Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 1, 2014

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THIS WEEK:

Sufficiency of the Evidence; Equal Access

Stewart v. State, A14A0337 (7/9/14)

Appellant was convicted of possession of cocaine. She argued that the evidence was insufficient to support her conviction. The Court agreed and reversed.

The record showed that appellant and her then-boyfriend, Beasley, and Beasley's friend, Whetstone, were indicted for trafficking cocaine. The indictment resulted from law enforcement's discovery of drugs in a hotel room that appellant and Beasley shared. The evidence showed that appellant, who still lived in her parents' home, rented the room so that she and Beasley could spend some time together. At 10:00 p.m., however, appellant decided to leave the hotel because she was frustrated by constant interruptions from Beasley's friends, including Whetstone. Beasley remained in the room with Whetstone until approximately 11:00 p.m., when the two left the premises to go shoot pool. At trial, Whetstone—who testified for the State in exchange for dismissal of the charges against him—noted that prior to leaving the hotel room, Beasley smoked marijuana, which he pulled from a white bag that was inside the hotel-room microwave. Beasley informed Whetstone that the bag contained "yams," which Whetstone understood to mean cocaine. Whetstone also observed Beasley remove cash from a drawer.

According to Whetstone, after getting into his car to leave, Beasley noticed law enforcement arriving at the hotel, and, as a result, he asked Whetstone to circle the building to see if officers were going inside of his room. Then, not long after driving away from the hotel, the two men were stopped by law enforcement after officers entered the room and discovered marijuana, cocaine, and a large stack of cash, all in plain view. Appellant was apprehended later, and she and Beasley were subsequently tried and convicted, although the jury convicted appellant of the lesser offense of simple possession.

The Court stated that it was undisputed that appellant did not actually possess the drugs and, therefore, the issue was whether she was in joint constructive possession of the drugs. In other words, whether appellant and the other defendants knowingly shared the power and intention to exercise dominion or control over the drugs. Mere "spatial proximity" to contraband is not sufficient to prove constructive possession. Instead, the State must show that the defendant had the power and intent to exercise control over the drugs, which requires evidence of some meaningful connection between the defendant and the drugs. And it is well established that mere presence where contraband is found when others have equal access to the substance is insufficient to support a conviction. Indeed, the Court stated, when it is affirmatively shown that others had equal

access or opportunity to commit the crime, a defendant's mere presence at premises where contraband is discovered, without more, is insufficient to support a conviction.

Here, the Court found, appellant informed law enforcement that she rented the room in order to spend time alone with Beasley and that she left because she was upset by constant interruptions from Beasley's friends. And Whetstone testified that it was only *after* appellant left the room that Beasley retrieved marijuana from the microwave in the room, indicated that the microwave contained cocaine, smoked the marijuana, and retrieved cash from a drawer. In other words, the Court stated, Whetstone affirmatively testified that no contraband was in plain view when appellant was in the room. Additionally, it was only *after* appellant left that law enforcement was called to the hotel with regard to concerns that the occupants of the room were smoking marijuana and, upon entering the hotel, noticed a smell of burning marijuana emanating from the vicinity of the room. Accordingly, there was no evidence linking appellant to the contraband that was discovered by law enforcement, save her rental of, and earlier presence in the room. And, there was affirmative evidence that others had equal access to the room, rebutting as a matter of law any presumption of possession arising from the fact that appellant rented the room in her name. Accordingly, the Court concluded, appellant's conviction must be reversed.

Pro Se Appeals

Baker v. State, A14A0006 (7/9/14)

Appellant was convicted of DUI. After her motion for new trial was denied, she filed a timely notice of appeal. However, the trial court dismissed the appeal thirteen months later because of an unreasonable delay in filing the transcript. Appellant then appealed from the order dismissing the appeal.

The en banc Court dismissed her appeal. The Court found that appellant's brief violated numerous rules of the Court. And specifically, the brief failed to set fourth any enumerations of error. The Court stated that it was not its function to review the record and brief to attempt to discern the error appellant intended to assert. Therefore, the Court stated, appellant can now seek in the trial court to obtain permission to file and out-of-time appeal and if the trial court denies the out-of-time appeal, appellant may file a notice of appeal from that denial.

Merger; Fictitious Victims

Young v. State, A14A0096 (7/7/14)

Appellant was convicted of violating the Computer or Electronic Pornography and Child Exploitation Prevention Act of 2007 ("Computer Child Exploitation") (two counts) and attempting to commit the felonies of aggravated child molestation and child molestation (two counts each). The evidence showed that he answered an advertisement on Craigslist placed by an undercover police officer. The officer posed as a stepfather looking for a "discreet" male to instruct his 12 and 14 year old stepdaughters concerning sexual relations. After a series of emails between the officer and appellant in which appellant detailed what sex acts he would instruct the girls on, they agreed to meet at a hotel. Appellant was then arrested when he arrived at the hotel.

Appellant contended that the trial court erred by sentencing him for six offenses because the same facts were used to prove multiple offenses. The Court, however, found that his argument ignored the language of the indictment, which based each count on different conduct. Each pair of counts, including the Computer Child Exploitation counts, was alleged against a different victim. Further, the two child molestation counts alleged different attempted conduct (intercourse) from the aggravated child molestation counts (oral sex). Thus, each of the counts was a separate and distinct crime. The email evidence, which outlined in detail appellant's planned encounter with the victims, supported a finding that appellant intended the distinct sex acts with each victim.

Appellant also argued that because the victims were fictitious, and his conduct was limited to a single set of facts leading to the arranged meeting, he should only have been convicted of one count for each of the three types of offenses, instead of two as alleged in the indictment. But, the Court found, appellant was accused of attempting to do each of the offenses, and the fact that the offenses were not consummated with actual victims does not decriminalize his conduct. To constitute an attempt there must be an act done in pursuance of the intent, and there was ample evidence that appellant's intent was to molest *two* specific victims. For example, each victim was identified to appellant by name, age, height, and weight; appellant explicitly described the sex acts he would perform with each of them; he referred to meeting "all of you," i.e. the fictitious stepfather and the two girls; he requested "pictures of them"; and he sought confirmation that "the girls are willing and up for this." Thus, it was clear that the steps appellant took were toward his goal of molesting two specific victims, which justified a finding of criminal intent as to each count in the indictment.

Recusal; Judicial Conflict of Interest

Beasley v. State, A14A0636 (7/9/14)

Appellant was convicted of trafficking in cocaine. He contended that his right to due process was violated when the trial judge failed to disclose and/or disqualify himself for an apparent conflict of interest. Specifically, that the judge who presided over his trial is married to the chief assistant district attorney for the judicial circuit in which he was tried. The trial court summarily denied appellant's motion for new trial on this issue.

The Court noted that it was undisputed by the State that the judge is married to the chief assistant district attorney in the relevant circuit and, in fact, that he had recused himself from handling all criminal cases following the Judicial Qualifications Commission's (JQC) issuance of an opinion on the matter. Specifically, the JQC determined that because the judge is married to the chief assistant district attorney in his judicial circuit, he "has a direct financial interest in his spouse's employment," and that his spouse's "supervisory authority in the district attorney's office" requires recusal.

The Court noted that in *State v. Hargis*, 294 Ga. 818 (2014) the Supreme Court held that the issue of recusal was not properly preserved for appellate review when the defendant first raised it in a motion for new trial but did not also seek disqualification of the trial judge to hear the motion for new trial. But here, the Court found, unlike in *Hargis*, the original trial judge did not preside over the motion for new trial. Indeed, it was undisputed that following issuance of the JQC opinion on May 1, 2013, the original trial

judge was reassigned from hearing all criminal matters, and the record reflected no orders signed by the judge after February 2013.

The Court determined that based on the current state of the record, it was unable to determine exactly when appellant and his counsel first became aware of the grounds for disqualification—i.e., it could not tell whether they learned of the grounds after trial but prior to filing the motion for new trial, at a later point but prior the judge's reassignment, or only after the judge's reassignment. Accordingly, because the Court could not discern whether this enumeration of error had been properly preserved for appellate review as delineated in *Hargis*, the Court vacated the trial court's order denying appellant's motion for new trial and remanded the case to the trial court to make findings of fact as to when appellant and his counsel first learned of the grounds for disqualification.

Search & Seizure

Harvey v. State, A14A0550 (7/9/14)

Appellant was indicted for kidnapping, attempted armed robbery and aggravated assault. The Court granted his interlocutory appeal from an order denying his motion to suppress. The evidence showed that around 1 a.m., a man called 911, identified himself, and reported that his adult son had asked him to pick him up at a gas station and to come "ready for trouble." The caller described his son as a white man, 44 years old, six feet one inch tall, with brown hair and brown eyes. A police officer responding to the "suspicious activity" call spotted three men near the gas station, walking on the road away from the station. One of the men was a white man who appeared to be about five feet eleven inches tall. The officer activated the blue lights of her patrol car and stopped next to the three men, one of whom was appellant. The officer stated that she stopped "because I thought I saw someone who matched the description of the son that the father had provided to the 911 call-taker." She also testified that she believed the dispatch "said something about a group of males—or a group of people, I believe, and I didn't know if this was part of the group." The officer asked the men where they had been and they responded that they had been at the gas station. She attempted to determine if they either were, or were familiar with, the 911 caller's son. She also asked for their identification. Appellant did not have identification but provided his name. The officer asked the men to sit on the curb while she checked this information in her patrol car. As she did so, another officer arrived and spotted a silver handgun on the ground in a ditch about five feet behind the men. The officers separated and handcuffed the three men. One of the men then told the officers that he had been talking with appellant and the other man about selling a cellular phone when appellant pointed a silver gun at him, forced him to walk down the road with them, and demanded the phone. The other man confirmed that story.

Appellant argued that the trial court erred in ruling that the encounter was a first tier one because the officer's activation of her vehicle's blue lights as she approached the men and her request that they sit on the curb while she checked their names, escalated the encounter to the second tier. The Court found that even if it was a second tier encounter, the evidence showed a basis for the stop. A temporary, investigative detention is reasonable if the officer is aware of specific and articulable facts which, taken together with rational inferences from those facts, provide a particularized and objective basis for suspecting the particular person stopped of criminal activity. The officer in this case had been dispatched to investigate suspicious activity at a particular gas station involving a white man slightly over six feet tall and possibly other people. She testified that, on a road near the gas station, she saw a group of men that included a man she believed matched the description given in the suspicious activity call. Based on this evidence, the officer had a reasonable, articulable suspicion for making a second-tier, investigatory stop of the men. Accordingly, the trial court did not err in denying the motion to suppress.

Venue; O.C.G.A. § 17-2-2(h)

Taylor v. State, A14A0270 (7/9/14)

Appellant was convicted of kidnapping and aggravated sodomy. The evidence showed that appellant and the victim had dated on and off, but ended their romantic relationship two years prior to the crimes. Appellant asked the victim to meet him at a storage unit in Dooly County. When appellant arrived, appellant used subterfuge to get her to come look at something in his car trunk. He then forced her into the trunk and drove away. The victim managed to get the car trunk open after some time, but appellant then stopped the car and put her in the back seat. During the time she was outside of the trunk, she saw nothing but trees and had no idea where she was. Appellant stopped the car, handcuffed and blindfolded the victim, before then committing the aggravated sodomy. Appellant then removed the handcuffs and blindfold and drove away. Eventually, she was rescued in Dooly County.

Appellant argued that the evidence was insufficient to prove venue of the aggravated sodomy. He acknowledged that under O.C.G.A. § 17-2-2(h), if "it cannot be determined in what county a crime was committed, it shall be considered to have been committed in any county in which the evidence shows beyond a reasonable doubt that it might have been committed." But, he argued, that statute did not apply here because the State could have determined the county in which the crime was committed by having the victim retrace the route from the point where she was rescued. The Court disagreed.

One purpose of O.C.G.A. § 17-2-2(h) is to provide for establishment of venue in situations in which there is some doubt as to which county was the scene of the crime. O.C.G.A. § 17-2-2(h) does not violate the mandate of Art. VI, Sec. II, Par. VI, Ga. Const. of 1983, requiring criminal cases to be tried in the county where the crime was committed. Instead, it merely provides a mechanism by which that mandate can be carried out when the place in which the crime is committed cannot be determined with certainty. Here, the Court found, the victim testified that she was abducted in Dooly County. She was in the car's trunk for part of the time that appellant drove her to the location of the aggravated sodomy. In response to the State's question, the victim testified that she had "no idea" where she was at the time of the sodomy. She was eventually rescued from appellant's car in Dooly County. This evidence supported the conclusion that the county in which the crime occurred could not be determined with certainty. The State therefore was entitled to rely on O.C.G.A. § 17-2-2(h) to prove venue.

Moreover, the Court noted, venue is a question for the jury, and its decision will not be set aside if there is any evidence to

support it. Even though the victim was unable to testify with precision in which county the attack took place, she was not required to do so to establish the proper venue. Her testimony established that she was abducted from and returned to Dooly County. This was sufficient to establish Dooly]County as the proper venue.

Notice of Recidivism; Merger

Taylor v. State, A14A0497 (7/7/14)

Appellant was convicted of aggravated assault, terroristic threats, burglary, aggravated assault on a peace officer, obstruction of a law enforcement officer, removal of a weapon from a public official, and stalking. He argued that that the trial court erred by sentencing him as a recidivist because the State failed to provide him with notice of its intent to seek recidivist sentencing under O.C.G.A. § 17-10-7(c) within ten days of trial. The Court disagreed.

O.C.G.A. § 17-16-4(a)(5) requires the State to, "no later than ten days prior to trial, or at such time as the court orders but in no event later than the beginning of the trial, provide the defendant with notice of any evidence in aggravation of punishment that the state intends to introduce in sentencing." The important requirement is that the defendant be given an unmistakable advance warning that the prior convictions will be used against him at sentencing so that he will have enough time to rebut or explain any conviction record. Here, the Court found, the State provided appellant with notice of its intent to seek recidivist sentencing on the second day of trial, before the jury was sworn. Notice received prior to the jury's being sworn is sufficient to satisfy the requirement of the statute. Therefore, because appellant received timely notice of the State's intention to seek recidivist punishment, no error was shown.

Appellant also contended that the trial court erred by failing to merge his convictions for aggravated assault on a peace officer, removal of a weapon from a public official, and obstruction of a law enforcement officer because they constitute the same conduct.

As to the obstruction and aggravated assault on officer, the Court noted that O.C.G.A. § 16-1-7(a) affords a defendant with substantive double jeopardy protection by prohibiting multiple convictions and punishments for the same offense, and O.C.G.A. § 16-1-7(a)(1) prohibits a defendant from being convicted of more than one crime if one crime is included in another. Obstruction of a police officer is "included in" the crime of aggravated assault on a police officer when the former is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the latter. Here, the Court found, appellant was charged with aggravated assault on a peace officer "by fighting and hitting [the officer] with hands, objects when used offensively against a person are likely to result in serious bodily injury." He was charged with obstruction "by offering violence to the person of [the officer], by fighting [him]." Thus, each count of the crime of obstruction was established by proof of the same or less than all the facts required to establish each count of the crime of aggravated assault. Accordingly, the Court held, appellant's conviction for obstruction and the sentence imposed thereon must be vacated, and the case remanded to the trial court for resentencing.

As to the conviction for removal of weapon from a public official, the Court noted that the State charged appellant with "attempt[ing] to remove a handgun from the possession of . . . [the officer], a peace officer as defined in O.C.G.A. § 35-8-2." Merger is not required where the two crimes are based on more than one separate act or transaction. If one crime is complete before the other takes place, the two crimes do not merge. And the aggravated assault count was not established by the same or less than all of the facts required to establish the count of removal of a weapon from an official. Therefore, these counts did not merge.