

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 17, 2013

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THIS WEEK:

- **Out-of-time Appeals**
- **Out-of-time Appeals; Habeas Corpus**
- **Statements; Equal Access**
- **Sentencing; Merger**
- **Nolle Prosequi; Pleas in Abatement**
- **Plea in Absentia; Dismissal of Indictment**
- **Similar transactions; Victim's Prior Bad Acts**
- **Armed Robbery; O.C.G.A. §17-8-57**

Out-of-time Appeals

Owens v. State, A13A0231 (5/6/13)

Appellant contended that the trial court lacked jurisdiction to accept his guilty plea because the indictment failed to aver venue, that the trial court failed to “merge the counts during the sentencing phase,” and that his plea was not knowingly and voluntarily entered because the indictment was fatally defective. The record showed that on April 27, 2011, appellant entered a guilty plea to trafficking in methamphetamine, possession of marijuana with intent to distribute, possession of methamphetamine within 1,000 feet of a school, possession of marijuana within 1,000 feet of a school, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. On January 25, 2012, appellant filed a notice of appeal, but the Court dismissed the appeal as untimely. Thereafter, appellant filed a motion for leave to file an out-of-time appeal, which the trial court denied.

The Court affirmed. The purpose of an out-of-time appeal in a criminal case is to address the constitutional concerns that arise when a defendant is denied his first appeal of right because the counsel to which he was constitutionally entitled to assist him in that appeal was professionally deficient in not advising him to file a timely appeal and that deficiency caused prejudice. So, a motion for an out-of-time appeal must be premised upon an allegation of a deprivation of the right to direct appeal due to trial counsel's ineffective assistance. Because appellant's motion for out-of-time appeal did not allege that his failure to file a timely appeal of his conviction was due to any ineffective assistance of counsel, the motion was therefore correctly denied.

Out-of-time Appeals; Habeas Corpus

Merilien v. State, A13A0451 (5/6/13)

Appellant appealed the dismissal of his out-of-time motion to withdraw his guilty plea to a charge of possession of a firearm by a convicted felon. He contended that the trial court erred by dismissing his petition as untimely. The record showed that on January 31, 2000, appellant, with the assistance of counsel, entered a negotiated plea to possession of a firearm by a convicted felon. The trial court sentenced appellant to serve two years on probation and imposed a \$1,000 fine. On December 2, 2011, appellant filed his motion to withdraw his guilty plea in the trial court, arguing that his 2000 conviction should be vacated because he did not enter his plea intelligently, knowingly, and voluntarily. The trial court found that it lacked jurisdiction to consider his petition as a motion to withdraw guilty plea because it was not filed in the same

term of court as the judgment of conviction and that the petition could not be considered as a writ of habeas corpus since the period for filing a habeas corpus petition had expired.

The Court stated that the trial court's jurisdiction to entertain a motion to withdraw a guilty plea ends after the term of court in which the judgment of conviction was rendered. The Court noted that it is well established that after the expiration of the term and of the time for filing an appeal from the conviction, the *only* remedy available to the defendant for withdrawing a plea is through habeas corpus proceedings. Since appellant filed his motion more than 10 years after the expiration of the term of court in which his judgment of conviction was entered, the trial court had no jurisdiction to rule on his motion to withdraw a guilty plea. Moreover, even construing his motion as a petition for writ of habeas corpus, appellant's petition was likewise untimely. Appellant had until July 1, 2008, to file a habeas corpus petition, but he did not file the present motion until December of 2011. Under O.C.G.A. § 9-14-42(c)(1), any person whose conviction has become final as of July 1, 2004, regardless of the date of conviction, shall have until July 1, 2008, in the case of a felony to bring an action for habeas corpus relief. Moreover, the Court found, to the extent that appellant's motion may be construed as one seeking an out-of-time appeal based on ineffective assistance of counsel, the trial court did not abuse its discretion in dismissing the motion.

Statements; Equal Access

Buckner v. State, A13A0663 (5/3/13)

Appellant was found guilty of trafficking in MDMA ("Ecstasy"). Appellant contended that the trial court erred in admitting his statement and in refusing to give a jury charge on equal access. The Court found no reversible error, and affirmed. The record showed that a deputy noticed appellant following too closely, and stopped him to issue a warning. Appellant's girlfriend and her son were in the car. During the stop, the deputy noticed some suspicious behavior and asked if he could search the car. The deputy's drug dog alerted on the driver's side, and a subsequent search revealed a black plastic bag hidden beneath the passenger-side front seat containing 490 pills which tested positive for MDMA. A deputy testified that,

before anyone questioned appellant about the drugs, he volunteered that his girlfriend knew nothing about them. Moreover, he even offered to be an informant in exchange for leniency. Appellant later signed a written statement that his girlfriend "had absolutely nothing to do with the ecstasy pills seized from the vehicle." He also testified at trial that he did not believe that his girlfriend "had anything to do with" the drugs. Nevertheless, appellant insisted that one of the two officers who searched his car must have planted the drugs, and that he gave the written statement because the officers coerced him into doing so.

Appellant contended that the trial court committed plain error in admitting his inculpatory statements without first conducting a hearing outside the presence of the jury to determine the voluntariness and admissibility of those statements. The Court noted that appellant's primary basis for suppression (and the only argument pursued in the hearing) was that the evidence was illegally seized in Henry County as opposed to Spalding County. Buckner did not file a motion in limine or a request for a *Jackson-Denno* hearing, and nothing in his motion to suppress identified any particular statement that he contended was inadmissible on the ground that it was involuntarily made. Moreover, counsel did not object to the introduction of appellant's statements at trial. Rather, appellant elected to testify on his own behalf, taking the position that the statements were coerced. Thus, the Court found, due process does not require a voluntariness hearing absent some *contemporaneous* challenge to the use of the statement. Having failed to make that challenge, any error is waived.

Appellant contended that this Court should apply the plain error standard of review due to the alleged magnitude of the constitutional error. However, because appellant was tried in 2008, the plain error analysis did not apply. The Court noted that in appeals from criminal cases tried before January 1, 2013, plain error review is limited to alleged error in three circumstances: the sentencing phase of a trial resulting in the death penalty; a trial judge's expression of opinion in violation of O.C.G.A. § 17-8-57; and a jury charge affecting substantial rights of the parties as provided under O.C.G.A. § 17-8-58(b). The Court noted however, that the new Evidence Code changes this rule for cases tried after January 1, 2013, allowing a court to consider plain

errors "affecting substantial rights although such errors were not brought to the attention of the court." O.C.G.A. § 24-1-103(d). Because, under the circumstances, plain error review did not apply to the instant allegations regarding the improper admission of evidence, the Court held that it provided no basis for concluding that the trial court committed reversible error in allowing the testimony.

Appellant further contended that the trial court's refusal to give his written request to charge on the law of equal access constituted reversible error. The Court disagreed. There was no evidence offered at trial demonstrating that anyone else had access to the drugs seized. Appellant testified that his girlfriend had nothing to do with the drugs that were in the car—a statement from which, incidentally, the jury could reasonably infer that appellant was aware of their presence. Further, the State did not rely on appellant's ownership of the car to establish possession, and the jury was not charged on that presumption. The Court explained that a charge on equal access is appropriate to counter a jury instruction on presumption of possession, and is not necessary otherwise. Equal access is merely a defense available when the presumption of possession flows to the accused. Where the State did not show the indicia giving rise to the presumption, that is, ownership or exclusive control of the vehicle, no presumption arose and therefore there was no triggering of the equal access defense. Because the requested charge was not adjusted to the evidence, the trial court was not required to give it.

Sentencing; Merger

Mullis v. State, A13A0044 (5/6/13)

Appellant was convicted of criminal attempt to commit armed robbery, aggravated assault, burglary, and three counts of possession of a knife during the commission of a felony. Appellant argued that his convictions for aggravated assault and criminal attempt to commit armed robbery merge as a matter of fact. Under O.C.G.A. § 16-1-7(a)(1), a defendant "may not . . . be convicted of more than one crime if . . . [o]ne crime is included in the other." The Court applied the required evidence test, noting that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two

offenses or only one, is whether each provision requires proof of a fact which the other does not. The Court further noted that because aggravated assault does not require proof of any element that armed robbery does not, convictions for both offenses will merge—but only if the crimes are part of the same “act or transaction.”

Here, as charged in the indictment, the criminal attempt to commit armed robbery occurred when appellant, with the intent to commit a theft, attempted to take property from the person of the victim, by use of an offensive weapon, to-wit: a knife. The indictment further alleged that appellant committed aggravated assault when he pushed the victim to the ground in an attempt to rob her. As alleged, appellant’s pushing of the victim was part of his effort to control her during the robbery. Under these circumstances, the aggravated assault arose out of the same “act or transaction” as the criminal attempt to commit armed robbery, and therefore, the convictions merged. Thus, appellant’s conviction was vacated and the case remanded to the trial court for resentencing.

Nolle Prosequi; Pleas in Abatement

Funk v. State, A13A0624 (5/10/13)

Following his third indictment for the same charges, appellant challenged the trial court’s denial of his plea in abatement, contending that the trial court’s approval of two nolle prosequis by the State of his two previous indictments precluded subsequent prosecution for the same offenses pursuant to O.C.G.A. § 17-7-53.1. The Court disagreed.

Under O.C.G.A. §17-7-53.1, if, upon the return of two “true bills” of indictment or presentments by a grand jury on the same offense, charge, or allegation, the indictments or presentments are quashed for the second time, whether by ruling on a motion, demurrer, special plea or exception, or other pleading of the defendant or by the court’s own motion, such actions shall be a bar to any future prosecution of such defendant for the offense, charge, or allegation. The record showed that on November 15, 2011, the grand jury returned Indictment No. 11CR00217 charging appellant with forgery in the first degree and criminal attempt to fraudulently obtain a controlled substance. Appellant filed his

demurrer on November 22, and the State filed its nolle prosequi prior to the trial court’s ruling on the demurrer. The trial court approved the nolle prosequi on December 5, 2011. On January 31, 2012, the grand jury returned Indictment No. 12CR0014 recharging these offenses. On March 15th, defendant filed his demurrer to this indictment, which had not yet been ruled upon when the State filed its nolle prosequi, approved by the trial court on May 2, 2012. On July 21, 2012, the grand jury returned Indictment No. 12CR00189 recharging these offenses. Appellant then filed his plea in abatement.

The Court explained that this case was factually similar to, and controlled by *Layman v. State*, 280 Ga. 794 (2006). There, as here, the trial court approved entry of a nolle prosequi on two indictments, to each of which Layman had demurred. Layman argued that the State should not be allowed to use entry of nolle prosequi to avoid application of O.C.G.A. § 17-7-53.1. As noted by the Supreme Court, O.C.G.A. § 17-8-3 provides that before a case is submitted to a jury, “the prosecuting attorney may enter a nolle prosequi with the consent of the court.” The *Layman* Court concluded that the fact that Layman’s motion to quash was pending at the time of the entry of the nolle prosequi did not change its analysis. Further, the trial court has discretion to order the entry of a nolle prosequi, instead of quashing the indictment, to avoid application of O.C.G.A. § 17-7-53.1. Therefore, there was no error in the trial court’s denial of appellant’s plea in abatement.

Plea in Absentia; Dismissal of Indictment

State v. Bachan, A13A0285 (5/3/13)

The State charged Bachan with felony theft by taking, O.C.G.A. § 16-8-2, for unlawfully taking the statue of Bre’r Rabbit from the Uncle Remus Museum in Eatonton, Georgia. The trial court subsequently dismissed the indictment, and the State appealed, arguing that the trial court erred by dismissing the indictment without legal cause before any evidence was presented before it. The Court agreed with the State and reversed the trial court’s dismissal of the indictment.

The record showed that in early October 2011, Bachan waived arraignment and entered a plea of not guilty to felony theft by taking.

In early November 2011, Bachan’s three co-defendants entered non-negotiated guilty pleas to misdemeanor theft by taking pursuant to the First Offender Act and were sentenced to community service and joint restitution. Bachan, a citizen of another country, was not present in court because he was in another state addressing his residency status with the United States Immigration Service, and his attorney requested that he be given the opportunity to enter a plea at a later date. In April 2012, Bachan’s attorney filed a request to enter a plea in absentia to misdemeanor theft by taking pursuant to the First Offender Act, accept his cash bond of \$1000, and suspend any sentence. In mid-August 2012, during an unrecorded bench conference with the State and Bachan’s attorney regarding his request to enter a plea in absentia, the trial court, sua sponte, forfeited his cash bond and dismissed the indictment against him, basing the order on his immigration status and his inability to return to the United States for “some years.”

The Court agreed with the State that the trial court erred by sua sponte dismissing the indictment, noting that in the district attorney’s role as administrator of justice, he or she has broad discretion in making decisions prior to trial about whom to prosecute, what charges to bring, and which sentence to seek. While the trial court may dismiss charges on its own accord in limited circumstances, a trial court abuses its discretion in dismissing a criminal charge when it interferes with the State’s right to prosecute without a legal basis to do so. A trial court generally is authorized to dismiss an indictment when there is a defect on the face of the indictment. Bachan did not argue that there was a defect on the face of the indictment, and the Court found none. Here, the Court found, Bachan’s case had not been called to trial and had not been placed on any calendar at which the State would have been required to present evidence. Instead, the indictment was dismissed following a bench conference at which the requested plea in absentia was apparently discussed. The Court found that a delay in Bachan being able to appear in court “for years” due to his immigration status did not provide any legal basis for dismissing the indictment and deprived the State of its right to present its case against Bachan.

Similar Transactions; Victim's Prior Bad Acts

Dean v. State, A13A0195 (5/7/13)

Appellant was convicted of two counts of child molestation. He contended that the trial court erred by allowing the introduction of similar transaction evidence. Under *Williams v. State*, 261 Ga. 640 (1991), the State must show that (1) it seeks to introduce evidence of the independent offense or act, not to raise an improper inference as to the accused's character, but for some appropriate purpose which has been deemed to be an exception to the general rule of inadmissibility; (2) there is sufficient evidence to establish that the accused committed the independent offense or act; and (3) there is a sufficient connection or similarity between the independent offense or act and the crime charged so that proof of the former tends to prove the latter. When considering the admissibility of similar transaction evidence, the proper focus is on the similarities, not the differences, between the separate crime and the crime in question.

Appellant first contended that the trial court erred by allowing evidence of a similar transaction involving the victim's older sister via testimony of a witness who attended appellant's church. He asserted that it should not have been admitted because the State presented insufficient evidence that he committed the alleged acts because both he and the older sister denied the alleged conduct at trial. The Court did not agree, noting that absolute proof is not required that a defendant committed the offense in a similar transaction. Instead, the State is required to prove that appellant committed the prior act by a preponderance of the evidence. A conviction for the prior act is not required, and it may be proven by circumstantial evidence. In this case, the State met its burden by presenting two witnesses who testified that they saw appellant commit similar acts with the victim's oldest sister.

Second, appellant contended that the trial court erred by admitting evidence of similar transactions involving appellant's his conduct with 12 year old twins in 1984 because it was too remote in time and took place when he was a minor only two years older than the twins. The Court noted that where similar transactions are particularly remote because they were committed decades in the past, the passage of time is one of the more important

factors to weigh in considering the admissibility of the evidence in question, although it is not wholly determinative. This factor takes on heightened significance when the similar transaction evidence is comprised of alleged acts for which there is no prior record of their occurrence. Although a similar transaction may have been committed many years in the past, any prejudice from its age may nonetheless be outweighed by its probative value, depending on the particular facts of each case and the purpose for which the similar transaction is being offered.

Additionally, the Court noted that a defendant's youth at the time of the similar transaction should be considered when deciding if the testimony should be admitted to show lustful disposition and inclination, i.e., bent of mind. But, this rule is most liberally extended in cases involving sexual offenses because such evidence tends to establish that a defendant has such bent of mind as to initiate or continue a sexual encounter without a person's consent. And "[a]s a general rule, the sexual molestation of young children or teenagers, regardless of the type of act, is sufficiently similar to be admissible as similar transaction evidence."

Based upon all of these guiding principles, the Court concluded that the trial court did not err by admitting evidence of defendant's similar conduct in sexually abusing minors in the middle of the night while the household was asleep. Although there was no prior record of the events, the testimony of each twin corroborated that of the other. And while appellant was fourteen years old at the time, he would have been old enough to be held criminally responsible for his conduct in this State because O.C.G.A. §16-3-1 holds children of 13 years or older accountable for their actions.

Finally, appellant contended that the trial court erred by ruling he could not impeach the victim with evidence that she had previously made a false accusation of murder against her biological father. The record showed that appellant and his wife adopted the victim and her siblings from Guatemala when the victim was 13 years old. The alleged prior false allegation was made by the victim when she was eight years old and living in Guatemala. The only evidence offered by appellant to prove that the allegation was made and that it was false was through the testimony of the victim's older sister, who was nine or ten years old at the time of the victim's alleged false allegation.

The trial court excluded the evidence based upon its conclusion that it was a specific bad act that was not relevant to the charges against appellant.

The Court stated that a victim's character is rarely relevant for any purpose in a criminal trial. Generally, a victim may not be impeached with instances of specific misconduct or prior bad acts. Instead, under the law in effect at the time this case was tried, a victim could generally be impeached by disproving the facts testified to by him, former O.C.G.A. § 24-9-82, by contradictory statements previously made by him as to matters relevant to his testimony and to the case, former O.C.G.A. § 24-9-83, by offering evidence of the witness's bad character in the form of reputation, former O.C.G.A. § 24-9-84, and by certain prior criminal convictions, former O.C.G.A. § 24-9-84.1. One exception to the general rule against impeachment with instances of specific misconduct or prior bad acts is that a victim's prior false allegation of sexual misconduct is admissible in a sex offense case. The evidentiary rule preventing evidence of specific acts of untruthfulness must yield to the defendant's right of confrontation and right to present a full defense in sex offense cases in which the victim has made prior false allegations of sexual misconduct. This limited exception, however, applies only to previous false allegations of *sexual misconduct*, not false allegations generally. Because the purported false allegation in this case did not fall within the scope of this exception, the Court affirmed the trial court's decision to exclude it.

Armed Robbery; O.C.G.A. §17-8-57

Harrell v. State, A13A0117 (5/3/13)

Appellant was convicted of seven counts, Count 1, armed robbery (O.C.G.A. § 16-8-41); Count 2, aggravated assault with intent to rob (O.C.G.A. § 16-5-21); Count 3, aggravated assault with a knife (O.C.G.A. § 16-5-21); Count 4, robbery by force and intimidation (O.C.G.A. § 16-8-40); Count 5, battery (O.C.G.A. § 16-5-23.1); Count 6, possession of a knife during commission of a felony (O.C.G.A. § 16-11-106); and Count 7, contributing to the delinquency of a minor (O.C.G.A. § 16-12-1).

Appellant contended that the evidence was insufficient to support his conviction of

armed robbery. The evidence showed that the victim was lured to a park late one evening. He was driving his truck and had with him two of the co-defendants, who directed him to the park. Once at the park, one of his passengers took the victim's keys out of the ignition and then appellant and another co-defendant approached the truck. They pulled appellant out of the truck and took his wallet, while pushing and punching him. Once the victim was on the ground, he was repeatedly kicked. As the victim tried to get up, appellant pulled out a knife and threaten to kill him if he moved again. Appellant and his co-defendants then left.

The Court found, and the State agreed, that the evidence was insufficient to support the conviction of armed robbery because appellant did not use the knife prior to or contemporaneously with the taking of the money, but rather in assaulting the victim after his wallet had been taken. The evidence confirmed that appellant did not commit armed robbery because O.C.G.A. § 16-8-41(a) clearly contemplates that the offensive weapon be used as a concomitant to a taking which involves the use of actual force against another person. Therefore, the Court reversed appellant's conviction for armed robbery and remanded the case for resentencing on the remaining counts.

Appellant also contended that the trial court violated O.C.G.A. § 17-8-57 by cross-examining a witness and intimating to the jury her opinion of the witness's credibility. Under O.C.G.A. § 17-8-57, it is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused. The witness acknowledged during her direct examination by the State, that she was less than forthcoming during her interview with the detective and told several different versions of what occurred that night. The detective testified concerning his lengthy interview of the witness, the inconsistencies in her testimony, and his opinion that she was trying to protect a co-defendant. Following cross-examination of the witness, the trial court asked the questions of which appellant complained. The trial court's questions were directed at clarifying how appellant became involved in the situation and how the idea of the robbery originated.

The Court stated that a trial court may propound questions to a witness in order to develop the truth of a case or to clarify testi-

mony. The extent of such an examination is a matter for the trial court's discretion. Having reviewed the transcript here, the Court held that the trial court's questions did not express or intimate an opinion on the evidence or appellant's guilt. Accordingly, no violation of O.C.G.A. § 17-8-57 occurred.