Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 15, 2016

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THIS WEEK:

Probation; Banishment

Mallory v. State, A15A2343 (2/26/16)

In October 2007, appellant was convicted in Bartow County of robbery by force, false imprisonment, and simple battery. The trial court sentenced him to serve 10 years in confinement, followed by 15 years on probation. The terms of his probation directed that he have no contact with the victim or her place of work and banished him from Bartow and Gordon Counties, which comprise the Cherokee Judicial Circuit. In June of 2015 he moved to modify the terms of his probation. He contended that the Board of Pardons and Paroles had notified him that he was required to complete a work release program before he could be released on parole. Due to his banishment from Bartow County, he asserted, the Department of Corrections had advised him that he was ineligible for assignment to a transition center to complete the work release program because his "only possible parole addresses are with his family in Bartow County." He acknowledged that prohibiting contact with the victim was a reasonable requirement, but argued that he had no prior history with the victim that would justify banning him from the area completely. The trial court denied his motion.

The Court affirmed. The Court found that appellant had not met his burden of proving on the record that the condition of probation banishing him from Bartow and Gordon Counties was unreasonable. He was indicted for, and convicted of, (1) taking money from the victim by force, (2) confining and detaining the victim without legal authority, and (3) making physical contact of an insulting and provoking nature to the victim's person. As a condition of probation, he was required to avoid contact with the victim and her place of work in addition to being banished from Bartow and Gordon Counties. The record contained no evidence supporting appellant's contentions regarding the restrictions on his ability to obtain release from confinement and begin serving the remainder of his sentence under probation. Thus, considering the absence of evidence to support his contention that the terms of his probation were unreasonable, the Court found that the trial court did not abuse its discretion by denying appellant's motion to modify his sentence.

Juvenile Delinquency Petitions; O.C.G.A. § 15-11-523

In re J. H., A15A2157 (2/26/16)

The State filed a petition seeking an adjudication of delinquency against appellant, a 15-year-old, alleging that he had committed four offenses that would have constituted crimes if he had been an adult: burglary, reckless driving, fleeing or attempting to elude a police officer, and criminal gang activity.

After the adjudication hearing began on April 28, 2015, appellant entered admissions to the first three offenses, but denied the charge of gang activity. After advising appellant of his rights and asking the prosecutor what the evidence would show regarding those charges, the juvenile court found a factual basis for the admissions and accepted them. The court then instructed the prosecuting attorney to call the first witness on the offense of gang activity. At that point in the adjudication hearing, the parties and the court held a discussion regarding the fact that the delinquency petition did not indicate that the fourth count was a Designated Felony, which was required under the revised Juvenile Code. The prosecuting attorney orally moved to amend the delinquency petition to state that the offense was being prosecuted under the Designated Felony provisions of Title 15. Appellant objected, asserting that jeopardy had already attached and that such an amendment was barred by statute. The trial court allowed the amendment reasoning that the prosecutor was not adding a new charge of delinquency, but was merely amending the petition to correct the pleading defect of having omitted the label of "Designated Felony."

Appellant argued that the trial court erred in allowing the amendment after jeopardy attached. The Court agreed. The Court noted that whether a juvenile is adjudicated for committing a Designated Felony or simply a delinquent act significantly alters the length of the commitment available. The maximum length of commitment for a delinquent act is 24 months, with the possibility of a 24-month extension. In contrast, an adjudication of delinquency for a Class A Designated Felony may result in restrictive custody with the Department of Juvenile Justice (DJJ) for as long as 60 months, and for a Class B Felony, in DJJ custody for 36 months, with a maximum of 18 months in restrictive custody.

Subsection (b) of O.C.G.A. § 15-11-523 provides that if the prosecuting attorney amends a delinquency petition to effect "material changes to the allegations . . . , the petition *shall* be served in accordance with Code Sections 15-11-530 and 15-11-531," (emphasis supplied) that is, served upon the child and his parent, guardian, or legal custodian at least 72 hours before the hearing. Alleging that the juvenile committed a designated felony materially changes the petition by allowing the juvenile court to impose a much lengthier sentence. Interpreting O.C.G.A. § 15-11-523 only to prohibit adding new charges to a delinquency petition after jeopardy attaches would render the mandatory service requirements of subsection (b) meaningless surplusage. Therefore, construing O.C.G.A. § 15-11-522(5), which requires a delinquency petition to state whether any charges are designated felonies, with § 15-11-523(b), which requires that a material amendment to the petition be served on the child and certain designated persons at least 72 hours before the hearing, the Court concluded that the legislature intended to prohibit the State from materially amending a delinquency petition after the hearing had commenced and after jeopardy attached. Accordingly, because the State sought to make a material amendment to the petition absent proper notice and service, the trial court erred in allowing the amendment.

DUI; Miranda

Rebuffi v. State, A15A1638 (3/1/16)

Appellant was convicted of DUI (less safe). He contended that the trial court erred in denying his motion to suppress. The evidence showed that a police officer working a foot patrol as a courtesy officer at an apartment complex heard a loud revving sound of an engine and saw a vehicle speeding in the parking lot. Appellant got out of the car and headed toward his apartment. The officer stopped him before he got into his apartment and noticed evidence of intoxication. Appellant told the officer he consumed three drinks. The officer called for a DUI task force officer. The officer arrived 23 minutes later. The task force officer conducted field sobriety evaluations and then arrested appellant. Appellant also told the task force officer that he consumed three drinks.

Appellant first contended that the courtesy officer's questioning of him violated his *Miranda* rights. The Court disagreed. The Court found that the officer's initial approach clearly fell within the realm of a first-tier citizen encounter. Thus, appellant was not entitled to be given *Miranda* warnings.

Appellant next argued that the results of his field sobriety tests and his refusal to submit to the State's breath test should have been suppressed because he was not given *Miranda* warnings. Specifically, he argued that the delay of 23 minutes amounted to his being arrested. Again the Court disagreed. Once the courtesy officer smelled alcohol on appellant's breath, he had the required articulable suspicion to investigate further and conduct a second-tier investigatory detention. The Court noted that it had previously held that a detention of twice as long as 23 minutes did not convert the investigation into a custodial arrest. Moreover, the evidence showed that appellant was permitted to sit or stand as they waited for the task force officer to arrive and appellant was not told he was under arrest or handcuffed. Thus, the Court concluded, the lapse of time between appellant's detention and the task force officer's arrival on the scene did not cause appellant's detention to ripen into a custodial arrest which would have required that *Miranda* warnings be given.

Indictments; Trafficking a Person for Sexual Servitude

Ferguson v. State, A15A1818 (3/1/16)

Appellant was convicted of trafficking a person for sexual servitude, two counts of attempting to commit that offense, pimping for a person less than 18 years of age, two counts of conspiring to commit that offense, enticing a child under the age of 16 years for indecent purposes, and nine counts of conspiring to commit sexual exploitation of a child. He contended that the trial court erred in denying his motion to dismiss the indictment. The Court disagreed.

First, he argues that Counts 1, 2, and 3 failed to allege facts of sexually explicit conduct, as required for trafficking a person for sexual servitude, and Counts 6 and 7 failed to allege facts that the two underage victims, K. P. or K. L., engaged in any acts of prostitution. But, the Court found, by virtue of the statutory definition of trafficking another person for sexual servitude, an indictment that alleges a violation of O.C.G.A. § 16-5-46(c) necessarily incorporates an allegation that the trafficking conduct by the accused involved sexually explicit conduct by the victim. In addition, Counts 6 and 7 alleged that appellant engaged in a conspiracy to commit the offense of pimping by having K. P. and K. L. distribute business cards in order to solicit men to buy sexual services from them. These Counts included facts showing that appellant, in concert with others, aided and abetted K. P.

and K. L. in acts of prostitution, which offense comprises, not only performing sexual acts for money, but offering or consenting to perform sexual acts for money.

Appellant also contended that Counts 9 through 16 of the indictment were flawed in alleging in one indictment both a conspiracy (to commit sexual exploitation of children) and, as the substantive step taken in furtherance of the conspiracy, the underlying substantive act (sexual exploitation of children by possessing photographs depicting the lewd exhibition of children's genitals). But, the Court stated, although a conviction for conspiring to commit an offense merges into a conviction for the completed offense for sentencing, appellant did not identify any authority for his position that an indictment is void if it alleges a conspiracy that achieved its object. Indeed, the Criminal Code provides that "[a] person may be convicted of the offense of conspiracy to commit a crime . . . even if the crime which was the objective of the conspiracy was actually committed or completed in pursuance of the conspiracy, but such person may not be convicted of both conspiracy to commit a crime and the completed crime." O.C.G.A. § 16-4-8.1. Accordingly, the trial court did not err in denying appellant's motion to dismiss the indictment.

Impeachment; First Offender Sentences

Hall v. State, A15A1639 (3/2/16)

Appellant was convicted of armed robbery, burglary, aggravated assault, two counts of false imprisonment, and two counts of possession of a firearm during the commission of a crime. The two victims and the victims' neighbor identified appellant at trial. Appellant's girlfriend testified as an alibi witness. Over objection, the trial court allowed the State to cross-examine her about a letter that appellant had written in a previous case in which he accepted responsibility for a crime to which she had pled guilty and received first offender treatment.

Appellant argued that the trial court erred by allowing the State to impeach his girlfriend using her first-offender plea. At the time of trial, appellant's girlfriend was still serving first-offender probation and had not been adjudicated guilty of that crime. The Court noted that appellant was correct that unless there is an adjudication of guilt, a witness may not be impeached on general credibility grounds by evidence of a first offender record. However, the Court stated, an exception to this general rule exists when the purpose of the impeachment is to show a witness's bias. The trial court retains broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion, repetition, or irrelevant evidence.

Here, the Court found, the State did not use appellant's girlfriend's guilty plea to impeach her general credibility, but instead used it to show bias through evidence that appellant had previously attempted to accept responsibility for her criminal conduct in a different matter. When overruling appellant's objection, the trial court explicitly noted that the witness's first-offender status did not amount to a conviction and instructed the State to "be careful how you structure the questions." The trial court later sustained appellant's objection and excluded the testimony of the prior crime's victim. Thus, the Court found, the trial court acted well within its discretion in allowing the State to explore whether appellant's previous attempt to accept responsibility for his girlfriend's criminal conduct may have influenced her trial testimony.