Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 24, 2012

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THIS WEEK:

Guilty Plea; Right to Counsel

Douglas v. State, A12A1263 (8/14/2012)

Appellant challenged the denial of his motion to withdraw his guilty plea to possession of cocaine with intent to distribute. Because, as the state conceded, the record did not reflect that appellant knowingly waived his right to counsel during the plea withdrawal proceedings, the Court reversed the order denying his motion and remanded the case for further proceedings.

Appellant was represented by counsel when he entered his guilty plea. Twenty-four days later, he filed a pro se motion to withdraw his guilty plea, asserting that he had received ineffective assistance of counsel. Without addressing the merits of appellant's motion, the trial court denied the motion on the ground that appellant—who was proceeding pro se and was presumably incarcerated at the time—failed to appear at the hearing. He appealed.

The Court noted that in Fortson v. State, 272 Ga. 457 (2000), the Georgia Supreme Court held that a proceeding to withdraw a guilty plea is a critical stage of a criminal prosecution, and that "the right to counsel attaches when a defendant seeks to withdraw a guilty plea, thus entitling that defendant to assistance of counsel." The Court further held that the trial court had an obligation to provide counsel or to obtain a constitutionally valid waiver of counsel from a defendant who seeks to withdraw his guilty plea. Therefore, because appellant was not appointed counsel for his motion to withdraw his plea, the record did not reveal that the trial court informed him of his right to counsel, and no waiver of counsel appeared in the record, the Court reversed and remanded the case to the trial court for a re-hearing on appellant's motion to withdraw his guilty plea to be conducted in conformity with the Court's opinion.

Child Molestation; Prior Crimes

Lowe v. State, A12A0988 (8/16/2012)

Appellant was indicted on one count of child molestation and one count of incest upon his 14-year-old niece, T. L. In a second indictment, he was charged with one count of child molestation upon his 13-year-old niece, G. L. Following a trial on both indictments, the jury acquitted appellant of child molestation involving G. L. but found him guilty of child molestation and incest with respect to T. L.

During the State's cross-examination, the prosecutor asked that the jury be excused to determine whether appellant had elected to put his character in issue by this testimony. Based on appellant's assertion that he "took too much time to try and do things right, for people and to other people," and without any finding that the evidence would be more probative than prejudicial, the trial court permitted the prosecutor to cross-examine appellant on his four previous convictions. The prosecutor questioned him regarding a prior conviction in 1989 for obstruction of police officers, a 1991 guilty plea to aggravated sodomy, and 1994 guilty pleas to the sale of a controlled substance

and possession of a controlled substance with intent to distribute. After deliberating for only 21 minutes, the jury found appellant guilty of incest and child molestation with respect to T. L. but found him not guilty of the child molestation charge with respect to G. L.

Appellant contended that the trial court erroneously allowed evidence of prior convictions to be heard by the jury without an express finding that the evidence was more probative than prejudicial. But pretermitting whether the trial court erred by allowing the State to cross-examine appellant on his previous convictions, the Court stated that it did not need to address that question because appellant "must show harm as well as error." The Court found that the record contained overwhelming evidence that appellant was guilty of both incest and child molestation based on multiple acts of sexual intercourse with T. L. between June 1, 2008, and August 31, 2008. Not only did T. L. testify to these incidents, but a forensic biologist testified that DNA evidence collected from T. L., her baby, and appellant indicated that the baby's paternal DNA matched appellant's in all 16 locations examined. In addition, the biologist testified that the DNA evidence revealed a very rare allele present in both appellant and the baby, which established a 99.9980 per cent probability that appellant was the father of T. L.'s baby. Thus, the Court noted that even if appellant's prior convictions had been excluded from evidence, there was no reasonable probability that the outcome would have been different given the overwhelming evidence of appellant's guilt.

Attempt to Entice Child for Indecent Purposes

Heard v. State, A12A1534 (8/16/2012)

Appellant was convicted of criminal attempt to entice a child for indecent purposes. Appellant asserted only a challenge to the sufficiency of the evidence and the Court reversed because the State presented insufficient evidence to support the only crime with which it charged appellant. The evidence showed that in July 2011, the 12-year-old victim received a text from an unknown number stating, "hey [victim's first name], what's up?" When the victim asked who was sending her the text, she learned that it was appellant, the father of teenage boys with whom she was friends. When she inquired about why he was sending her text messages, he responded "I don't know, for the fun it." They exchanged numerous text messages and at some point during their exchanges, appellant asked the victim to "send a naked shot." The victim responded, "no," and when appellant asked "why," she explained "because you're old and that is just wrong." During the time period that appellant was sending her text messages, the victim contacted one of his sons and asked him to tell his father to stop sending her text messages. Appellant lived "roughly adjacent" to the home which the victim's mother rented in a "family-oriented community" with "a lot of children in the area." While the victim testified that she had never had problems with appellant in the past, she found it "odd" that every time she was outside at a friend's house nearby, appellant would always go outside and sit on his porch or mow his lawn even though the grass did not need mowing. The victim's mother learned about appellant's texts from one of the victim's friend's mother. After confirming with her daughter that appellant had sent her a text message requesting a naked photo, the mother confronted appellant at his home. Appellant admitted sending a text message to the victim and "said he did ask for a picture and may have mentioned naked." The mother contacted the sheriff's department, and appellant told the responding deputy that he had received a request for a naked picture that he may have accidentally forwarded to the victim. In a later videotaped interview with a sheriff's department investigator, appellant admitted sending a text message to the victim. A Verizon Wireless representative testified that approximately 40 text messages were exchanged between a phone registered to appellant's wife and a phone used by the victim between 11:26 a.m. and 12:54 a.m. The representative also demonstrated how a person would have to manually enter a phone number to forward a message on the phone used by appellant to send text messages to the victim.

The State charged appellant with only one crime for his text message: criminal attempt to entice a child for indecent purposes. Appellant argued that the conduct proved by the State during his trial cannot support a conviction for attempting to entice a child because the State cannot prove attempted asportation, an essential element of child enticement. He admitted that t his conduct "might have been some other crime," and referenced the criminal exploitation of children statute, OCGA § 16-12-100 (b) (1), and noted that this crime does not have an asportation element. The Court noted that appellant correctly asserted that the crime of enticing a child includes an asportation element. "[T]he asportation element of this offense is satisfied whether the 'taking' involves physical force, enticement, or persuasion." "The concept of asportation relates to movement, and a conviction for enticing a child cannot be sustained without evidence of movement. The State correctly asserted that it was not required to prove completed asportation because it charged appellant with attempted enticing of a child. Instead, it must satisfy the elements of the criminal attempt statute, OCGA § 16-4-1, which provides: "A person commits the offense of criminal attempt when, with intent to commit a specific crime, he performs any act which constitutes a substantial step toward the commission of that crime." The Court cited Dennard v. State, 243 Ga. App. 868, 872 (2000), in which it addressed the interplay between the asportation element of enticing a child and a charge of attempt. In that case, the Court concluded that the defendant was properly charged with attempted enticing of a child because the defendant arranged a meeting with the victim at a local mall. Although the victim did not go to the proposed meeting, the Court found that the defendant had taken a substantial step toward the commission of the crime. In contrast to the facts presented in Dennard, the Court stated that the victim's compliance with appellant's request to send a naked picture would not have satisfied the element of asportation because the request did not attempt to entice or persuade the victim to go to another place. Without evidence that appellant attempted to move the victim "any place whatsoever," the State failed to prove that appellant possessed the requisite intent to commit the crime of enticing a child and that he took a substantial step toward committing that crime. Therefore, while the State presented sufficient evidence showing that appellant requested a 12-year-old minor to send him a naked picture, it presented insufficient evidence to prove all of the elements of the only crime with which it charged appellant: attempted enticing of a child. On appeal from a criminal conviction, the Court's role is limited to reviewing whether the State presented sufficient evidence to sustain the crime for which a defendant was charged and convicted. The Court therefore

could not remedy the State's failure to charge appellant with a different crime for which this evidence might have been sufficient to affirm a conviction and were thusly constrained to reverse.