Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING NOVEMBER 30, 2018
Issue 48-18

THIS WEEK:

- **Obstruction of a Peace Officer; Municipal Police Officers**
- **Search & Seizure; Scope of Consent to Search**
- **DUI; Rule 403**
- **Indictments; OCGA § 42-5-15**

Obstruction of a Peace Officer; Municipal Police Officers

Bacon v. State, A18A1212 (10/19/18)

Appellant was convicted of obstruction of a police officer, but acquitted of simple battery. The evidence showed that Officer J. B, who was a sworn police officer for the Plains Police Department and the Montezuma Police Department, was working security for the American Legion in Americus, Sumter County. His work at the time did not involve the Plains or Montezuma Police Departments, and he was not a sworn officer with the Sumter County Sheriff's Department or the City of Americus Police Department. The officer observed appellant strike another individual and told appellant she was under arrest. Appellant then resisted arrest and was then also charged with obstruction.

Appellant contended that the trial court erred by denying her motion for a directed verdict of acquittal on the charge of obstruction of a law enforcement officer, when the officer was an off-duty municipal police officer working outside of his jurisdiction when he attempted to arrest her. The Court agreed and reversed her conviction. OCGA § 16-10-24 (a) (2015) provides in pertinent part: "A person who knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties is guilty of a misdemeanor." Consequently, as an essential element of a prosecution for this offense, the State must prove that the officer was in the lawful discharge of his official duties at the time of the obstruction. A police officer is not discharging his lawful duties when he is making an unlawful arrest, and a person who resists an unlawful arrest does not hinder the officer in the lawful discharge of his official duties.

The Court noted that unless otherwise provided by law, "[n]o municipality may exercise any of the powers listed in subparagraph (a) of this Paragraph [e.g., police protection] or provide any service listed therein outside its own boundaries except by contract with the county or municipality affected." Ga. Const. Art. IX, §II, Para. III (b). Also, OCGA § 40-13-30 provides: "Officers of the Georgia State Patrol and any other officer of this state or of any county or municipality thereof having authority to arrest for a criminal offense of the grade of misdemeanor shall have authority to prefer charges and bring offenders to trial under this article, provided that *officers of an incorporated municipality shall have no power to make arrests beyond the corporate limits of such municipality unless such jurisdiction is given by local or other law*."

Here, it was undisputed that Officer J. B. was an officer of an incorporated municipality (Plains, as charged, but also Montezuma, per trial testimony) and was off duty and beyond the corporate limits of the municipality when he attempted to arrest appellant. The Court noted that the fact that he was off duty is not determinative because

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obstruction can be committed against a law enforcement officer who is off duty or working private security. However, Officer J. B. was an officer of an incorporated municipality, and he thus lacked power to make an arrest outside that municipality unless local or other law gave him such jurisdiction. And the State failed to show that any local or other law gave him such jurisdiction. Therefore, Officer J. B. had no power to arrest appellant outside of the territorial limits of his jurisdiction; thus, he was not discharging his official duties when he tried to arrest her, and she could not be convicted of obstruction of an officer for resisting the arrest. Accordingly, the evidence demanded a verdict of acquittal, and the trial court erred by denying appellant's motion for a directed verdict.

Search & Seizure; Scope of Consent to Search

Martinez v. State, A18A1051 (10/19/18)

Appellant was convicted of 10 counts of sexual exploitation of a child following a stipulated bench trial. He contended that the trial court erred in denying his motion to suppress. The evidence at the motion hearing, briefly stated, showed that agents of the sheriff's office, the GBI and the U. S. Marshall's office came to appellant's home around 11:00 p.m. The officers were checking on registered sex offenders to verify their compliance with the registration requirements. After confirming that appellant's registry information was correct, a female GBI agent asked appellant if had any electronic devices. Appellant gave the officer his phone. After a short conversation, the agent returned the phone to appellant, and the two spoke about applications on the phone, including music, Facebook, and YouTube. Appellant began to show the agent something on the phone and then he again voluntarily handed the phone to her. At this point, the agent observed an image she believed to depict child pornography. Without any further conversation with appellant, the agent then carried the phone to another agent who specialized in forensic technology. Using his equipment, the technologist conducted another search, which lasted, according to appellant, about 30 minutes, and found more than 1,000 potential pornographic images on appellant's phone.

Appellant first contended that he had a right to privacy in the curtilage of his home, and the officers violated this right when they exceeded the investigatory nature of their interaction with him. However, the Court agreed with the trial court that there was no Fourth Amendment violation because the officers were on the property to conduct the compliance review and had entered the property "just as any guest or mail man would."

Appellant next argued that the officers exceeded the scope of any permissible presence at his house due to their intent to search independently of the registry compliance check. The Court disagreed. Even after the officers verified appellant's information as part of the registry check, their interaction with him remained a consensual first-tier encounter. And it was during this lawful interaction that the officers asked for consent to search appellant's phone. "Such conduct does not violate the Fourth Amendment."

Citing *Florida v. Jardines*, 569 U. S. 1, 6 (II) (A) (133 SCt 1409, 185 LE2d 495) (2013), appellant next contended that the officers had a subjective intent to conduct a more thorough search using forensic equipment, and that considering their intent, the officers violated the Fourth Amendment. The Court noted that in *Jardines*, the officers entered onto the defendant's porch with a drug-sniffing dog that alerted to the scent of drugs from the porch. Here, however, the officers engaged in a legitimate first-tier encounter on the porch. They had been conducting similar checks throughout the evening. Although a forensic technician had accompanied them, the technician remained in the car while officers spoke with appellant on the porch. The technician did not conduct a "search" until after officers discovered the images on

appellant's phone, a phone that they initially accessed with appellant's consent. Thus, unlike *Jardines*, which was a search from the very beginning, the officers' legitimate first-tier encounter on appellant's porch did not constitute a Fourth Amendment search regardless of the officers' alleged subjective intent.

Appellant further argued that his consent was not freely and voluntarily given. The trial court found that the agent asked to "search" the phone, after which appellant handed the agent his phone, showed her various applications on the phone, and assisted her in accessing the phone. The trial court identified the relevant factors to consider in viewing the voluntariness of a search, noted that there was no use of force or duress to obtain consent, and concluded that appellant was not manipulated or tricked into giving consent. The Court found that because these findings were supported by the record, this claim of error was meritless.

Finally, appellant contended that the search of his cell phone exceeded the scope of his consent. Specifically, he argued that the agent's request to view his phone was "informal and imprecise" and did not indicate the nature of the evidence the officers and agents sought, and thus the scope of his consent did not extend to opening applications on the phone and searching it using specialized forensic equipment.

The Court noted that there were arguably two searches here — the agent's initial search while on the porch and the second search by the forensic technologist. As to the first search, the agent asked for consent to "search" and appellant gave this consent voluntarily. Moreover, appellant was seated with the agent during this search, spoke with her about various applications on his phone, showed her some of the applications, and assisted her in accessing the phone. The agent observed the initial photo while viewing applications in appellant's presence and with his consent. On these facts, the Court found, the officer's discovery of the first image did not exceed the scope of appellant's consent.

However, appellant also argued that the forensic review of his phone after the agent found an image she believed to depict child pornography exceeded the scope of his consent. The Court stated that warrantless searches of cell phones is a developing area of law and our courts must take into consideration the changing nature of technology and the corresponding ability of law enforcement to invade a person's privacy. And here, the trial court's order contained no factual findings on this issue. Given the fact-intensive nature of the analysis on the scope of consent, the Court concluded that the trial court's order lacked the factual findings necessary for the Court to fully review the scope of appellant's consent. Therefore, the Court vacated the trial court's order and remanded for the trial court to make additional factual findings on the limited issue of the scope of appellant's consent.

DUI; Rule 403

Houseworth v. State, A18A1105 (10/22/18)

Appellant was charged with DUI (less safe), hit-and-run, and two counts of first degree vehicular homicide (predicated on felony hit-and-run and DUI less-safe). A jury acquitted her of vehicular homicide based on DUI less-safe (Count 1), and she was convicted on the remaining three counts. The evidence, very briefly stated, showed that on the night in question, appellant, her friend, and her boyfriend left a bar after eating and drinking. The boyfriend was driving appellant's car. After appellant and her boyfriend got into an argument, her boyfriend got out and announced he was going to find another way home. Appellant and her friend got out of the vehicle and tried unsuccessfully to get the

boyfriend to come back. They then returned to the car. It started raining. Appellant, who was driving, made a U-turn and headed down the road. They saw something in the road which they thought might be a deer. As they got closer, they realized it was the boyfriend. They swerved to avoid hitting him. The car sustained front end damage and the passenger hit her head on the windshield. They drove away. The boyfriend was found after another driver hit him as he laid on the pavement.

Appellant contended that the trial court erred in admitting evidence of her subsequent, unresolved DUI (less-safe) arrest, arguing that it was irrelevant, lacked probative value, and was unfairly prejudicial. The other acts evidence showed that thirteen months after the night in question, appellant and a different friend were drinking at the same bar. They left around 3:30 a.m. and appellant's vehicle struck an unoccupied, abandoned house, resulting in damage to the house and extensive damage to the car. Appellant, who was driving, and her passenger walked away from the scene. She was eventually charged with DUI (less safe).

The Court noted that the State sought to admit the evidence to show appellant's "intent to drive under the influence of alcohol" and to show that her actions were not an accident, and the trial court admitted the evidence "for the purpose of demonstrating intent." But, the Court found, even assuming that her subsequent arrest for DUI was relevant to show intent, the record did not demonstrate that the evidence of her subsequent DUI arrest was properly admitted. Under Rule 403, the Court stated that it must examine whether the trial court properly considered all the circumstances surrounding the extrinsic act evidence, including the similarities between the charged act and the extrinsic act, the remoteness in time between the charged act and the extrinsic act, and the prosecution's need for the extrinsic act evidence.

Here, the temporal span of thirteen months was not too remote for the probative value of the extrinsic act to be impacted in a significant way. Therefore, the Court's determination of the admissibility of the similar act focused on the similarities between the two events and the State's need for the subsequent DUI arrest to demonstrate intent. While both events involved DUI after appellant consumed alcohol at the same bar, they were not identical. In the subsequent act, appellant drove her car from the bar and struck a building, and there was no evidence that the collision resulted from anything other than her diminished capacity. In the charged crime, she drove her car after her boyfriend refused to drive anymore, and she struck him when he later entered the roadway — in a location other than where she left him and had no reason to expect him to be — in the rain. Accordingly, the Court found, the "similarities" between the two crimes were a relatively neutral factor in the balancing test.

At trial, appellant's attorney specifically conceded during opening and closing arguments that appellant consumed alcohol before she drove. The Court found that such a concession, notwithstanding her failure to admit that she was under the influence to the extent that she was less-safe, diminished the probative value of her subsequent DUI arrest because probative value depends upon the need for the evidence. When the fact for which the evidence is offered is undisputed or not reasonably susceptible of dispute, the less the probative value of the evidence. Given appellant's concession during argument, coupled with the undisputed evidence that she had consumed alcohol at the bar before the accident and the fact that DUI less-safe is a general intent crime, the Court found that the probative value of the subsequent DUI arrest to show intent was very low.

Moreover, the Court stated, because the probative value of appellant's subsequent DUI arrest was minimal given all the attendant circumstances, the danger of interjecting *unfair* prejudice was a greater risk. This danger was evidenced by the manner in which the prosecutor actually used the extrinsic act evidence at trial. And here, the Court noted, during closing argument, although the State maintained that the evidence of appellant's subsequent DUI arrest was important because it "goes to intent," the prosecutor went on to explain that "[i]t shows you that she consumed alcohol and intends to drive. …" The Court found that this statement impermissibly implied course of conduct and propensity, not intent. Neither course of conduct nor propensity are listed as proper purposes to admit Rule 404 (b) evidence; in fact, Rule 404 (b) prohibits the admission of similar act evidence when it is offered solely for the impermissible purpose of showing a defendant's bad character or propensity to commit a crime

Therefore, the Court held, instead of going to the issue of intent, the admission of appellant's subsequent DUI arrest created the potential that the jury would render a decision predicated on her propensity to drink and drive in addition to the stigma already associated with a similar criminal act. Accordingly, the Court concluded that the trial court abused its discretion by admitting evidence of appellant's subsequent DUI arrest because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. And because the Court further concluded that the error was not harmless, appellant was entitled to a new trial.

Indictments; OCGA § 42-5-15

State v. Fowle, A18A0077 (10/23/18)

Fowle was indicted for misdemeanor possession of marijuana and crossing the guard lines of a county correctional institution with drugs, in violation of OCGA § 42-5-15. Fowle moved to dismiss the charge brought under OCGA § 42-5-15, arguing that he could not be found guilty as a matter of law and that the prosecution violated his constitutional protection against self-incrimination. The trial court granted the motion, and the State appealed.

The evidence showed that appellant was arrested on an outstanding arrest warrant. The arresting officer searched him, but found no contraband. Nevertheless, the officer smelled marijuana at the scene and informed Fowle that if police discovered marijuana on him after he entered the county jail, he would be charged with a felony. Fowle denied that he had any drugs, and the officer transported him to the county jail. After Fowle entered the jail, the officer located a small amount of marijuana on Fowle's person.

The State argued that the trial court erred in finding that Fowle lacked the criminal act and intent necessary to violate OCGA § 42-5-15 because he did not voluntarily enter the county jail. The Court agreed. The Court noted that there was no dispute on whether Fowle chose to cross the jail's guard lines; the arresting officer brought him into the facility. However, the Court stated, nothing in the language of OCGA § 42-5-15 requires a *voluntary* entry into the jail. On the contrary, the statute makes it unlawful for *any* person to enter a state or county correctional institution with drugs, not just those persons who come in voluntarily. Moreover, the statute does not criminalize entering a correctional facility; it forbids crossing the guard lines with drugs without the warden's knowledge or consent. Although the arresting officer required Fowle to cross those lines, the evidence supported the conclusion that Fowle elected to keep marijuana hidden on his person, despite the officer's warning. Under these circumstances, a jury could find that Fowle intentionally came inside the guard lines with marijuana, thus satisfying the criminal act and intent requirements of OCGA § 42-5-15.

The State also contended that the trial court erred in concluding that the prosecution infringed on Fowle's constitutional protection against self-incrimination because Fowle was presented with the "unconstitutional choice" of incriminating himself by confessing to marijuana possession or subjecting himself to felony prosecution pursuant to OCGA § 42-5-15. The Court again agreed. Fowle was not compelled to make an incriminating statement or provide incriminating evidence. He explicitly elected not to turn the marijuana over to police. And although he claimed that the arresting officer presented him with the untenable choice of incriminating himself or facing a felony charge under OCGA § 42-5-15, the record demonstrated no coercion or force. The officer merely apprised Fowle of the legal consequences he potentially faced by bringing marijuana into the jail, information that does not constitute a threat or coercion. Moreover, the State did not create the difficult dilemma confronting Fowle upon his arrest and entry into the jail. The situation stemmed from his possession of marijuana. He was not compelled to incriminate himself through words or action or forced by police to bring drugs into the jail. Rather, he had the choice of relinquishing the marijuana or keeping it hidden. Because the circumstances did not implicate federal or state constitutional concerns, the trial court erred in finding that prosecution under OCGA § 42-5-15 violated Fowle's right against self-incrimination.

Finally, the Court rejected the trial court's determination that prosecuting Fowle under OCGA § 42-5-15 would "violate both public policy and legislative intent" by elevating misdemeanor possession of marijuana to a felony offense. Here, the State did not convert a misdemeanor offense into a felony. It alleged that Fowle committed a new offense by bringing drugs into the county jail. And although simple drug possession may only be a misdemeanor, the General Assembly has determined that anyone who crosses the guard lines of a correctional institution with drugs without the warden's consent or knowledge faces felony punishment.