

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 9, 2016

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THIS WEEK:

- **Judicial Commentary; O.C.G.A. § 17-8-57**
- **Juveniles; Sentencing**
- **Search & Seizure**

Judicial Commentary; O.C.G.A. § 17-8-57

Quiller v. State, A16A0114 (7/15/16)

Appellant was convicted of aggravated assault, burglary, and possession of a firearm during the commission of a felony. Appellant contended that the trial court committed reversible error by improperly commenting on the evidence during preliminary instructions in violation of O.C.G.A. § 17-8-57. The Court determined that the trial court erred in expressly informing the jury, prior to the presentation of evidence, of its opinion of fact: that fingerprint testimony is rarely presented at trial and that fingerprint evidence is “very hard to get.”

However, the Court noted, appellant was tried in 2009 and his motion for new trial was denied in April 2015. O.C.G.A. § 17-8-57 was amended effective July 1, 2015 and before this case was docketed in the Court of Appeals. Thus, the Court stated, it must determine whether the old version of § 17-8-57 or the new version of § 17-8-57 is to be applied as the proper standard of review.

A divided whole Court agreed with the State that the newly amended version was applicable because it is a “procedural law” that should apply retroactively. In so holding the Court “overrule[d] *Alday v. State*, 336 Ga.App. 508 (784 SE2d 860) (2016) (physical precedent only) in which former

O.C.G.A. § 17-8-57 was applied rather than current O.C.G.A. § 17-8-57(b). We also disapprove of the following cases to the extent that they could be relied upon to stand for the proposition that O.C.G.A. § 17-8-57(b) should be applied prospectively: *Mitchell v. State*, ___ Ga.App. ___ (___ SE2d ___) 2016 Ga.App. LEXIS 355 (Case No. A16A0041; decided June 16, 2016); *Marlow v. State*, 337 Ga.App. 1 (785 SE2d 583) (2016); *King v. State*, 336 Ga.App. 531 (784 SE2d 875) (2016); *Weaver v. State*, 336 Ga.App. 206 (784 SE2d 61) (2016) (physical precedent only); *Sneiderman v. State*, 336 Ga.App. 153 (784 SE2d 18) (2016); *Williams v. State*, 336 Ga.App. 64 (783 SE2d 666) (2016); *Bolden v. State*, 335 Ga.App. 653 (782 SE2d 708) (2016); *Wallace v. State*, 335 Ga.App. 232 (779 SE2d 130) (2015); *Goulding v. State*, 334 Ga.App. 349 (780 SE2d 1) (2015).”

Under O.C.G.A. § 17-8-57(b) (2015), the Court must analyze whether, in the absence of an objection, the trial court’s improper statement constitutes plain error. Under this standard, the Court must determine whether there is an error that has not been affirmatively waived, is clear and obvious, affects the defendant’s substantial rights, and seriously affects the fairness, integrity or public reputation of the judicial proceedings. Assuming without deciding that appellant satisfied the other factors, the Court found that he could not show that the court’s instruction affected his substantial rights which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings.

Here, the Court found, the evidence showed that after appellant entered the victims’ home at gunpoint with two other men, the

occupants of the home struggled with him and held him down until police arrived. So any fingerprint evidence would not have been vital to placing him at the scene of the crime. Moreover, the detective testified that the crime lab was unable to recover fingerprints from the weapon used in the crimes, and that “[i]t’s actually few and far between that we are able to lift a fingerprint that we can use.”

Therefore, the Court found, appellant failed to show that it was highly probable that the court’s error affected the outcome of the court proceedings. Accordingly, he failed to show that the trial court’s improper statement constituted plain error requiring reversal of his convictions.

Juveniles; Sentencing

Ga. Dept. of Juvenile Justice v. Eller,
A16A0526 (7/15/16)

In 2013, Eller entered a negotiated guilty plea to child molestation and burglary in superior court. Eller was 15 years old at the time of the crime, and was prosecuted as an adult. He received a 40-year sentence, with 15 years to be served in confinement. During the sentencing hearing, defense counsel requested the judge to direct that Eller remain in the custody of the Department of Juvenile Justice (“DJJ”) until he turned 21 years old, and the State indicated it had no objection to the request. The trial court agreed after both parties took the position that she was authorized to do so. In January 2014, when Eller turned 17 years old, the Department of Corrections attempted to take Eller into its custody pursuant to O.C.G.A. § 17-10-14(a). The superior court conducted a sentence review hearing, after which it ordered that Eller was to remain in the custody of DJJ until his twenty-first birthday. DJJ appealed, arguing that the superior court’s order violates Georgia law.

O.C.G.A. § 17-10-14(a) provides that “[When] a person under the age of 17 years is convicted of a felony and sentenced as an adult ... to a certain term of imprisonment, such person shall be committed to the Department of Juvenile Justice to serve such sentence in a detention center of such department until such person is 17 years of age at which time such person *shall* be transferred to the Department of Corrections to serve the remainder of the sentence. (Emphasis supplied). The DJJ argued that this statute mandated a transfer. Eller

argued that his retention in DJJ custody is authorized by O.C.G.A. § 49-4A-9(e). That statute provides that when a child under the age of 17 years who was convicted of a felony and sentenced in the superior court as an adult approaches the age of 17, the DJJ “shall notify the court that a further disposition of the child is necessary. ... The court shall review the case and determine if the child, upon becoming 17 years of age, should be placed on probation, have his or her sentence reduced, be transferred to the Department of Corrections for the remainder of the original sentence, or be subject to any other determination authorized by law.”

A divided whole Court found that O.C.G.A. § 17-10-14(a) explicitly and unequivocally provides that, upon turning 17 years old, a juvenile in DJJ custody who was sentenced in superior court as an adult “shall be transferred to the Department of Corrections to serve the remainder of the sentence.” In passing O.C.G.A. § 49-4A-9(e), the Georgia Legislature authorized the sentencing court to review and reassess a juvenile’s case as his or her transfer date approaches in order to consider whether to impose an alternative disposition. Pursuant to the express language of that statute, to the extent that the superior court reviewed Eller’s case and determined that an alternative disposition was warranted, the judge was authorized to: place him on probation, reduce his sentence, allow his transfer to the Department of Corrections, or fashion “any other determination authorized by law.” Ordering that Eller remain in DJJ custody until he reaches 21 years of age, however, was neither authorized by O.C.G.A. § 49-4A-9(e) or any other provision of Georgia law. Moreover, the Court stated, to construe O.C.G.A. § 49-4A-9(e) in the manner proposed by Eller would render meaningless the express statutory requirement that any alternative determination imposed by the sentencing court otherwise be “authorized by law.” And while O.C.G.A. § 49-4A-9(b) provides the superior court broad discretion to modify its orders for the welfare of “any child” subject to its jurisdiction, the plain language of subsection (e) limits that discretion once that child becomes 17 years of age. Accordingly, the Court reversed the order directing the DJJ to hold Eller in its custody.

Search & Seizure

Torres v. State, A16A1074 (7/22/16)

Appellant was charged with trafficking in methamphetamine. He argued that the trial court erred in denying his motion to

suppress. The evidence showed that as part of an undercover narcotics investigation, Cherokee County law enforcement officers followed a target from his home to an area of Acworth, where they lost sight of him. Later, the officers spotted the target in Woodstock, this time with a male passenger. They conducted a traffic stop and arrested the target for possession of methamphetamine. During the ensuing investigation, the target offered to show the officers where he had purchased the methamphetamine. From the location the target described, the officers believed the residence was located in Acworth. Accordingly, the officers contacted the City of Acworth Police Department and briefed them on the issue. The target, now informant, led the City’s officers to the residence and told them that he had purchased the methamphetamine there earlier that day and had seen an additional two to three ounces of methamphetamine in the apartment. He also stated that a Hispanic female and Hispanic male lived in the apartment. While one officer returned to the police station to apply for a search warrant, other officers watched the residence. The officers saw no drug-related activity, but did observe a Hispanic male entering and exiting the residence. Also, the officers did not have prior knowledge of any drug activity at that residence. They had, however, previously responded to calls about suspicious “oddball” activity at that address, and had made contact with a Hispanic female and male there. Those calls did not result in any arrests or ongoing investigations and, at the time he applied for the search warrant, the City officer was not certain that he had been in contact with the same individuals as those referenced by the informant. Relying on this information, the officer applied for and obtained a search warrant for the residence.

The Court found that it was undisputed that, prior to the search warrant, the informant had not established a history of reliability with the City’s law enforcement department, and the officers did not investigate the informant’s criminal history before relying on the informant’s statements to apply for the search warrant. In cases where, as here, a confidential informant has not been shown to be credible or reliable, the information he provides may be proven trustworthy if portions of the information are sufficiently corroborated by law enforcement. For the corroboration to

be meaningful, however, the information corroborated must include a range of details relating to future actions of third parties not easily predicted. That is, the tip must include inside information not available to the general public; otherwise, the corroboration is not sufficiently meaningful to show reliability.

Here, the Court found, the informant gave some details as to where and when he saw the drugs in the residence — according to the application for the search warrant, the informant stated that he saw two to three ounces of methamphetamine “sitting on a shelf in the residence” earlier that day when he bought drugs there — but he did not provide the officers with the names or any identifying details of the individuals living in the residence, except that they were a Hispanic male and female. But, the Court stated, even if it accepted the officers’ observation of a Hispanic male entering and exiting the residence as corroboration of the informant’s assertion that a Hispanic male lived there, this detail was not sufficient to establish that the informant was a credible source of information as to the alleged criminal activity at the residence because it is not a detail that would be unavailable to the general public.

Nevertheless, the State contended, under the totality of the circumstances, the warrant was justified because the informant provided information that was against his own penal interest and his statements were consistent with the officers’ observations, including their tracking him to the area near the residence. The Court noted that when a named informant makes a declaration against his interest and based on personal observation, that in itself provides a substantial basis for the magistrate to credit his statement. However, this principle of law applies to *named informants*, i.e., those informants whose identities have been disclosed to the magistrate. In this case, the informant was not identified to the magistrate, so the statement against interest rule did not control.

Moreover, the Court found, the State’s reliance on the fact that Cherokee County officers had tracked the informant to the area near the residence before they found him with methamphetamine was misplaced because the record did not indicate how long the informant was out of the officers’ view or indicate how close he was to the residence at issue. Consequently, these additional considerations did not overcome

the weaknesses in the information upon which the warrant was based. Accordingly, because the application and affidavit for the search warrant contained insufficient information to allow a finding of probable cause to search the residence, the trial court erred in denying appellant’s motion to suppress.