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VICTORY!

Court of Appeals of Georgia

Holland v. State

Case No. A11A0100

July 7, 2011

After Holland was convicted of shoplifting, the trial court sentenced her to ten years to serve as a recidivist (she had several priors including three shopliftings) under OCGA §§16-8-14(b)(1)(C) and 17-10-7(a) and (c), possibly because it did not believe it had discretion to probate all but one year, as provided in the former statute.

At the hearing on Holland’s motion for new trial, her trial counsel testified that during discussions before trial among counsel, the trial court, and Holland, everyone expressed the belief that the trial court would not have discretion to probate or defer any of the recidivist sentence. At the sentencing, the trial court had said “[T]his was under the recidivism statute, which means, as you understand, talking to your attorney, both before we started this trial and now, that you were looking at ten years to serve ... Your sentence, ma’am, will be ten years to serve in prison.”

In the absence of affirmative evidence otherwise, a trial court is presumed to have exercised its discretion in imposing sentence. Here, though, the Court of Appeals says, “Holland has demonstrated on the record that the trial court may not have exercised its discretion to consider probating or suspending a

portion of Holland’s sentence. Under the circumstances, and out of an abundance of caution, we vacate Holland’s sentence ... and remand ... for resentencing with direction to the trial court to exercise its discretion in reimposing sentence.” Lester, 309 Ga. App. 1 (2011); Paige, 277 Ga. App. 687 (2006); Bradshaw, 237 Ga. App. 627 (1999).

Appellant was represented by Elizabeth A. Brandenburg and Marcia G. Shein.



RETROACTIVITY: Garza applies retroactively since its holding is substantive. Hammond v. State, Case No. S10G1263

The Court of Appeals had affirmed Hammond’s kidnapping and other convictions – Hammond, 303 Ga. App. 176 (2010). The Supreme Court granted cert. to determine whether its holding in Garza, 284 Ga. 696 (2008), applies retroactively, and, if so, whether the trial court’s refusal to give Hammond’s requested instruction on asportation at his 2006 trial was reversible error.

The Court holds that Garza’s ruling does apply retroactively, but, under the circumstances of this case, it was highly probable that the trial court’s error in not giving a jury instruction

consistent with what became the Garza rule, was harmless.

Garza overruled prior law regarding the need for only slight movement to satisfy the asportation element of kidnapping, and set out a four factor test for that element: 1] the duration of the movement, 2] whether the movement occurred during the commission of another offense, 3] whether the movement was an inherent part of that separate offense, and 4] whether the movement itself added a significant danger to the victim beyond that posed by the separate offense.

The Court finds that this established a substantive rule, which, as such, should be applied retroactively. “[B]y overruling the slight movement standard, the Court removed from the reach of the kidnapping statute any conduct that included only slight movement of the victim but did not meet the Garza four-factor test for asportation...”

Although it was thus error for the trial court not to instruct Hammond’s jury in line with what became the Garza rule, the error was harmless because the evidence showed that Hammond’s movement of the victim had been independent of the other offenses he was committing, and had posed an added, independent danger to her.

The Court notes that the decision of the Court of Appeals in Hammond’s case came in the period between the Garza decision and the kidnapping statute’s amendment (effective as of July 1, 2009) which provided again that slight movement is sufficient to prove kidnapping as long as the movement was not incidental to another offense; but Hammond’s 2005 crimes predated the statute’s amendment, so it didn’t apply in his case. Bousely v. United States, 523 US 614 (1998); Hicks, 287 Ga. 260 (2010); Luke v. Battle, 275 Ga. 370 (2001); Felder, 266 Ga. 574 (1996).

INEFFECTIVE ASSISTANCE OF COUNSEL: Failure of appellate counsel to

raise venue. VENUE: Not proven. Thompson v. Brown, Case No. S10A1992 (March 18, 2011).

Brown’s drug convictions in Toombs County had been affirmed by the Court of Appeals: Brown, 274 Ga. App. 302 (2005). He was subsequently granted habeas relief, which the Supreme Court affirms on the ground that appellate counsel was ineffective for failing to raise the meritorious claim that the State had failed to prove venue at Brown’s trial.

Brown made the drug sales at issue to an informant while they were driving in Vidalia, and under surveillance by officers. Vidalia straddles two counties – Toombs and Montgomery. The informant and officers testified that certain locations where things happened were in Vidalia, but no one testified that these places and the driving route were in Toombs County.

The Court rejects the State’s reliance on appeal on OCGA § 17-2-2(e), which provides that when venue is uncertain because the crime occurred during movement through different counties, the crime can be prosecuted in any county in which the crime may have occurred. “The trial court did not specifically charge the jury on venue, much less that the jury could find venue based on OCGA § 17-2-2(e), and the warden did not argue the statute before the habeas court. This argument therefore was not properly raised at trial or preserved below.”

Moreover, “[B]ecause the informant would have known the general locations where the two sales occurred and because the agents knew the exact route that the informant and Brown traveled, the State could have readily determined whether the drug sales occurred in Toombs County and offered evidence ... on that essential point.”

Further, “[T]here was no evidence that the agents, who were part of a multi-jurisdictional task force, were limited to acting within Toombs County [and] even if the agents’ authority was

limited to Toombs County, they did not exercise any police power, during the time in which the drug sales were made, that was required to be limited to their territorial jurisdiction... Instead, the agents were simply watching the informant and Brown as they drove, and in doing so, the agents would have been authorized to follow them across county lines.”

Since reversal of the convictions would have been required because of the failure to prove venue, “It follows that Brown’s appellate counsel provided professionally deficient performance in failing to raise this meritorious issue on appeal and that Brown was prejudiced thereby.”

The Court concludes with comments about the continuing frustration over this issue: “We understand that all the participants in Brown’s trial – the members of the jury, the judge, the prosecutor, defense counsel, and Brown himself – may have known from their daily lives in and around Toombs County that the entire route driven by Brown and the informant was in the part of Vidalia that lies in that county, making venue over the drug sales seem obvious to them. Nevertheless, that fact is not established by the trial record, and defendants may not be convicted of crimes based on extra-judicial knowledge rather than evidence of such essential facts admitted at trial. We have noted before that, ‘[i]n light of the ease with which venue [generally] can be proved, it is difficult to understand why the appellate courts are repeatedly faced [with this] issue.’ Chapman, 275 Ga. 314 (2002). Nevertheless, like the Court of Appeals, we continue to see cases like this one in which venue becomes a serious issue on appeal, apparently unnecessarily. One way to encourage prosecutors to make sure they have proven venue and to alert the juries to their role in determining venue is to instruct juries that they must find venue beyond a reasonable doubt. Accordingly, this Court strongly urges trial courts to begin giving an appropriate charge on venue tailored to the facts of the

case... We again strongly urge trial courts to give appropriate charges on venue, and we also urge prosecutors to make sure that they do not overlook this essential part of their cases.” State v. Dixon, 286 Ga. 706 (2010); Brown v. Baskin, 286 Ga. 681 (2010); Nelson v. Hall, 275 Ga. 792 (2002); Lynn, 275 Ga. 288 (2002); Rogers, 298 Ga. App. 895 (2009).

GUILTY PLEA: Improper judicial participation in plea negotiations render it invalid. Pride v. Kemp, S11A0159 (June 13, 2011).

The Supreme Court reverses the habeas court’s finding that Pride’s guilty plea to rape, aggravated assault, and cruelty to children was valid, finding that, given the trial judge’s statements during the plea proceedings, his plea was not valid. “[T]he judicial participation in Pride’s plea negotiations was so great as to render his guilty plea involuntary.”

The case involved a pretty brutal attack on Pride’s wife in front of their children. The trial court refused to accept the negotiated plea deal of 20 to serve 13.

The trial judge said she did not “know why [appellant] should get less than twenty years. I mean, it doesn’t sound like anything is wrong with the case as far as the State ... If I tried the case and he was found guilty I would give him the maximum. I would stack the sentences.”

After the State explained that it was trying to avoid having the children testify, the trial judge said that she would “give him eighteen years – that is rock bottom – and I am happy to try him [in five days] and ready to go and he is going to get a lot more. I would really much rather try him, frankly, so I can give him what I would really like to give him.”

After a break, the trial judge said that she had decided that “the lowest I could really, in good consci[ence], sentence him to is twenty.”

Pride accepted the trial court’s terms and entered his guilty plea.

The Court says that such significant participation by a judge in plea negotiations is prohibited as a matter of constitutional law since, due to the force and majesty of the judiciary, it can skew the defendant's decision-making and he may waive rights based solely on the judge's stated inclination as to sentencing, and thus the guilty plea is rendered involuntary.

The Court also notes that the trial court's comments as to the merits of the State's case "are not only contrary to Uniform Superior Court Rule 33.5(A) but also create a risk of a coerced guilty plea" since the defendant is faced with a judge who seems already to have made up her mind. United States v. Barrett, 982 F.2d 193 (6th Cir. 1992); McDaniel, 271 Ga. 552 (1999); Gibson, 281 Ga. App. 607 (2006).

GUILTY PLEA: Insufficient advice as to waiver of right against self-incrimination. Wilson v. Kemp, Case No. S10A1465 (January 24, 2011).

The Supreme Court reverses the habeas court's denial of Wilson's petition which challenged the validity of his guilty plea to voluntary manslaughter; nothing in the transcript of his plea showed that he was informed as to one of the three Boykin rights – the privilege against self-incrimination at trial. (The other two are the right to a jury trial and the right to confront one's accusers.)

During a "mass guilty plea hearing," the trial court addressed Wilson and about 20 other defendants concerning their rights, telling them that they were presumed innocent and that they had the "right to remain silent thereby not giving any evidence against yourselves..."

This was insufficient since the trial court's discussion was specifically limited to the guilty plea hearing itself, and Wilson was not told that, by pleading guilty, he would waive that right "at trial;" the "essential concept" of the right against compulsory self-incrimination had not been conveyed to Wilson.

Further, evidence that Wilson's counsel had advised him of his "constitutional rights" was insufficient since there was no specificity as to what rights were discussed.

Thus, the habeas court had erred in finding that the State had met its burden of establishing that Wilson's guilty plea was made voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 US 238 (1969); Adams, 285 Ga. 744 (2009); Sanders v. Holder, 285 Ga. 760 (2009); Arnold v. Howerton, 285 Ga. 66 (2007).

JUDICIAL COMMENT: Improper reference to appellate process; APPEAL: Improper comments reviewable under plain error rule. Gibson v. State, Case No. S10A1661 (February 28, 2011).

In a split opinion, the Supreme Court reverses Gibson's felony murder, armed robbery, and firearm possession convictions, finding that the trial court violated OCGA §17-8-57 by making comments which referred to the appellate process and thus intimated that Gibson was going to need to appeal.

During deliberations, the jury sent out a note saying, "We'd like to have all of the evidence. Have only exhibits through 72." The trial court responded:

Let me tell you that you have all of the evidence, which by law, you are entitled to. There are several things that, if I give them to you, *we would have to try the case all over again ...* Some evidence is considered to be such that it's disadvantageous for you to have it out with you, particularly in regard to statements and things like that. They are supposed to be read like any other testimony, and *it would be reversible error* for me to give you all the exhibits.

The Court says, "These statements improperly referred to the availability of appellate review, thus intimating that Gibson was in fact guilty

and would need to appeal his forthcoming conviction.” The Court discusses the similar case of Faust, 222 Ga. 27 (1966) and the concerns that such comments would be taken by jurors to mean that the evidence at issue was “disadvantageous” or harmful to the defendant, that they would cause the jury to unduly focus on the exhibits being withheld, and that they would lessen a jury’s sense of responsibility for the verdict.

It did not matter that Gibson’s attorney did not object to the comments since comments which may be improper under OCGA §17-8-57 are reviewable under the plain error rule. State v. Gardner, 286 Ga. 633 (2010); Brooks, 281 Ga. 514 (2007); Walker, 255 Ga. 251 (1985); Floyd, 135 Ga. App. 217 (1975).



SEARCH & SEIZURE: Intense conversation is not articulable suspicion for stop. Gattison v. State, Case No. A11A0722 (April 20, 2011).

The Court of Appeals reverses Gattison’s marijuana possession conviction.

The trial court found, in denying Gattison’s motion to suppress, that Officer McLean saw several guys engaged in a heated conversation on a sidewalk, that he was concerned that it might escalate into a fight, that he stopped his car, got out and approached them, and that as he did, they began to disperse. McLean said for them to come back so he could speak with them, that Gattison hesitantly complied, that McLean asked him what they were doing, that Gattison said they’d been talking about a recent shooting, that McLean asked him if he had any weapons

or contraband, and that Gattison admitted there was marijuana in his pocket.

The Court discussed the three tiers of police/citizen encounters, and says that the trial court found, as the parties agreed on appeal, that McLean had conducted a second-tier investigatory stop by “not allowing [Gattison] to continue on his way away from the [the officer’s] questioning.”

That being so, the trial court had erred by denying Gattison’s motion to suppress.

McLean had testified that he “wasn’t sure if it was something that was escalating into a fight ... their body movements, facial expressions, ... hands moving around a little bit, [were] kind of indicative of some kind of, you know, intense conversation, at least at a minimum.”

McLean had not seen Gattison do anything unlawful, and there was nothing illegal about his standing on a sidewalk at 10:30 in the morning engaging in a conversation with others, and his walking away upon the officer’s arrival did not provide the basis for elevating the encounter to a second-tier investigatory stop. The stop being based on a mere hunch, it was unauthorized, and the marijuana thus being unlawfully discovered, it should have been suppressed. Miller, 288 Ga. 286 (2010).

VERDICTS: Mutually exclusive. Holcomb v. State, Case No. A11A0721 (July 13, 2011).

Holcomb was indicted for 1) malice murder for shooting the victim, 2) felony murder with the underlying felony of aggravated assault by shooting, 3) aggravated assault by shooting and, 4) possession of a gun while committing aggravated assault and murder. The jury convicted him of involuntary manslaughter, aggravated assault, and the firearm possession.

The Court of Appeals reverses because, as the State conceded, “the jury returned mutually exclusive verdicts of aggravated assault and involuntary manslaughter without specifying the

methodology upon which the verdicts were based.”

Holcomb, the victim, and a third guy had been drinking all day. When Holcomb started to leave, the other two tried to prevent him from driving because he was drunk. Holcomb got angry, got his gun from his motorcycle, fired it a couple of times in the air, and fired a third shot which killed the victim. Testimony at trial was in conflict as to whether the men struggled for the gun, whether Holcomb pointed the gun at the victim, or whether the gun discharged as Holcomb fell after being pushed.

The Court says, “This evidence is sufficient to support the jury’s verdict whether it was based on the finding [that the victim] died as a result of an intentional act by Holcomb or as a result of Holcomb’s reckless conduct.”

As to aggravated assault, the trial court had charged the jury that to find that Holcomb had assaulted the victim, they could do so in one of two ways pursuant to O.C.G.A. §16-5-20, the underlying crime of simple assault. Under O.C.G.A. §16-5-20(a)(1), a person commits an assault when he tries to violently injure another. Under O.C.G.A. §16-5-20(a)(2), a person commits an act which places another in reasonable apprehension of being immediately violently injured, requiring only evidence of criminal negligence on the part of the defendant.

As to involuntary manslaughter as a lesser-included offense of both malice and felony murder, the trial court had charged the jury that, 1) it could determine that Holcomb had committed involuntary manslaughter by intentionally pointing a gun at the victim or, 2) it could determine that Holcomb had committed involuntary manslaughter by consciously disregarding a substantial risk that his act would cause the death of another.

O.C.G.A. §17-9-2 provides that “Verdicts are to have a reasonable intendment and to receive a reasonable construction, and are not to be avoided unless from necessity.” The Court finds such necessity here.

Citing Jackson, 276 Ga. 408 (2003), the Court says, “Because ‘we cannot conclusively say that the verdict rested exclusively’ on either criminal negligence *or* criminal intent ‘so as to eliminate the reasonable probability that the jury might have returned a mutually exclusive verdict by finding [Holcomb] acted with both criminal intent and criminal negligence at the same time as to the same victim’ it is necessary to reverse Holcomb’s convictions and remand for a new trial.” Drydan, 285 Ga. 281 (2009); Flores, 277 Ga. 780 (2004); Noble, 282 Ga. App. 311 (2006); Tanner, 259 Ga. App. 94 (2003); Smith, 234 Ga. App. 314 (1998).

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