

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 9, 2011

Legal Services Staff Attorneys

Stan Gunter
Executive Director

Chuck Olson
General Counsel

Joe Burford
Trial Services Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Resource Coordinator

Gary Bergman
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Todd Hayes
Traffic Safety Resource Prosecutor

THIS WEEK:

- **Due Process; Prosecutorial Misconduct**
- **Sentencing; Recidivism**
- **Sentencing; Merger**
- **Double Jeopardy**
- **Right To Be Present At Trial; Ineffective Assistance of Counsel**

Due Process; Prosecutorial Misconduct

Billingslea v. State, A11A1203 (8/24/11)

Appellant appealed the trial court's denial of his motion to dismiss four counts of armed robbery against him for an alleged violation of his right to due process because he was not arrested until more than six years after the crime. The Sixth Amendment does not guarantee a right to a speedy arrest. However, an inordinate delay between the time a crime is committed and the time a defendant is arrested or indicted may violate due process guarantees under the Fifth and Fourteenth Amendments. To find a due process violation where a delay precedes arrest and indictment, courts must find 1) that the delay caused actual prejudice to the defense, and 2) that the delay was the product of deliberate action by the prosecution designed to gain a tactical advantage. Both elements, actual prejudice and deliberate delay to gain a tactical advantage, must be established to find a due process violation.

Appellant contended that his defense was prejudiced because during the six year delay, latent prints from the crime scene were lost and a witness "crucial to the defense" could no longer be located. The Court disagreed. As

to the missing fingerprint evidence, at worst, a match between the latent fingerprints and his fingerprints would have inculpated him. At best, a failure to match the prints would have been neutral to both the defense and the State, because it would have proved neither appellant's presence nor his absence. Similarly, appellant failed to establish that the absence of the witness would substantially prejudice his defense. The witness, who denied knowing appellant, simply owned the account associated with a telephone number which someone called from a victim's stolen cell phone two hours after the robbery.

Since appellant must show both that his defense was prejudiced and the State deliberately delayed his arrest to obtain a tactical advantage to establish a due process violation, his failure to satisfy the prejudice element obviated any need to consider the reasons for the delay. Nevertheless, the Court determined that the lead detective did not testify that he delayed the arrest to strengthen the State's case; he testified that he delayed the arrest because he could not find appellant, and that finding him would strengthen the case. Thus, appellant failed to prove that the State delayed arresting him to gain a tactical advantage.

Sentencing; Recidivism

Washington v. State, A11A1268 (8/25/11)

Appellant was convicted of two counts of aggravated battery, possession of a firearm during the commission of a crime and possession of a firearm after having previously been convicted of a felony involving use of a firearm. Appellant argued that the trial court erred in sentencing him under OCGA § 17-10-7(c), because one of his prior felonies was used to prove the charge of possession of firearm after

having previously been convicted of a felony involving a firearm. Thus, he argued, pursuant to *King v. State*, 169 Ga. App. 444 (1984) and its progeny, that prior felony could not also be used to enhance his punishment.

The Court found that *King* and its progeny stand for the limited proposition that a felony used to convict a defendant of possession of a firearm by a convicted felon under OCGA § 16-11-131 cannot also be used to enhance the defendant's punishment as a repeat offender under OCGA § 17-10-7(a). The rule set out in *King* is not founded on the idea that the defendant's possession of a firearm is "used up" by its consideration under one statute and therefore not available under the other. Rather, the reason for this narrow rule is that to hold otherwise would eviscerate the sentencing range prescribed by the legislature for possession of a firearm by a convicted felon.

Here, neither OCGA § 17-10-7(a) nor OCGA § 16-11-131 was involved. Appellant was not convicted under OCGA § 16-11-131; he was convicted under OCGA § 16-11-133(b), which provides that a person who has previously been convicted of a felony involving the use or possession of a firearm and who has on, or within arm's reach of, his person a firearm during the commission of any felony against or involving the person of another, commits a felony that "shall be punished by confinement for a period of 15 years." OCGA § 16-11-133(b)(1). Thus, unlike the one-to-five year sentencing range applicable to a conviction under OCGA § 16-11-131, no sentencing range applies to appellant's conviction under OCGA § 16-11-133(b), which instead mandates a 15-year sentence.

Moreover, appellant was sentenced pursuant to subsection (c), not subsection (a), of OCGA § 17-10-7. OCGA § 17-10-7(c) provides that a person convicted of three prior felonies shall, upon conviction for a fourth felony or subsequent felonies, "serve the maximum time provided in the sentence of the judge based upon such conviction and shall not be eligible for parole until the maximum sentence has been served." The holding in *King* does not extend to a sentence imposed under OCGA § 17-10-7(c). Because the application of OCGA § 17-10-7(c) does not eviscerate any sentencing range and means only that the sentence imposed on appellant will have to be served without the possibility of parole, *King* and its progeny do not apply. Accordingly, the

trial court did not err in sentencing appellant under OCGA § 17-10-7(c).

Sentencing; Merger

Dahlman v. State, A11A1380 (8/23/11)

Appellant was convicted of manufacturing methamphetamine in violation of OCGA § 16-13-30 (b) and possession of substances with the intent to use them to manufacture methamphetamine in violation of OCGA § 16-13-30.5 (a). He argued that the trial court erred by refusing to merge the conviction for possession with intent to manufacture into the conviction for manufacturing. Specifically that manufacturing methamphetamine in violation of OCGA § 16-13-30 (b) necessarily included possession of the substances used in the manufacturing process in violation of OCGA § 16-13-30.5 (a) (1), and therefore, both offenses arose from the same conduct and merged under the Fifth Amendment Double Jeopardy Clause.

OCGA § 16-13-30 (b) provides that "it is unlawful for any person to manufacture . . . any controlled substance" including methamphetamine. OCGA § 16-13-30 (a) (1) provides that "[i]t shall be illegal for a person to possess, whether acquired through theft or other means, any substance with the intent to . . . [u]se such substance in the manufacture of a . . . Schedule II controlled substance" including methamphetamine. The Court found that under *Drinkard v. Walker*, 281 Ga. 211, 212 (2006), when the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if one crime is included in the other. Under OCGA § 16-1-6 (1), one crime is "included in" another crime where it 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 other crime. To determine under OCGA § 16-1-6 (1) whether convictions under two criminal provisions merge because one is included in the other, the "required evidence" test is used to determine whether each provision requires proof of a fact which the other does not.

But, the Court found, even if it was possible for both offenses at issue to be committed by the same conduct, the evidence showed that appellant committed the charged offenses by

separate acts occurring at different times. A search of the residence produced evidence which showed that appellant had already completed the manufacture of methamphetamine, and other evidence showed that, at the time of the search, he possessed substances with the intent to use them to manufacture more methamphetamine in the future. Because the separate offenses for which appellant was convicted did not arise from the same conduct, he was not placed in double jeopardy and the convictions did not merge.

Double Jeopardy

Boutwell v. State, A11A1298 (8/24/11)

Appellant contended that the trial court erred in denying her plea in bar based on double jeopardy. The record showed that on September 8, 2010, appellant was charged in the State Court with misdemeanor theft by taking: "on or about the 20th day of May, 2010 by unlawfully taking a 1976 yellow gold class ring and a gold in color chain having a value of less than Five Hundred Dollars (\$500.00) and being the property of [the victim]" in violation of OCGA § 16-8-2. She pled guilty to this charge on October 4, 2010. On October 20, 2010, appellant was charged in the Superior Court with felony theft by taking. The indictment stated that she "on and about the 3rd day of May 2010, did unlawfully take a gold herringbone style necklace, the property of [the victim], with a value greater than \$500." The same person was the alleged victim in both cases.

Appellant argued that there should have been a single prosecution because the state court solicitor was aware of all the facts giving rise to the superior court charge of felony theft by taking. The Court disagreed. A crime should have been charged within the meaning of OCGA § 16-1-8 (b) (1) if it falls within the scope of OCGA § 16-1-7 (b). OCGA § 16-1-7 (b) provides: "If the several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution except as provided in subsection (c) of this Code section." And "the phrase 'the same conduct' has been used interchangeably with the phrase 'the same transaction.'"

Here, appellant was charged in superior court with taking a different item of a different

value from the victim on a different day than the items listed in the state court accusation. The evidence of the felony taking alleged in superior court could be presented without presenting evidence of the misdemeanor takings, and vice versa. Because the subsequent felony prosecution did not arise from the same conduct as the former misdemeanor prosecution, OCGA §§ 16-1-7 and 16-1-8 did not apply. The trial court therefore did not err in denying appellant's plea in bar based upon double jeopardy.

Right To Be Present At Trial; Ineffective Assistance of Counsel

Lyde v. State, A11A0863 (8/25/11)

Appellant was convicted of aggravated child molestation and child molestation. He contended that the trial court erred when it failed to find that his trial counsel rendered ineffective assistance by improperly waiving appellant's presence at a critical stage of trial. The record showed that after completion of direct examination of a defense witness, the trial court gave the jury a short break. During that break, appellant left the courtroom. The attorneys stayed and the prosecutor moved for a finding that the witness had placed appellant's character into evidence. Appellant's attorney, after waiving his client's presence, argued otherwise. The trial court then took a short recess and when court resumed, appellant was back in the courtroom. Defense counsel moved to strike any portion of the defense witness's non-responsive testimony pertaining to appellant's good character. The trial court granted the motion to strike, then denied the State's motion for a finding that appellant had placed his character into issue.

Appellant argued that he should have been present when his attorney discussed whether evidence of his good character had been introduced because he "would have explained to his counsel how important his good character defense was to his liberty and would have vigorously objected to striking this material, essential testimony." However, the Court found, appellant did not raise an ineffective assistance claim regarding his lawyer's successful motion to strike, which counsel interposed because the prosecutor sought a ruling that would have allowed her to question the defense witnesses about appel-

lant's specific bad acts. The issue, the Court stated, was not whether trial counsel's motion to strike constituted ineffective assistance, whether appellant understood why his lawyer moved to strike the evidence, or whether he could have convinced his lawyer to keep the testimony if he had been there. The issue was whether appellant's absence during the discussion violated his due process right to be present during a *critical stage* of his trial. A critical stage in a criminal prosecution is one in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or one in which the outcome of the case is substantially affected in some other way. Here, appellant was present when his trial counsel made the motion on the record to strike his witness's good character evidence, and present when the trial court ruled. The only thing appellant missed was the discussion about whether the testimony constituted good character evidence that opened the door to cross-examination about bad character evidence. As in charge conferences or bench conferences involving purely legal argument, appellant's absence during only the discussion of the motions did not violate his due process right to be present during critical stages of the proceedings against him. Accordingly, the trial court did not err in finding that his counsel was ineffective for waiving his presence in court.