

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 13, 2012

State Prosecution Support Staff

Stan Gunter
Executive Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Resource Coordinator

Gary Bergman
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Todd Hayes
Traffic Safety Resource Prosecutor

THIS WEEK:

- **Search & Seizure; Cocaine Trafficking**
- **Deposit Account Fraud; Present Consideration**
- **Probation Revocation; Sentencing**
- **Probation Revocation; Right to Remain Silent**
- **Commenting Upon Defendant's Silence**
- **Search & Seizure**
- **Videotape; Original Evidence**

Search & Seizure; Cocaine Trafficking

Shell v. State, A12A0236 (4/12/2012)

Appellant was convicted of trafficking in cocaine. He argued that the trial court erred in denying his motion to suppress evidence of the cocaine, which was found when a law enforcement officer searched his car during a traffic stop. Because the evidence demonstrated that the officer was authorized to stop the car and to search containers found therein, the Court affirmed.

Appellant argued that the cocaine should have been suppressed because the officer had no articulable suspicion for stopping his car. The Court disagreed. The officer's testimony authorized a finding that he saw appellant commit the traffic violation of impeding the flow of traffic when appellant slowed down to 50 miles per hour in a 65 mile per hour zone, and not allowing the vehicles and tractor trailers behind him to pass. The officer testified that appellant's driving caused the traffic behind him to back up and created a hazard.

Appellant argued that the officer's testimony was not credible because it was internally inconsistent and because a video recording of the stop showed that, shortly before the stop, a tractor-trailer was able to pass appellant's car on the right. But the Court stated that it is for the trial court, sitting as finder of fact, to gauge the credibility of the officer's testimony.

Appellant also argued that the cocaine should have been suppressed because his consent to a search of the car did not extend to a search of the bag in which the cocaine was found. The Court found that it did not need to reach the issue of the scope of appellant's consent since an officer is permitted to search a car without a warrant if he has probable cause to believe the car contains contraband. Here, evidence was presented that particles of what appeared to be marijuana were in plain view in the car, that appellant displayed characteristics consistent in the officer's experience with involvement in illegal narcotics transactions, and that he displayed an extremely nervous demeanor. Construing this evidence most favorably to support the trial court's judgment, "the facts and circumstances before [the officer] were such as would lead a reasonably prudent person to believe that contraband was present," thereby providing the officer with probable cause to search the car.

Deposit Account Fraud; Present Consideration

Gibson v. State, A12A0195 (4/13/2012)

Appellant was convicted of deposit account fraud. The issue presented was whether his check, drawn on a closed account, was presented "in exchange for a present consideration" within the meaning of OCGA § 16-9-20 (a).

The Court concluded that a rational trier of fact could have found beyond a reasonable doubt that the check in question was presented in exchange for a present consideration, and therefore affirmed.

The victim, a construction rental company, rented two pieces of heavy equipment to appellant for a construction project. The company delivered a crawler dozer to the job site on September 8, 2008, and picked it up on September 18. An excavator was delivered on September 19, and the company picked it up on September 22. The excavator was damaged during the rental period, and the company repaired it after ordering the necessary parts. The owner of the company testified that on October 7, he presented appellant with the bill for the entire transaction, including the rental for both pieces of equipment and the repairs, which he testified were completed on that date. Upon presentation of the bill, appellant gave the victim a check drawn on a closed account.

After hearing this testimony, the trial court specifically found that the check constituted present consideration and found appellant guilty.

The Court found that evidence that the check was given in exchange for equipment rental was sufficient to enable a rational trier of fact to find appellant guilty of the crime charged. Even if this were not the case, or if the repairs to the equipment were considered separately, “[t]he requisite of present consideration may exist although goods or services are received before a check is delivered in payment, where the interval is slight and the exchange can be characterized as a single contemporaneous transaction.” Here, evidence was presented that the rental of multiple pieces of construction equipment constituted a single transaction, which was not completed until the victim picked up the equipment, calculated the amount due for necessary repairs, and presented appellant with an invoice for which he immediately wrote a check. This constituted sufficient evidence for the trial court to conclude that appellant’s check was given for a present consideration within the meaning of OCGA § 16-9-20 (a).

Probation Revocation; Sentencing

Klicka v. State, A12A0187, A12A0188 (4/13/2012)

Appellant challenged the court’s revocation of his probation for violation of the terms

thereof. Appellant filed an application for discretionary appeal, which the Court granted to review the revocation order. The Court held that because the evidence failed to support the revocation to the extent ordered by the trial court, the Court vacated the order and remanded the case for resentencing.

The record showed that on February 11, 2011, appellant plead guilty to possession of methamphetamine and aggravated assault and was sentenced to concurrent sentences of 10 years, with one year in confinement commuted to time served, and the remaining nine years probated in each case. The general terms of his probation required him to report to his probation officer, pay probation fees, and refrain from violating criminal laws. In March 2011, the State filed a petition to revoke appellant’s probation based on allegations that appellant failed to report to intake and that he was arrested on March 1, 2011, for committing aggravated assault, criminal trespass, property damage, failure to maintain lane, fleeing or attempting to elude an officer, following too closely, hit and run, obstruction, reckless driving, suspended license, and theft by receiving stolen property. The trial court revoked appellant’s probation based on his “failure to report and pay” and his “new aggravated assault charges,” making no findings as to the other allegations in the revocation petition. The revocation order required appellant to serve three years in confinement, with the balance of his probation suspended.

Appellant argued that (1) the evidence failed to support the trial court’s finding that he committed the new offense of aggravated assault, and (2) that the three-year revocation was not supported by appellant’s failure to report and pay the fees under the terms of his probation. A court may not revoke any part of any probated or suspended sentence unless the evidence produced at the revocation hearing established by a preponderance of the evidence the violation or violations alleged. OCGA § 42-8-34.1 (b). The only new offense found by the trial court was an aggravated assault offense allegedly committed by appellant. Further, the Court noted that aggravated assault requires proof of certain aggravating circumstances and an assault. The sole testimony at the revocation hearing was that of the officer who arrested appellant based on the stolen vehicle report. That officer testified as to his pursuit and capture of

appellant, but there was no further testimony about or from an alleged victim of an aggravated assault. Thus, the Court held that even assuming appellant’s collision with another vehicle while evading the officer was the basis for the aggravated assault charge, there was no evidence as to the occupant’s apprehension of receiving an injury or as to his or her conduct showing the same. The evidence here did show that appellant hit another vehicle in his attempt to elude the officer, but absent some evidence in addition to the mere collision, the State failed to prove the intent necessary to show that appellant collided with the vehicle in an attempt to injure someone for purposes of an aggravated assault offense. Therefore, even under the lower evidentiary burden at the revocation hearing, there was insufficient evidence that appellant committed an aggravated assault offense in violation of the terms of his probation. Furthermore, because the trial court’s revocation order required appellant to serve three years, the Court vacated the order and remanded for resentencing to a term of confinement no greater than that specified in OCGA § 42-8-34.1 (c).

Probation Revocation; Right to Remain Silent

Germany v. State, A12A0185 (4/12/2012)

Appellant argued that the trial court violated his Fifth Amendment rights by revoking probation for his refusal to take a polygraph examination; that at most, the trial court could revoke two years probation. The Court held that requiring appellant to undergo a polygraph as a condition of probation did not violate his Fifth Amendment rights and that the trial court was not limited to revoking two years probation. In 1992, appellant pled guilty to one count of aggravated child molestation and was sentenced to 30 years, to serve five years in prison and the remainder on probation. He also pled guilty to one count of statutory rape and was sentenced to serve 20 years on probation. Later that year, he pled guilty to aggravated sexual battery and was sentenced to 20 years, to serve five years in prison and the remainder on probation. All three sentencing forms, Form SC-6, listed as a special condition of probation that: “Probationer shall submit to and cooperate with a lie detector test or Psychological Stress Evaluation, whenever so directed by the Probation Supervisor of any city, county or state

law enforcement officer concerning any inquiry relative to compliance with the terms of his/her probation. Additionally, probationer shall submit to and cooperate with a lie detector test and/or Psychological Stress Evaluation inquiring into his/her knowledge of criminal activity as may be directed by the Probation Supervisor or by any city, county or state law enforcement officer.” All three sentencing forms also informed appellant that if his probation were revoked, “the Court may order the execution of this sentence which was originally imposed or any portion thereof in the manner provided by law after deducting there from the amount of time the defendant has served on probation.”

In 2010, appellant’s probation officer filed a petition to revoke his probation, alleging that appellant had violated his probation by committing child molestation and by failing to submit to and cooperate with a polygraph examination. The court ruled that appellant had violated the condition requiring him to submit to a polygraph examination and revoked five years probation. The Court held that a probation “condition requiring the probationer to submit to polygraph tests does not violate the [probationer’s] Fifth Amendment rights.” The Court reasoned that “[t]he intrusion into the area of self-incrimination is no greater than a requirement that a probationer answer all reasonable inquiries of his probation officer.” The Court noted that this is a different situation than agreeing to undergo a polygraph examination and then refusing to answer incriminating questions, which would invoke Fifth Amendment rights. Appellant was not forced to answer incriminating questions, and was never threatened that his invocation of his right not to answer particular questions would result in revocation of his probation.

Commenting Upon Defendant’s Silence

Williamson v. State, A12A0075 (4/6/2012)

Appellant was found guilty of rape, statutory rape, aggravated sexual battery, aggravated sodomy, child molestation, and aggravated child molestation. Appellant contended that the trial court erred in denying his motion for a mistrial after an investigator allegedly commented on his right to remain silent. The Court discerning no error, affirmed.

The Court stated that an improper comment on the defendant’s silence does not

necessarily require a reversal. Furthermore, testimony about the defendant remaining silent is not deemed to be prejudicial if it is made during a narrative on the part of the authorities of a course of events and apparently was not intended to, nor did it have the effect of, being probative on the guilt or innocence of the defendant. Indeed, to warrant a reversal of a defendant’s conviction, the evidence of the election to remain silent must point directly at the substance of the defendant’s defense or otherwise substantially prejudice the defendant in the eyes of the jury. The following was at issue: According to the police officer who was investigating molestation allegations in 2005, after she witnessed one of the alleged victim’s forensic interviews, she became concerned for the safety of the other children who lived in appellant’s home. She met with her supervisor and they jointly decided to conduct a warrantless arrest of appellant at his home. The investigator testified that, when she and a Department caseworker arrived at appellant’s home, she asked him “to step outside so I could talk with him and explain what was going on. Well, he was very belligerent and refused to talk with me or go outside to discuss anything.” Outside the presence of the jury, defense counsel moved for a mistrial, objecting on the basis that the investigator’s testimony was a “testimonial comment on my client’s invocation of his right to remain silent.” After conducting a hearing, the trial court denied the motion and then provided the jury with limiting instructions which included emphasizing that the defendant was under no duty not only to present evidence tending to prove his innocence, he was under no duty to talk to the police, to this officer or to any other officer with reference to these matters. Furthermore, the investigator’s comment did not point at any specific defense offered by appellant nor was there any indication in the record that the comment was intended to improperly influence the determination of appellant’s guilt or innocence, or that it actually did so. Under these circumstances, the Court concluded that it was not an abuse of the trial court’s discretion to deny appellant’s motion.

Search & Seizure

State v. Taplin, A12A0067 (4/12/2012)

Steve Taplin was indicted for aggravated assault, possession of a firearm during the

commission of a crime, cruelty to a child in the third degree and driving with a suspended license. The trial court granted Taplin’s motion to suppress evidence of a gun found in his truck during a warrantless search incident to his arrest, and the State appealed. Because the uncontroverted evidence demonstrated, as a matter of law, that Taplin was arrested for the crime of aggravated assault, and because it was reasonable for an officer to believe that the truck contained evidence related to that crime, the warrantless search was permitted pursuant to *Arizona v. Gant*, 556 U. S. 332 (2009). Accordingly, the Court reversed.

The only evidence presented at the suppression hearing was the testimony of a police officer. He testified that around noon on November 29, 2009, he was dispatched to a domestic dispute with information that a person named Steve Taplin had pointed a firearm at his child’s mother and then driven away from an apartment complex in a black pickup truck. One to two minutes later, as the officer was en route to the scene, he saw a black pickup truck leaving the vicinity of the apartment complex. He determined by checking the license tag that the pickup truck was registered to Steve Taplin. The dispatcher informed him that Taplin’s driver’s license was suspended. The officer testified that, “based on the possibility of a firearm being in the vehicle,” he did not immediately initiate a traffic stop but, along with an officer in another vehicle, continued following the truck for another five to ten minutes. He then initiated what he described as a “felony traffic stop.” The two officers got out of their vehicles with their firearms drawn and asked Taplin to place his hands outside the truck’s window. Taplin did not comply but instead “look[ed] around in the vehicle toward the center of the vehicle compartment.” A third officer arrived on the scene, and Taplin was ordered to step out of the truck and face away from the officer. Taplin did so, but repeatedly tried to look and reach inside the truck, telling the officers that he was looking for his identification. Ultimately, he complied with commands to walk backwards toward the officers, get on his knees on the ground, and cross his legs behind him. One of the officers approached him and placed him in handcuffs. They sought consent to search the truck but Taplin refused. An officer then checked the area of the truck where he had noticed Taplin

looking and found a firearm under the driver's seat cushion cover.

The Court found that the totality of the circumstances supported a finding that at the time of Taplin's arrest, the officer had probable cause to arrest him for aggravated assault, specifically the dispatches naming "Steve Taplin" as the perpetrator and indicating that the truck stopped by the officer was registered to "Steve Taplin," the match of the truck to the description provided in the dispatches, the location of the truck near the scene of the aggravated assault, the officers' identification of the truck's driver as Steve Taplin, and Taplin's behavior upon being stopped. Given the evidence that Taplin allegedly pointed a gun at the aggravated assault victim before leaving the scene in his truck, along with the evidence of Taplin's movements inside the truck and his persistent efforts to reach and look into the truck during the stop, it was reasonable to believe that evidence relating to the aggravated assault (the gun) might be found in the truck, and thus the warrantless search of the truck incident to Taplin's arrest was justified.

Videotape; Original Evidence

Redinburg v. State, A12A0009, (4/6/2012)

Appellant was found guilty of aggravated assault with a deadly weapon, and possession of a firearm during the commission of a crime against another person. He contended that the court erred in excluding a recording of a phone conversation between two potential witnesses. Specifically, that the complete recording was admissible to impeach one of the witness's trial testimony by showing that he promised to lie to the police about the other witness's involvement in the victim's death, as well as to show the jury that the witness's testimony and demeanor on the witness stand was simply an act that was inconsistent with the witness's natural, out-of-court manner of communicating.

The events leading to the phone call are as follows. About three months after the shooting, police investigators still had not identified a suspect in the victim's death. In a seemingly unrelated incident, however, police officers arrested Cureton (witness 1) for possession of a stolen truck. Alls (witness 2) had also been riding in the truck before it was stopped by the police, but he escaped on foot. Following his arrest, Cureton agreed to assist the police

by making a telephone call to Alls that was recorded without Alls' knowledge. During the phone call, the two men talked about the shooting that led to the victim's death and discussed a handgun that one of them had thrown out of the window while the police were chasing the truck. They acknowledged that their fingerprints were going to be on the gun and that the ammunition for the gun was the same type that had been used to shoot the victim. Alls also promised to provide an alibi for Cureton for the night of the murder. However, Cureton never appeared to testify, and attempts to locate and apprehend him pursuant to a witness contempt citation and arrest warrant failed. When it was clear that Cureton would not be present to testify, appellant's counsel expressed his intent to play the recording of the phone call. The State objected, however, on the basis that, because Cureton had failed to testify, his portion of the conversation was inadmissible hearsay. The trial court agreed that Cureton's statements constituted inadmissible hearsay and ruled that the recording would only be admitted if Cureton's statements were redacted.

The Court found that the admissibility of Cureton's statements in the recorded phone call is governed by OCGA § 24-3-2. That statute has repeatedly been cited as authority for admitting recordings of phone calls between witnesses, co-conspirators, informers, and/or other third parties that were made after the crimes at issue and at the direction of law enforcement officers, even when one of the parties to the conversation did not testify at trial, as in this case. The trial court erred when it excluded the statements on the basis that they constituted inadmissible hearsay.

The Court also found that the evidence of appellant's guilt, while legally sufficient to support his convictions, was neither overwhelming nor so compelling that it rendered harmless the erroneous exclusion of the recording. Consequently, the Court concluded that there was a reasonable possibility that the outcome of the trial would have been different if the recorded phone conversation had been played in its entirety for the jury.