because the evidence failed to prove that she unlawfully

took United States currency in excess of \$500 as alleged. A variance between the allegata and the probata is not fatal unless it misinforms the accused of the charges against her or leaves her subject to subsequent prosecutions for the same offense. The indictment placed appellant on notice that she was accused of theft of monies belonging to the Federal Highway Administration (FHA) in excess of \$500. At trial, the evidence showed that appellant used FHA funds without her supervisor's permission by manipulating the use of purchase orders to pay for her college courses. The Court held that the inclusion of the word "currency" in the indictment was not an essential element of the offense and did not create a fatal variance between the allegata and the probata since a purchase order authorizing the expenditures of funds, like currency, is a method of payment. Therefore, no fatal variance occurred because the indictment contained the elements of the offense intended to be charged, and sufficiently apprised appellant of what she must be prepared to meet.

Appellant also argued that the trial court's charge on the offense of theft by taking was erroneous because the trial court charged the jury on the commission of the offense by two methods when the indictment alleged the commission of the offense by one specific method. Specifically, she contended that the jury was improperly charged that theft by taking could be committed by the unlawful appropriation of property lawfully obtained. The Court disagreed. Considering the charge as a whole, the Court held that the indictment charged appellant with the unlawful taking of U.S. currency of a value in excess of \$500 with the intention of depriving the FHA of said property, and the jury instruction corresponded to the manner of theft alleged.

Nolle Prosequi; OCGA §17-8-3

Truelove v. State, A09A2081

Appellant was charged in Count 1 with trafficking in methamphetamine (by possessing more than 28 grams); in Count 2 with possession of methamphetamine with intent to distribute, and in Count 3 with simple possession of a quantity of methamphetamine "separate and distinct from the quantity alleged in counts one and two." At the close of the State's case, appellant moved for a directed verdict, in

part because the methamphetamine offered in support of Count 1 amounted to only 27.6 grams. The trial court allowed the State, over objection, to nolle prosequi Counts 2 and 3 and to proceed on Count 1 by combining the 27.65 grams with the separate quantity of methamphetamine that had been introduced in support of Count 3. The jury convicted appellant on Count 1.

Appellant contended that the trial court erred by denying his motion for a directed verdict on Count 1 and by allowing the State to nolle prosequi Counts 2 and 3. OCGA § 17-8-3 provides that "[a]fter the case has been submitted to a jury, a nolle prosequi shall not be entered except by the consent of the defendant." A case has been "submitted to the jury," within the meaning of this section, when the jury has been impaneled and sworn in the cause. Thus, appellant's consent was required before the nolle pros could have been entered because under this code section, the case had been submitted to the jury at the time the State sought the nolle pros of counts 2 and 3. Citing *Marshall v. State*, 275 Ga. 218, 219 (2) (2002), the Court reversed and remanded for a new trial. The Court concluded that the trial court eliminated the jury's full consideration of the charges against appellant, including whether it might acquit on Count 1 and convict on Count 3. Furthermore, the trial court essentially allowed the State to amend the indictment to eliminate the charge that he possessed a quantity separate and distinct from the amount alleged in Counts 1 and 2.

Juveniles; Restitution

In the Interest of W.J.F., A09A2186

Appellant, a 15-year-old, was adjudicated a delinquent for interference with government property and disrupting a lawful gathering. The evidence showed that he tampered with a sprinkler head in a holding cell at a detention center that caused the sprinklers to activate and a subsequent evacuation of the building. The uncontroverted damage was a little less than \$5,000.00. The juvenile court deferred the payment of restitution until appellant's sixteenth birthday, and ordered that at that time he would begin to pay at a minimum rate of \$100 per month. The court further held that if the restitution was not fully satisfied by the end of the probationary period the court "would hold a hearing and consider whether or not to

extend the order for purposes of attempting to collect the balance of the restitution."

Appellant argued that the juvenile court erred in imposing restitution as a condition of his probation because the evidence was insufficient to show that he had the financial means to pay the amount ordered. The Court held that pursuant to OCGA §§ 17-14-5 (a), (b) it is "the policy of this state to recognize that restitution is consistent with the goal of rehabilitation of delinquent juveniles and to provide restitution in such cases." In determining the nature and amount of restitution a trial court is required to consider a number of factors, including but not limited to the defendant's financial resources, assets, income, and financial obligations and to make appropriate findings of fact, which the juvenile court did in this case. Thus, the Court noted, the juvenile court found that 1) there was testimony that appellant worked occasionally and earned approximately \$20 a yard cutting grass during the summer; 2) psychological reports showed average intelligence and no mental impairments that would prevent appellant from working; and 3) one psychologist even opined that appellant would benefit from "part-time employment." Furthermore, the juvenile court made accommodations for appellant's age by deferring the payment of restitution until he turned sixteen. Therefore, the Court held, "as OCGA § 17-14-5 (b) expressly authorizes restitution as a condition or limitation of the probation of delinquent or unruly juveniles," the juvenile court did err in ordering restitution.

Sentencing

Crane v. State, A09A2331

Appellant entered into a negotiated plea to possession of cocaine. He was sentenced to five years, two to serve and ordered to begin making monthly payments on fines, fees and court costs during his incarceration. He contended that his plea was involuntary because he was promised that his jail time would be served in a county facility. The Court held that to the extent that he sought to withdraw his guilty plea, his request was untimely because after the expiration of the term of court and of the time for filing an appeal from the conviction, the only remedy available to a defendant for withdrawing a plea is through habeas corpus proceedings. Here, appellant waited almost eight months before filing his motion.

The Court also held that the sentence was not void. A sentence is void when the trial court imposes a punishment that the law does not allow. Here, the sentence was within the statutory range of punishment and therefore not void,

Nevertheless, the Court held, that portion of the sentence which required appellant to begin making monthly payments on fines, fees and court costs during his incarceration, was a punishment that the law does not allow. Consequently, this part of the sentence was void. Appellant could only be ordered to make payments on such fines and fees as a condition of probation.

Guilty Pleas

Shaw v. State, A10A0165

Appellant pled guilty to aggravated assault, making terroristic threats, and possession of a firearm by a convicted felon. He appealed from the denial of his motion to withdraw his plea. He argued that his guilty plea was not knowing and voluntary because there was evidence that he suffered from medical and mental health problems and was under the influence of medication when he entered his guilty plea. When a defendant challenges the validity of a guilty plea, the State bears the burden of showing that the plea was entered voluntarily, knowingly, and intelligently. This burden is satisfied if the State shows that the defendant was cognizant of all of the rights he was waiving and the possible consequences of his plea. The State may meet its burden by (1) showing on the record that the defendant was cognizant of his rights and the waiver of those rights, or (2) using extrinsic evidence that shows affirmatively that the guilty plea was entered knowingly and voluntarily.

Here, the record showed that appellant responded affirmatively to the trial court's series of questions, including whether he understood the charges against him, that he faced a 30-year sentence, that he had a right to a jury trial, and that he was waiving certain rights by pleading guilty. He also denied being under the influence of any drugs or medication that would affect his ability to understand the proceedings, denied being promised anything or threatened in any way in order to secure his guilty plea, and said he understood that he did not have to enter the plea and could go to trial. At the motion hearing, his trial counsel testi-

fied that she knew appellant was depressed but, based on her 10 years of experience in criminal defense, he did not appear to be incompetent or in need of a psychiatric evaluation before pleading. Trial counsel and appellant also discussed at length whether he would be better off going to trial or pleading guilty in light of his medical problems and possible recidivist treatment. The Court held that the trial court had no duty to make any further inquiries into appellant's competence before accepting the guilty plea. Therefore, the trial court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea.

Mistrial; Character of Defendant

Jackson v. State, A09A1822

Appellant was convicted of two counts of aggravated assault, two counts of aggravated battery, and burglary. He contended that the trial court erred in not granting him a mistrial after the two victims each placed his character into evidence. The record showed that prior to trial the court granted appellant's motion in limine that no State's witnesses mention previous arrests, convictions, probations, paroles or incarcerations. During trial, both victims, in unresponsive answers to questions posed to them, each mentioned that appellant had been incarcerated. The Court, citing and discussing *King v. State*, 261 Ga. 534 (1991) and its progeny, found that the trial court abused its discretion in not granting a mistrial. First, the Court found that the statements themselves, although not entirely unresponsive, were both gratuitous and unnecessary to answer the questions posed. Nor could the statements be characterized as either "passing" or oblique. In fact, one victim twice mentioned appellant's incarceration in consecutive sentences. And both witnesses testified clearly that appellant was "incarcerated," using the same terminology and leaving no doubt of their meaning.

Second, both witnesses had been specifically instructed to avoid referring to appellant's previous criminal history in any manner. Thus, it found, this case was akin to those cases involving law enforcement officers "who should know better." Moreover, after each reference, the jury was instructed to disregard the testimony, but the Court stated it was hard to "un-ring" the bell not once, but twice.

Finally, the evidence was not overwhelm-

ing given that "both of these witnesses at times gave testimony that was vague, ambiguous, conflicting and contradictory." Consequently, the case was reversed and remanded for a new trial.

Search & Seizure

State v. Willis, A09A1615

The State appealed from an order granting Willis's motion to suppress. The evidence showed that a CI gave the police information about a person named Bell, who was a passenger in a vehicle driven by Willis. Law enforcement found marijuana and cocaine on Bell. The vehicle also smelled of marijuana and had marijuana residue inside. The officers arrested both men. The officers formally interviewed Bell at the station. This interview was recorded and certain statements allegedly made by Bell were included as facts in an affidavit in support of a search warrant for Willis's home. The trial court listened to the entire recording and found that Bell never made the following statements used to support the affidavit: 1) he observed Willis go inside his residence and get a large quantity of marijuana, take it out to the back of the residence and place the marijuana in a wooded area behind residence; and 2) Willis had scales, baggies and possibly a large sum of currency. The trial court found that without this information, the affidavit lacked probable cause and granted the motion to suppress.

The State argued that the trial court erred because a warrant application containing omissions or misrepresentations of fact does not automatically create a basis for suppressing evidence. The Court agreed, but noted that the trial court actually held that after omitting the untrue statements from the affidavit, the balance of the information was insufficient to have established probable cause. Moreover the Court held, the trial court was correct in this determination that the affidavit, without the misrepresentations, lacked probable cause. The only other information in the affidavit was that Bell and Willis were seen in the vicinity of Willis's home and that Bell knew where Willis lived. All the remaining information in the affidavit related entirely to the events surrounding the undercover operation that led to the agents stopping Willis's car and finding contraband on Bell.