Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 29, 2015

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THIS WEEK:

Search & Seizure; GPS Tracking Devices

Green v. State, A14A1849 (3/30/15)

Appellant was convicted of burglary. He contended that the trial court erred in denying his motion to suppress evidence obtained through the use of a Global Positioning System ("GPS") device placed on his co-defendant's truck by the police. The Court disagreed.

The Court found that appellant, as the passenger in the truck, had no standing to contest the placement of the GPS device on the truck. The Court noted that the U.S. Supreme Court in *Jones v. United States*, ___ U.S. ___ (132 S.Ct. 945, 181 L.E.2d 911) (2012) did not apply a reasonable expectation of privacy analysis, but rather a "trespass" theory of analysis, and it was undisputed that appellant had no property interest in his co-defendant's truck as a mere passenger. Additionally, the Court noted, other jurisdictions considering the standing of a passenger to assert a Fourth Amendment violation based upon GPS tracking of another's vehicle have reached similar results.

Moreover, the Court found, while a passenger has standing to challenge the constitutionality of a traffic stop generally, a passenger cannot challenge his detainment based upon an independent violation of another person's Fourth Amendment rights. Finally, the Court stated, the Supreme Court of Georgia's decision in *Wilder v. State*, 290 Ga. 13 (2011), did not require a different result. In *Wilder*, the Supreme Court held that the defendant had "standing to contest the seizure of his own personal property from the premises of another." Here, however, no property of appellant was seized or searched by the police.

Similar Transactions; Character Evidence

Ashley v. State, A14A1848, (3/30/15)

Appellant was convicted of convicted of kidnapping, attempted kidnapping, entering an automobile, and criminal trespass. The evidence showed that in Sept. 2011, appellant grabbed a 7 year old girl from inside a minivan while it was parked in a mobile home park. After pulling the child out of the van, the child broke free and ran. Appellant then tried to grab another younger girl in the same minivan, but she scrambled away from appellant. Appellant then fled when the mother of the children yelled at him. Appellant contended that the trial court erred in admitting similar transaction evidence. A divided Court agreed and reversed.

The record showed that the trial court allowed three incidents in the summer of 2011 to be admitted as similar transaction evidence for the sole purpose of showing intent: 1) appellant squirted a young boy with a water gun so hard that he made the boy cry; 2) appellant looked at young girls in a manner that made one girl's mother uncomfortable and gave another onlooker a "very bad vibe"; and 3) appellant often picked at and teased children in his family, making them cry.

However, the Court found, this evidence was not relevant for that purpose. While a similar transaction need not be a crime, the fact that a person engaged in a non-criminal behavior does not evince criminal intent. And here, the State sought to use acts in which appellant lacked criminal intent to prove that he had criminal intent in another instance.

In so holding, the Court noted that this case must be decided under the laws regarding similar transactions as they existed prior to the enactment of the new Evidence Code. Nevertheless, the adoption of the new Evidence Code did not change the requirement that similar transaction evidence be relevant to show a proper purpose because that requirement is found in cases decided under both the old and new Codes. Thus, citing *Bradshaw v. State*, 296 Ga. 650 (2015) and *United States v. Dickerson*, 248 F3d 1036, 1047 (IV) (A) (11th Cir. 2001), the Court stated that when the admission of the similar transaction is to prove intent, the offered extrinsic offense must have the same intent as the crime charged. But here, appellant had different mental states; he lacked criminal intent in the similar transaction evidence and possessed criminal intent in the crimes for which he was convicted.

Accordingly, the Court held that the admission of the improper character evidence against appellant required reversal. The jury found appellant guilty of kidnapping and attempted kidnapping rather than lesser included offenses of simple battery and simple assault. A significant amount of the State's evidence addressed appellant's character, and the Court could not say that it was highly probable that the error in admitting that character evidence did not contribute to the jury's verdict.

Jury Charges; Pattern Instructions

Potts v. State, A14A2350 (3/30/15)

Appellant was convicted of seven counts of aggravated assault, three counts of felony cruelty to children, one count of armed robbery, one count of possession of a firearm during the commission of a crime, and one count of possession of a pistol or revolver by a person under 18 years of age. He contended that the trial court erred by supplementing the pattern charges on knowledge and mere presence with language the trial court found appropriate based on the evidence at trial. The instruction was as follows:

"Knowledge on the part of the Defendant that any of these crimes were being committed and that the Defendant knowingly and intentionally participated in or helped in the commission of such crimes must be proved by the State beyond a reasonable doubt. If you find from the evidence in this case that the Defendant had no knowledge that these crimes were being committed, or that the defendant did not knowingly and intentionally commit, participate or help in the commission of these alleged offenses, then it would be your duty to acquit the Defendant. On the other hand, should you find beyond a reasonable doubt that the Defendant had knowledge that the crimes charged were being committed and the Defendant knowingly and intentionally participated or helped in the commission of them, then it would be — you would be authorized to convict the Defendant. *If a person had knowledge of the intended crime and shared in the criminal intent of the principle actor, he is an aider and abettor. Hence, the defendant — if the defendant was at the scene and did not disapprove or oppose the commission of the offense, a trier of fact may consider such conduct in connection with prior knowledge and would be authorized to conclude that the Defendant assented to the commission of the offense, that he lent his approval to it, thereby aiding and abetting commission of the crime*."

"Ladies and gentlemen, a jury is not authorized to find a person who was merely present at the scene of the commission of a crime at the time of its perpetration guilty of consent in or concurrence in the commission of the crime unless the evidence shows beyond a reasonable doubt that such person committed the alleged crime, helped in the actual perpetration of the crime or participated in the criminal endeavor. … *Mere presence at the scene of a crime is insufficient to convict one of being a party to the crime, but presence, companionship and conduct before and after the offense are circumstances for which one's participation in the criminal intent may be inferred*." (Emphasis supplied).

Appellant first argued that a presumption of prejudicial error arises whenever a trial court deviates from the pattern instructions and that this presumption is strongest when the trial court "expands" the pattern instructions by supplementing them with additional language. However, the Court stated, jury instructions do not need to track, exactly, the language of pattern jury instructions. Rather, the law simply requires that the jury charge, when viewed as a whole, fully and accurately explains to the jury the law they are to apply. And here, the Court found, the additional language incorporated into the trial court's charge on knowledge was a correct statement of the law. Similarly, the additional language incorporated into the trial court's charge on mere presence had also been approved by our State's appellate courts and thus, also represented an accurate statement of the law. And, the Court found, the additional language was warranted by the evidence.

Appellant next argued that the "expanded charges placed undue emphasis on the 'parties to a crime' charge and likely" confused the jury. As evidence of the jury's "likely" confusion, appellant pointed to the jury's request to be recharged on party to a crime, aiding and abetting, felony murder, and malice murder. But, the Court noted, following the recharge, the jury acquitted appellant of the two most serious charges he was facing: malice murder and felony murder. It also acquitted appellant of one of the aggravated assault charges. More importantly, appellant failed to offer any legal authority to support the proposition that a request to recharge, standing alone, evidences confusion on the part of the jury. And, the mere fact that the language of the charge deviated from that found in the pattern charge, without more, is insufficient to show that the charge was likely to confuse the jury. Given this fact, and given that the charges represented a clear and accurate statement of the applicable law and were tailored to the evidence, the Court found nothing in the charge as a whole that could have resulted in jury confusion.

Finally, appellant contended that the charges on knowledge and mere presence conflicted with the trial court's instruction on mere association. With respect to mere association, the trial court instructed the jury: "Likewise, a jury is not authorized to find a person who was merely associated with other persons involved in the commission of a crime guilty of consent in or concurrence in the commission of the crime unless the evidence shows beyond a reasonable doubt that such person helped in the actual perpetration of

the crime or participated in the criminal endeavor."

Appellant contended this charge conflicted with the additional language the trial court incorporated into the pattern charges on knowledge and mere presence because the mere association charge "requires the jury to find an 'actual perpetration of the crime,' or proof that [appellant] 'participated in the criminal endeavor.'" But, the Court found, appellant offered no explanation as to how or why this part of the mere association charge conflicted with the additional language incorporated into the charges on knowledge and mere presence. And reading the charges together, the Court found no conflict between the language requiring proof of "actual perpetration of the crime" or participation "in the criminal endeavor" (the mere association charge) with the language requiring proof of "the commission of the offense" (the knowledge charge). Nor did the Court find any conflict between the above-referenced language from the mere association charge and the additional language incorporated into the charge on mere presence, which referred to proof of "presence, companionship and *conduct before and after the crime*." (Emphasis supplied).

Discovery; Subpoenas Duces Tecum

Gregg v. State, A14A2065 (3/30/15)

Appellant was accused of one count of theft by taking (O.C.G.A. § 16-8-2). The State alleged that appellant, a pharmacy employee, repeatedly removed currency from the pharmacy's cash register for her personal benefit. Appellant contended that the owner of the pharmacy instructed her to remove funds from the cash register in order to pay visiting pharmacists and to conduct other business of the pharmacy, including the purchase of employee lunches.

Appellant argued that the trial court erred in denying her motion to compel compliance with her subpoena duces tecum to the pharmacy "for limited and specific federal tax records." In particular, appellant sought Internal Revenue Form 1099 records from 2009 and 2010 for current and former employees of the pharmacy: (1) to demonstrate "the volume of the amounts that were needed to pay the several cash-paid employees, in order to support the volume of cash from the register" used to conduct the pharmacy's business; and (2) "to thoroughly cross examine the [pharmacy owner] to support the critical point of her only defense" — that she was instructed to take funds from the register for the operation of the pharmacy. A divided Court found that the trial court abused its discretion in denying appellant's motion to compel discovery and reversed.

The Court stated that there is no generalized right of discovery in criminal cases. Through O.C.G.A. § 17-16-1 et seq., Georgia codified procedures that provide a comprehensive scheme of reciprocal discovery in criminal felony cases — in other words, procedures addressing discovery between the defendant and the state. But, those procedures do not also define the scope of discovery sought through a subpoena duces tecum to a third party. Thus, a defendant who elects to have the reciprocal discovery procedures apply does not waive the right to use means of discovery that are otherwise available to any party, such as the subpoena power. In such instance, the State may move to quash the subpoena, as it did here. The motion to quash serves to prevent a criminal defendant from using a subpoena duces tecum as an instrument of general discovery against a third party; it is the tool to stop the defendant using a subpoena to search through the third party's records in hopes of obtaining information which might possibly impeach a witness's credibility.

When a motion to quash a subpoena is filed, the party serving the subpoena has the initial burden of showing the documents sought are relevant. Where the evidence sought in a subpoena duces tecum is demonstrably relevant and material to the defense, it is error for a trial court to quash the subpoena. And here, the Court found, appellant met her burden of showing the relevance of the evidence sought in the subpoena. She demonstrated that she sought the documents not just for use in cross-examining the pharmacy owner, but also to prove the volume of cash that the pharmacy used to pay its cash-based employees. The fact that the pharmacy needed a certain amount of cash to pay its cash-paid employees directly pertained to appellant's sole defense — her claim that she took cash out of the register at her employer's direction to pay those employees and other expenses. Evidence of the volume of cash used to pay those employees is relevant to that defense. The trial court therefore erred in denying appellant's motion to compel a response to her subpoena seeking this relevant evidence.