Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 23, 2010

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THIS WEEK:

Statements; Miranda

State v. Billings, A10A0591

The State appealed from the grant of Billings' motion to suppress. The evidence showed that an officer was working a security detail at a private employer when a security guard with the employer told her that he suspected Billings of selling drugs. The officer approached Billings in the presence of other employees. She asked Billings to remove the contents of his pockets. He complied. There was a small bag with pills. The officer asked Billings what he was doing with it. Billings said he found it. But then after further questioning, he told the officer he was going to sell them. The officer then left for 30 minutes to question other witnesses. She then returned and arrested Billings. The trial court found that once the suspect showed the officer the pills, she was required to give him Miranda warnings before any further questioning.

The Court held that *Miranda* warnings are required when a person is (1) formally arrested or (2) restrained to the degree associated with a formal arrest. Unless a reasonable person in the suspect's situation would perceive that he was in custody, *Miranda* warnings are not necessary. The proper inquiry with respect to the issue of custody is not whether the person being interrogated was a prime suspect or whether police had probable cause to arrest, but whether a reasonable person in the suspect's position would have perceived that they were in custody. Here, the evidence showed that Billings was not isolated by police for questioning, but was questioned in an open work area in the presence of other workers. He was not restrained during the questioning. There was no evidence that during the questioning, the officer seized the evidence that Billings produced by consent from his pockets. Even if the officer had probable cause to arrest Billings after he produced the pills, there was no evidence that the officer told him during the questioning that she intended to make an arrest. After the short period of questioning, the officer left Billings without restraint to question other witnesses before returning 30 minutes later to make a formal arrest. Under these circumstances, a reasonable person in Billings' position would not have perceived himself to be in police custody during the questioning. Therefore, no *Miranda* warnings were required before the questioning, and the trial court erred by suppressing Billings' statements.

DUI; Jury Charges

Crusselle v. State, A10A0575

Appellant was convicted of DUI (less safe) and speeding. He argued that the trial court erred in its instructions to the jury. The evidence showed that appellant was stopped for doing 90 in a 55 mph zone. He refused to do

an alco-sensor and refused to take field sobriety tests. Appellant argued that the trial court erred by instructing the jury that the refusal to do field sobriety tests raised an inference of impairment. The Court disagreed. It stated that a defendant's refusal to submit to field sobriety tests is admissible as circumstantial evidence of intoxication and together with other evidence would support an inference that he was an impaired driver. Appellant also argued that the trial court's charges were not properly adjusted to the evidence because the National Institute of Highway Safety and Traffic Administration (NHTSA) does not list speeding as one of the visual cues used to detect impaired drivers. The Court, however, found that the charge was adjusted to the evidence because the testimony adduced at trial showed that appellant was speeding immediately prior to his arrest. Upon finding evidence of speeding, the jury may determine that the driver was impaired. Therefore, the jury charge was not erroneous.

First Offender; Revocation

Otuwa v. State, A10A0137

Appellant contended that the trial court erred when it revoked his first offender status and sentenced him to a greater sentence than originally imposed. The record showed that in January 2004, appellant entered a negotiated guilty plea to burglary (Count 1), criminal damage to property (Count 7), and criminal trespass (Count 8). The trial court granted his request for first offender probation and sentenced him to eight years probation on Count 1, three years probation on Count 7, and twelve months probation on Count 8, all terms to run concurrently. In 2008, appellant was indicted on three counts of vehicular homicide, resulting in revocation of his probation for the 2004 offenses. The court adjudicated him guilty of the 2004 offenses and sentenced him to an aggregate of 22 years, including 12 to serve on Count 1.

Appellant argued that the trial court lacked authority to increase the sentence imposed in 2004 because that sentencing document was ambiguous. The Court held that sentences for criminal offenses should be certain, definite, and free from ambiguity; and where the contrary is the case, the benefit of the doubt should be given to the accused. Here, the sentencing form was ambiguous given that both the first offender treatment box and the felony sentence box were checked. But the ambiguity in the form was not fatal to the court's imposition of a sentence greater than the original one because appellant was informed at the plea hearing in 2004 that he could be sentenced to the maximum term authorized by law if he violated the terms of his probation. An accused is entitled to rely on the provisions set forth in the sentencing document if he is not informed to the contrary when the sentence is imposed. Because appellant was informed by the prosecutor when the first offender probation sentence was pronounced that, upon an adjudication of guilt, he could be sentenced to the maximum allowable under the law, the trial court was authorized to increase the sentence originally imposed upon him.

Search & Seizure; DUI

Butler v. State, A10A0736

Appellant was convicted of DUI (less safe). She contended that the trial court erred in denying her motion to suppress. The evidence showed that an officer was dispatched on a 911 domestic dispute to a particular address. When he drove toward the house, he noticed a car pulling out and heading toward him. The officer rolled down his window, stuck his arm out, and waved at the car. The car stopped, and he asked the driver, appellant, if she had just pulled out of the driveway of the address to which he was heading. She replied that she had. The officer asked her to return to the house with him and she agreed to do so. He testified that at this point, appellant was not in custody. During the ensuing investigation, the officer noticed appellant exhibited manifestations of intoxication. Appellant admitted she had been drinking. She was subsequently arrested and charged with DUI.

Appellant contended that the stop of her vehicle was a second-tier stop unsupported by reasonable, articulable suspicion, and that the trial court therefore erred in denying her motion to suppress. The Court disagreed. The evidence showed no coercion or detention by the officer. Instead, the record reflected that she was given the choice to leave or to return to the house and voluntarily chose to return. The trial court therefore had grounds to find that this was not a "stop," and thus, correctly held that it was a first-tier encounter that did not require articulable suspicion.

Sentencing

Kirk v. State, A10A0819

Appellant was convicted on May 3, 2007 of vehicular homicide (2nd degree), and other traffic offenses. He was given 16 months probation, fines, and 180 hours of community service. He appealed that conviction and it was affirmed. On July 29, 2009, more than 16 months after the remittitur from the Court of Appeals was returned and made the judgment of the trial court, the State filed a motion "to lift the suspension of sentence and formally impose" the sentence reflected in the trial court's May 3, 2007 judgment. The trial court granted the motion. Appellant argued that his probated sentence expired before the hearing, and therefore, the trial court erred in "resentencing" him.

OCGA § 17-10-9 provides, in pertinent part, "[i]n cases which are appealed to the Georgia Court of Appeals or the Georgia Supreme Court for reversal of the conviction, [a criminal] sentence shall be computed from the date the remittitur of the appellate court is made the judgment of the court in which the conviction is had, provided the defendant is not at liberty under bond but is incarcerated or in custody of the sheriff of the county where convicted." However, when a defendant remains at liberty but not under bond during the appeal of a probated sentence, the probationary period does not automatically begin to run on the date the remittitur of the appellate court is made the judgment of the trial court. Rather, the running of the probationary period must await some act which would cause it to begin. The act that causes a probationary period to run in such a case may be an act of the State or an act of the defendant. A sentence is not voided because of the State's delay in attempting to enforce it. Where the State makes no move to initiate the sentence, the defendant must "offer himself up" if he wishes the term to begin to run. Moreover, the Court held, even when the State's delay in attempting to enforce a sentence is unreasonable, such delay will be deemed to prevent later enforcement of the sentence only if the defendant has offered to begin serving his sentence. Here, the May 2007 judgment permitted appellant to serve his sentence on probation, he appealed the judgment while remaining at liberty but not under bond, and he was still at liberty on the date the remittitur of this Court was made the

judgment of the trial court. Appellant had not identified any act on his part that he contended constituted offering himself up to suffer the punishments the trial court imposed for his offenses. As a result, the probationary period did not expire before the hearing on the State's motion to enforce his sentence.

Enticing A Child For Indecent Purposes; Similar Transactions

Henderson v. State, A10A0305

Appellant was convicted of one count of aggravated sexual battery, four counts of sexual battery, five counts of enticing a child for indecent purposes, and five counts of child molestation. The victims, M. H. and S. H., were his two grandchildren. He argued that the evidence was insufficient to support his convictions for enticing a child for indecent purposes. The Court agreed. Pursuant to OCGA § 16-6-5 (a) "[a] person commits the offense of enticing a child for indecent purposes when he or she solicits, entices, or takes any child under the age of 16 years to any place whatsoever for the purpose of child molestation or indecent acts." The statute includes the element of "asportation." Any asportation, however slight, is sufficient to show the taking element of enticing a child for indecent purposes. Here, the Court found, there was no evidence of a taking or asportation. M. H. stated that he was touched by appellant on two separate occasions in appellant's bedroom and once in the bathroom, and in each of these instances, appellant closed the doors to the rooms. S. H. testified that the incidents occurred while she was in her grandmother's bed and was joined by appellant, or when she was in other areas of the house. However, there was no evidence that he enticed, persuaded, or lured the children into any area of the house. In the absence of sufficient probative evidence that appellant himself enticed the victims onto the premises with the present intention to commit acts of indecency or child molestation after they had been enticed there, his convictions for violating OCGA § 16-6-5 could not stand.

Appellant also contended that the trial court erred in admitting similar transaction evidence relating to his niece because it was too remote. The evidence showed that the niece testified that she was presently 49 years old and that appellant molested her when she was 4 years old and then again when she was seven or eight years old. The Court held that similar transaction evidence that shows a pattern of sexual abuse against several generations of members of the same family is admissible despite the lapse of time between the acts. Although the Supreme Court held in *Gilstrap v. State*, 261 Ga. 798 (1991), that an event that occurred 31 years in the past was too remote to be admitted as similar transaction evidence, it nonetheless declined to establish a bright-line rule. Here, the evidence displayed a course of conduct of appellant's that involved the abuse of many generations of his family. Therefore, despite the lapse of time (41 years), the Court concluded that the trial court did not abuse its discretion when it admitted this evidence.

Search & Seizure; Venue

Price v. State, A10A0448

Appellant was convicted of VGCSA. He argued that the trial court erred in denying his motion to suppress. Specifically, he contended that the search warrant did not particularly describe his property located at 174 Churchill Rd. The record showed that police obtained two search warrants. The first identified the property as 184 Churchill Rd. The other, however, described the property to be searched as follows: "The residence is a white color mobile home adjacent to the address [of] 184 Churchill Rd. The physical address is unknown as it is not clearly marked. The mobile home is perpendicular to Churchill Rd. and is in between the addresses of 184 and 174 Churchill Rd. The [curtilage] as it appears on Effingham County aerial maps shares curtilage with the address of 174 Churchill Rd. . . . [Traveling south on Churchill Road from the intersection at Amanda Avenue, the] residence is located on the right side of Churchill Rd. and is the second residence on the right." The Court held that although a search warrant which describes the premises by street and number will generally not authorize a search of the premises at another street or number, a search warrant that is incorrect as to street number may be valid where there are other elements of description sufficiently particular to identify the premises to be searched. The importance of exactitude of street address, it may be said, varies inversely with the thoroughness of the description. Here, the evidence presented supported a finding that all of the contraband at issue was seized from the trailer described in the search warrant and its surrounding curtilage. The trial court therefore did not err in concluding that the search warrants sufficiently identified the property to be searched.

Appellant also contended that the State failed to prove venue. The Court noted that three members of the Effingham Sheriff's Office that they executed the search warrant. The Court found that "'In light of the well-settled principle public officials are believed to have performed their duties properly and not to have exceeded their authority unless clearly proven otherwise,' this testimony supported a finding that the employees of the Effingham County Sheriff's Office, in participating in the investigation of drug offenses at 168, 174 and 184 Churchill Road in Guyton were acting within their jurisdiction." Moreover, the Court found that while this evidence, standing alone, may not have proven venue beyond a reasonable doubt, the State introduced the search warrants issued by the Effingham County Magistrate Court which authorized the search of property in Effingham County. The search warrants, together with the Sheriff's Department employees' testimony, provided sufficient evidence of venue to support appellant's conviction.

Kidnapping; Juror Misconduct

Dixon v. State, A10A0085

Appellant was convicted of rape, kidnapping with bodily injury and aggravated assault. He was acquitted of aggravated sodomy. He contended that the evidence of kidnapping was insufficient in light of *Garza*. The evidence showed that the victim was locked out of her hotel room. Appellant offered to let her use the phone in his room. When she tried to leave, he assaulted her, smashing her body and arm on the door. He then threw her onto the bed, threatened to kill her while holding a razor, tied her arms and then raped her. The Court found the evidence of asportation sufficient. While the duration of the movement in this case was minimal, the movement occurred before the aggravated assault occurred (when appellant threatened the victim's life with a razor) and before the rape occurred, and the movement was not an inherent part of either of those separate offenses Also, the asportation that occurred here presented a significant

danger to the victim independent of the danger posed by the other offenses. It served to isolate her from contact with other guests in the hotel, who might have been able to provide help; and it further enhanced appellant's control over her. Moreover, although the trial court charged the jury regarding "slight movement" the Court found that this did not contribute to the verdict.

Appellant also contended that the jury conducted unauthorized and improper experiments during its deliberations. During the deliberations, two jurors used string to bind the wrists of one of the jurors, in order to see whether or not the string left marks or bruising on the wrists. The Court stated that because a defendant has a right to be confronted with all the evidence against him, it is improper for the jury to conduct tests or experiments during deliberations which have the effect of producing new evidence not introduced at trial. But, it is not improper for the jury to use its common experience to conduct illustrations or experiments which merely examine or verify evidence admitted during the trial. The use of an object by the jury may constitute no more than a common sense illustration of the evidence admitted at trial. In order to set a jury verdict aside, the jury misconduct must have been so prejudicial that the verdict is deemed to be inherently lacking in due process. Here, the Court found no basis for concluding that the experiment allegedly conducted by the jurors during deliberations influenced the jury in a manner harmful to appellant's cause. During the trial, defense counsel argued to the jury that if the victim's wrists had been bound with an electrical cord, as she testified, then the cord would have left marks on her wrists. The experiment showed that a cord tied around the wrists does leave marks, so the experiment would have supported appellant's arguments. Thus, the alleged experiment was not so prejudicial that the verdict must be deemed inherently lacking in due process.