

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 22, 2017

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THIS WEEK:

- **Prior Bad Acts; Rule 404 (b)**
- **Fugitive Disentitlement Doctrine**
- **Jury Charges; Juror Questions**
- **Theft by Taking; Evidence of Value**
- **Consent; Right to be Present**
- **DUI Refusals;
Comment on Defendant's Silence**

Prior Bad Acts; Rule 404 (b)

Gunn v. State, A17A1128 (8/2/17)

Appellant was convicted of trafficking cocaine, possessing cocaine with the intent to distribute, and possessing a firearm as a convicted felon. The evidence showed that in 2012, law enforcement found the cocaine during a search of a mobile home to which appellant was connected. At trial, the State was allowed to introduce evidence of appellant's 2001 conviction for possession of cocaine with intent to distribute. The evidence supporting this conviction showed that appellant was searched incident to arrest following a traffic stop and the drugs were found on his person.

Appellant contended that the Rule 404 (b) evidence was improperly admitted because the 2001 incident was factually dissimilar and because of the time span between 2001 and the events in 2012. But, the Court found, appellant failed to establish that the trial court abused its discretion by admitting evidence of his 2001 conviction for possessing cocaine with the intent to distribute when he placed his intent in issue by pleading not guilty to the charges of trafficking in cocaine and possessing cocaine with the intent to distribute.

Furthermore, appellant did nothing to remove intent as an issue and, he told law enforcement that he did not live in the house throughout which the drugs and drug-distribution paraphernalia were found. Moreover, the Court found, because appellant's participation in the earlier crime required the same intent as the charged crimes, the evidence of the earlier other act was relevant.

As to the time span between the two incidents (2001 to 2012), given precedent from the Eleventh Circuit Court of Appeals, the Court held that under the facts of this case, the temporal nexus was not too remote to erode the probative value of the prior conviction. Accordingly, the Court held that the trial court did not abuse its discretion in admitting this evidence.

Fugitive Disentitlement Doctrine

Worthen v. State, A17A0949 (8/3/17)

Appellant was convicted of insurance fraud, theft by deception, making a false statement, and false report of a crime. The record showed that appellant's trial started in March 2015. On the fourth day of trial, appellant absconded and the case proceeded without him. After the jury convicted him, appellant's counsel filed a motion for a new trial on his behalf. Over a year later, appellant was captured. Thereafter, the trial court dismissed his motion for new trial.

Appellant argued that his trial counsel was authorized to file a timely motion for new trial during his absence, that there was no valid waiver of his post-conviction rights, that the trial court's failure to consider the merits of his motion for new trial violated his due process

rights under the state and federal constitutions, and that his motion for new trial was not subject to dismissal because he was back in custody by the time the trial court dismissed it. However, the Court agreed with the State that these contentions were meritless under the fugitive disentitlement doctrine, which limits access to courts by fugitives from justice. Thus, where a defendant becomes a fugitive before filing any post-conviction motions and then remains a fugitive during the time in which he could assert such a motion, he waives his right to seek post-conviction relief. A fugitive defendant does not have a right to appear by counsel until he has returned into custody and no due process violations are implicated in dismissals under this doctrine. Therefore, the fact appellant was captured before the trial court dismissed the motion for new trial filed by his attorney did not preclude application of the doctrine.

Nevertheless, appellant argued, the General Assembly's 1980 enactment of a statute making bail-jumping a crime, OCGA § 16-10-51, meant "the prior judicially-created penalty is no longer available." The Court disagreed. Nothing in the plain language of the statute criminalizing bail-jumping can be viewed as superseding the equitable common law doctrine of fugitive disentitlement and no inconsistencies exist between the common law and the statute.

Jury Charges; Juror Questions

Bradley v. State, A17A0668 (8/4/17)

Appellant was convicted of aggravated child molestation, rape, and incest for sexually abusing his 15-year-old stepdaughter. He argued that the trial court erred in not answering a question from the jury about whether "unconsented" oral sex constitutes rape. The record showed that in response to the question, the trial court stated, "I cannot — or none of us can enter into a general discussion with [you] concerning these issues." The trial court then recharged the jury on the definitions of rape and aggravated child molestation. A juror then asked the trial court to read the rape charge one more time and the court acquiesced. The jury then asked if there is a difference between statutory rape and rape to which the trial court responded: "Legally there is of the definition, but [you] are not concerned with statutory

rape. That's not one of the issues for [you] to consider in this case."

The Court noted that because appellant did not object, its review was limited to whether there was plain error. Appellant contended that the exchange between the trial court and the jury proved the jury was confused about the rape charge and likely convicted him of rape based on conduct that did not constitute rape. He further argued that the trial court committed plain error by not answering the jury's question with a simple "no." But, the Court stated, the trial court had discretion to decline to answer the jury's question directly and, the Court noted, it has never held that the court must engage in a question and answer session with the jury or instruct the jurors individually on how to apply the law to the facts. Here, the Court found, the trial court sought to avoid any "problematic situation" by recharging the jury on rape and aggravated child molestation, which effectively answered the question posed. The trial court's recharge specifically instructed the jury that rape involves the penetration of a female sex organ with a male sex organ and that aggravated child molestation involves the sex organs of one and the mouth or anus of another. Thus, the Court concluded, the trial court's decision to answer the jury's question by recharging on rape and aggravated child molestation did not amount to plain error, was not obviously erroneous, and likely did not affect the outcome of the proceeding.

Theft by Taking; Evidence of Value

Puckett v. State, A17A0968 (8/9/17)

Appellant was convicted of kidnapping, felony theft by taking a motor vehicle, and two counts each of armed robbery and false imprisonment. She argued that the trial court erred in imposing a felony sentence on her conviction for theft by taking of a motor vehicle. Specifically, she argued that the State failed to prove that the fair market value of the victim's car was more than \$1,500 at the time the theft was committed.

The Court noted that although the victim never testified about how much his 2002 Honda Accord cost when it was purchased as a "certified pre-owned" car in 2009, he did testify that he would not sell it for less than \$1,500 at the time of appellant's trial. The

victim testified that, at the time appellant stole his car, there was nothing mechanically wrong with it and it had less than 200,000 miles on the odometer, but it did have a dent in the right front fender. The victim also stated that, a few months after the theft, his car had been damaged in an accident, and it cost \$4,000 to repair it. In addition, the State showed the jury what the car actually looked like at the time of the theft by presenting photographs of the car and a surveillance tape from the scene of the crime.

The Court, citing *Wilson v. State*, 304 Ga. App. 743, 747 (1) (c) (2010), found that there was sufficient evidence to support the jury's conclusion that the fair market value of the 2002 Honda Accord was more than \$1,500. Consequently, the trial court did not err in sentencing appellant for a felony on her conviction for theft by taking.

Consent; Right to be Present

Duncan v. State, A17A1224 (8/9/17)

Appellant was convicted of two counts of aggravated sexual battery, aggravated child molestation, nine counts of child molestation, and two counts of cruelty to children in the first degree. Appellant contended that his aggravated sexual battery convictions must be reversed because the trial court gave an improper jury instruction. The Court stated that it was "constrained to agree." The transcript showed that the trial court charged the jury that "[c]onsiderations of consent and force are irrelevant in . . . aggravated sexual battery cases against children under 16 years of age, for children under the age of 16 years are legally incapable of consenting to illicit sexual acts." In *Watson v. State*, 297 Ga. 718, 720 (2) (2015), the Supreme Court determined that it is erroneous for a trial court to instruct a jury that an underage victim is not capable of consenting to contact constituting sexual battery because sexual battery as defined in our Code does not necessarily involve sexual conduct. The same holds true for aggravated sexual battery. Accordingly, the Court extended the holding of *Watson* to cases involving aggravated sexual battery. And therefore, because the erroneous jury instruction here effectively relieved the State of its burden to prove an essential element of the crime of aggravated sexual battery, the instruction could not be said to

have been harmless. Accordingly, the Court reversed appellant's convictions for aggravated sexual battery.

He also contended that his convictions must be reversed because his right to be present at his trial was violated by his absence from a hearing. The record showed that after a break, the court sought to take up some evidentiary issues. Although appellant was not in the courtroom, his trial counsel, without authority to waive his presence, stated that appellant was aware of what was taking place and his presence was not necessary. Thereafter, appellant's counsel explained that the guardian ad litem ("GAL") from the deprivation case involving the victims was present with her file. After discussion, the trial court ordered that the GAL sit down with counsel for both parties and go over the contents of the file that may be relevant to the case. The trial court clarified that if there was any dispute as to the relevance of anything in the file, the parties could address the issue with the trial court.

Appellant argued that his absence from this hearing violated his right to be present under the Georgia Constitution because he could not assist his counsel "with issues relating to this [m]otion hearing, including the review of [the GAL's] file." The Court disagreed. The Court found that the hearing at issue in this case dealt with a purely legal issue. The State did not object to appellant's trial counsel having access to the GAL's file, yet counsel for both parties felt that the proper procedural mechanism for release of the file, which may have contained privileged information, was for the trial court to release the file. That was the sole purpose of the hearing. Additionally, at the hearing on appellant's motion for new trial, appellant's trial counsel acknowledged that he reviewed the GAL's file and that if it had contained anything exculpatory, he would have done whatever was necessary to admit the exculpatory evidence at trial. At the same hearing, appellant testified that, at the time of trial, he knew that there was a GAL who may have had evidence but he had "no idea" how to gain access to the file. Moreover, appellant believed that if his trial counsel had found anything exculpatory in the GAL's file that he would have brought attention to it. Accordingly, the Court concluded, since there was not a reasonably substantial relationship between appellant's presence during the discussion of these legal matters and his opportunity to

defend against the charges, his right to be present during critical stages of his criminal trial was not violated.

DUI Refusals; Comment on Defendant's Silence

Szopinski v. State, A17A1198 (8/9/17)

Appellant was convicted of DUI (less safe) and failure to maintain lane. She contended that the trial court erred in allowing the jury to hear testimony that she had refused to take the State-administered breath test. Relying on *Williams v. State*, 296 Ga. 817 (2015), she argued that her refusal was made upon reliance of her Fourth Amendment rights and, therefore, may not be used as evidence of her guilt. The Court disagreed.

Quoting *Klink v. State*, 272 Ga. 605, 606 (1) (2000), the Court stated that "[t]he right to refuse to submit to state administered testing is not a constitutional right, but one created by the legislature." Thus, the trial court did not err because the implied right grants drivers the right to refuse to take a state-administered test, with one of the consequences of exercising that right being that evidence of such refusal is admissible at trial. In so holding, the Court stated that appellant's reliance on *Williams* was misplaced. That case addressed the standards to be applied when evaluating whether to admit evidence of a defendant's blood alcohol content obtained through state-administered chemical testing. Nevertheless, the Court stated, while the reasoning in *Williams* "may have substantially eroded *Klink's* analytical foundation, . . . [the case] nevertheless remains binding authority over this Court unless and until it is overturned by our Supreme Court."

Appellant also argued that the trial court erred in allowing the State to comment during closing argument on her alleged failure to come forward with evidence in her defense. The Court noted that appellant testified that she initially told the arresting officer that she had failed to maintain her lane because she had something in her eye. On the stand, she also claimed that her weaving was due to her "multitasking," that she had been reading an old text message on her phone. The prosecutor cross-examined appellant about this inconsistency, and appellant said that she did not mention looking at her phone because "[n]othing was asked about it." During closing, as part of an argument suggesting that it was incredible

that appellant had decided to read an old text with something in her eye while turning left, the prosecutor stated: "[I]'s the first time she's ever said it to anybody. . . . [T]hat's the first time she's ever given that story."

The Court found that it was clear from the record that the prosecutor was not commenting on appellant's failure to come forward with evidence; rather, he was arguing that the jury could infer from the inconsistencies in her statements that appellant was making up a story to explain away her drunk driving, argument which the law allows. Accordingly, the trial court did not err.