CaseLaw Update

Prosecuting Attorneys' Council of Georgia

Legal Services Staff

David Fowler
Deputy Director for Legal Services

Chuck Olson
General Counsel

Joesph Burford
Trial Services Director

Fay McCormack
Traffic Safety Coordinator

Patricia Hull
Traffic Safety Prosecutor

Tom Hayes
Staff Attorney

Gary Bergman
Staff Attorney

Tom Jones
Staff Attorney

Tony Lee Hing
Staff Attorney

Rick Thomas
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Troy Golden
Staff Attorney

Clara Bucci
Staff Attorney

CaseLaw This Week

Week Ending April 16, 2004

Severance
Statements
Jury Charges
Evidence – Prior Accusation of Molestation
Evidence – Similar Transaction
Evidence – Prior Consistent Statement
Evidence – Hearsay
Search & Seizure
Discovery
Speedy Trial
Evidence – Intoxication
Evidence – Opinion
Evidence – Inaccessibility of a witness

Severance

Bennett v. State, A03A2439 (03/24/04), 04 FCDR 1236, 2004 Ga. App. LEXIS 415

Defendants' convictions for armed robbery were affirmed. **"There is no authority requiring a court to sever the trial of a defendant who has made no motion to sever nor joined in a co-defendant's motion." Since "it is too late after an adverse verdict to raise the issue for the first time," an "appellant will not be heard to complain of the trial court's denial of a co-defendant's motion to sever."** The court stated that even if defendant had properly preserved this argument for review, the failure to sever the trials was harmless error.

The court found that the only additional evidence that was admitted against defendant as a result of defendant being tried jointly with his co-defendant's was the co-defendant's statement to police that did not implicate defendant but only confirmed that the co-defendant and defendant resided together. The court held that in light of defendant's confession that he and his co-defendant had just committed the robbery of defendant's former work place, the co-defendant's statement would have had little impact on defendant's conviction. Similarly, the argument of the co-defendant's counsel that defendant was the gunman was not evidence and was of little relevance since defendant had

ALERT:

Please do not attempt to try another case where you intend to use a Hearsay Exception without first reading Crawford v. Washington, 2004 U.S. LEXIS 1839, March 8, 2004, Decided.

confessed to being involved in the robbery at a minimum as the getaway driver.

Statements

Bennett v. State, A03A2439 (03/24/04), 04 FCDR 1236, 2004 Ga. App. LEXIS 415

Defendants' convictions for armed robbery were affirmed. Defendant argued that his statement was involuntary because police withheld water from him before defendant confessed to robbing a furniture store. The court held that inasmuch as the court had evidence on which to base a finding that the statement was voluntary, the trial court did not err in admitting the statement.

The evidence showed that the officer interviewing defendant at the site was concerned about defendant's thirst and that the officer actually gave defendant a bottle of water (provided by a local business) to quench that thirst. The officer also made sure defendant received immediate medical attention before defendant confessed. The officer testified that defendant received his *Miranda* warnings and was offered no benefit to make a statement nor was he threatened in any way. The court found that, based on the officer's testimony, the fact that the water arrived just as defendant began making incriminatory statements was a matter of logistics, not tactics.

Bennett v. State, A03A2440 (03/24/04) 04 FCDR 1236, 2004 Ga. App. LEXIS 415

Defendants' convictions for armed robbery were affirmed. Defendant contended that the court erred in admitting his co-defendant's out-of-court statement, which inculpated defendant, since his co-defendant did not testify at the joint trial. The court agreed that admitting this evidence violated defendant's Sixth Amendment rights as explained in *Bruton v. United States*, 391 U.S. 123 (88 S. Ct. 1620, 20 L. Ed. 2d 476) (1968). **Under the *Bruton* rationale, simply removing the name of the co-defendant and inserting a blank is not sufficient to avoid a *Bruton* violation. "Only where the confession is redacted to eliminate not only the defendant's name but any reference to the defendant's existence would the confession not violate *Bruton*."** The court found the present case even more compelling because nothing was redacted with reference to defendant. The court nevertheless found that the constitutional error was harmless.

Jury Charges

Saxon v. State, A03A1674 (03/24/04), 04 FCDR 1316, 2004 Ga. App. LEXIS 429

Defendant's convictions for RICO violation, making a false statement, and forgery were affirmed. The trial court instructed the jury regarding the definition of RICO, tracking the relevant language of O.C.G.A. §§ 16-14-3 and 16-14-4. It further charged the jury that "the State is not required in the first part to prove all of the predicate offenses alleged in the indictment, but is required to prove only two beyond a reasonable doubt." **The court found the RICO instruction was proper where defendant's counsel did not object and had helped to draft it and where the instructions fully charged the jury on what they needed to find to convict.** Moreover, there was overwhelming evidence of defendant's participation in more than two of the predicate crimes listed in O.C.G.A. § 16-14-3(9)(A) to support a RICO conviction. The court found that the charge on accomplice testimony was sufficient since that testimony was amply corroborated by defendant's own incriminating statements. Where the evidence indicated a conspiracy existed, a charge was authorized.

Evidence – Prior Accusation of Molestation

Williams v. State, A03A2193 (03/25/04), 04 FCDR 1327, 2004 Ga. App. LEXIS 431

Defendant's convictions for aggravated sexual battery, aggravated sodomy, child molestation and aggravated child molestation were affirmed. Defendant's six-year-old daughter claimed that defendant sexually molested her. Defendant argued that the trial court erred by refusing to allow him to impeach the victim by cross-examining her about prior false accusations of molestation. **The appellate court found that the trial court conducted a hearing to determine if the allegations at issue had a "reasonable probability of falsity." The trial court found the victim more credible than the alleged perpetrator and there was no error in refusing to allow the cross-examination.**

Evidence – Similar Transaction

Mooney v. State, A03A2462 (03/25/04), 04 FCDR 1330, 2004 Ga. App. LEXIS 432

Defendant's convictions for aggravated child molestation, child molestation and enticing a minor for indecent purposes were affirmed. Defendant contended that the trial court erred by allowing the state to present the videotape as similar transaction evidence. The trial court ruled that the videotape was admissible because it demonstrated Mooney's "proclivity to invite or bring females to a location to engage in sexual activity with [him] in exchange for crack cocaine" and "[his] intent, motive, bent of mind, course of conduct and lustful disposition during the occasions described by the alleged victim. . . ."

"In a prosecution for a sexual offense, evidence of sexual paraphernalia found in defendant's possession is inadmissible unless it shows defendant's lustful disposition toward the sexual activity with which he is charged or his bent of mind to engage in that activity. Under this rule, sexually explicit material cannot be introduced merely to

show a defendant's interest in sexual activity. It can only be admitted if it can be linked to the crime charged." The court found that the videotape did not simply show that defendant had a general interest in sexual activity. It showed defendant engaged in oral sex, and it showed him offering drugs to women in exchange for oral sex, as he had offered drugs to the victim. Thus, the videotape showed defendant's lustful disposition toward a particular sexual activity and his bent of mind to engage in that activity. The link between the videotape and the crimes charged in this case was defendant's course of conduct - exchanging drugs for oral sex.

McGuire v. State, A03A2543 (3/30/04), 04 FCDR 1310, 2004 Ga. App. LEXIS 452

Defendant's convictions for aggravated assault with intent to rape, aggravated sexual battery, and kidnapping were affirmed. Defendant complained that the trial court erred in admitting evidence of similar transactions because they were not sufficiently similar to the present one. The similar transactions were a 1978 conviction for aggravated assault with intent to rape, and a 1979 conviction for rape, kidnapping and aggravated sodomy. Defendant argued that the prior crimes were too old and involved weapons, thus the crimes were too dissimilar to be admitted. Defendant also argued that the prior crimes were committed on strangers and not on an acquaintance, as here. **The Court of Appeals held that "in the area of sexual offenses, the admissibility of similar transaction evidence is liberally construed." As a result, focusing on the similarities of the prior acts, rather than the differences, the Court of Appeals held that the prior convictions were admissible as similar transactions because "all three instances involved attacks against adult women, who were either beaten, or threatened during a sexual assault or attempted sexual assault. While there was a significant lapse in time between the incidents, any lapse of time between the prior offense and the crimes charged goes to the weight and credibility of the evidence, not to its admissibility."**

Evidence – Prior Consistent Statement

Pope v. State, A03A2552 (03/26/04), 04 FCDR 1325, 2004 Ga. App. LEXIS 437

Defendant's convictions for the forcible rape of two of defendant's granddaughters were affirmed. Defendant contended that the trial court erred by excluding a videotape of a witness's prior consistent statement. Defendant claimed that he was entitled to show this videotape under *Woodard v. State*, 269 Ga. 317, 320 (2) (496 S.E.2d 896) (1998), because the witness's veracity had been questioned at trial. Pope alleges that the witness's veracity had been attacked because one of the victims testified that the witness had been molested, and the witness denied that she had been molested.

The court held that **"[A] witness's veracity is placed in issue so as to permit the introduction of a prior consistent statement only if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross-examination." Further, "unless a witness's veracity has affirmatively been placed in issue, the witness's prior consistent statement is pure hearsay evidence, which cannot be admitted merely to corroborate the witness, or to bolster the witness's credibility in the eyes of the jury."** The court found that, under the evidence in this case, the witness's veracity was not placed in issue and the trial court did not err by excluding the videotape.

Evidence – Hearsay

Pope v. State, A03A2186 (03/30/04), 04 FCDR 1312, 2004 Ga. App. LEXIS 453

Defendant's convictions for armed robbery, kidnapping, false imprisonment, burglary, and aggravated assault were affirmed. Defendant alleged that the trial court abused its discretion by excluding from the evidence an out-of-court statement by Paul Kozachyn, one of the men convicted for the home invasion, and a letter from another, Wilbanks. Defendant sought to introduce this evidence under the necessity exception to the hearsay rule. The standards for admitting evidence under the necessity rule are set out in *Chapel v. State*, 270 Ga. 151, 155 (4) (510 S.E.2d 802) (1998): **Under the necessity exception to the hearsay rule, hearsay statements are admissible when the evidence is "necessary" and when there are "particular guarantees of trustworthiness." . . . Additionally, the proponent of the evidence must show that the statement is relevant to a material fact and that the statement is more probative on that material fact than other evidence that may be procured and offered.**

Defendant contended that Paul Kozachyn and Wilbanks were unavailable because the both stated, through counsel, that they would assert their privilege against self incrimination if called to testify at Pope's trial. Thus, the essential question was whether Kozachyn's statement and the letter would meet the reliability test of the necessity rule. Defendant asserted that it did because Kozachyn made the statement during the investigation of the crime and his statement implicated him in criminal conduct.

As a general rule, admission of evidence is a matter resting within the sound discretion of the trial court, and appellate courts will not disturb the exercise of that discretion absent evidence of its abuse. Here, the court found no abuse of discretion. Although what defendant said about Kozachyn's statement is true, what he does not say is that Kozachyn almost immediately disavowed his statement. As a consequence, the trial court found that Kozachyn's statement lacked any indicia of reliability. The court found that this was amply supported by the record, and therefore there was no abuse of discretion.

Defendant further contended that the trial court erred by refusing to allow him to introduce a letter from Wilbanks to another witness in the case. In relevant part, the letter, signed "dum ass," but with Wilbank's return address, stated, "My lawyer said they offered me 20 years to testify on K.P. and E.T. I told my lawyer I didn't even know the girl and I didn't know anything on K.P." The letter further says that the recipient knows that the author of the letter is not guilty. The trial court also found that the letter lacked any indicia of reliability and thus excluded the letter. Given the nature of the letter itself and the lack of any information tending to establish "particular guarantees of reliability," we find no abuse of the trial court's discretion.

Search & Seizure

Crawford-Thomas v. State, A04A0095, 04 FCDR 1321, 2004 Ga. App. LEXIS 444

Defendant's convictions for DUI and two traffic offenses were affirmed. An officer stopped defendant after seeing her car speeding and drifting in and out of her lane of travel. After speaking to defendant at her car, the officer wrote a warning ticket for speeding. When he returned to defendant's car, he saw that her eyes were bloodshot and watery, and he could smell an odor of alcohol coming from her. Three field sobriety tests showed that defendant was impaired by alcohol.

The court found that **after the traffic stop ended by the officer handing the ticket to defendant, the officer had specific, articulable facts that gave rise to his suspicion that she was under the influence of alcohol. Those facts included her erratic driving-driving through a gore area in the road, weaving in and out of her lane of traffic and speeding, her red and watery eyes, her initial refusal to look toward the officer whenever she spoke, and the smell of alcohol coming from her when she finally did look at him and speak.** Because the officer had reasonable suspicion that defendant was driving under the influence of alcohol, he did not act improperly in continuing his investigation after the initial traffic stop had ended.

Discovery

Ruff v. State, A04A0768 (03/31/04), 04 FCDR 1306, 2004 Ga. App. LEXIS 457

Defendant's conviction for interference with the lawful custody of a child was affirmed. At the start of trial, defendant complained that he had not timely received the State's updated witness list. In response, the trial court offered defendant a continuance to prepare for the witnesses, which he declined to take. **It is settled that a defendant is obliged to request a continuance to cure any prejudice which may have resulted from the State's failure to comply with the requirements of the receiprocal discovery act. [. . .] Under the circumstances, [. . . defendant] waived his right to assert error on appeal by his knowing failure to seek continuance.**

Speedy Trial

State v. Summage, A03A2533 (03/29/04), 04 FCDR 1322, 2004 Ga. App. LEXIS 448

The State appeals from the trial court's dismissal of the charges against defendant for child molestation. The Court of Appeals reversed the order of the trial court. The State complained that the defendant waived his speedy trial rights as to a second indictment which was identical to the original indictment with regard to the first two counts. The second indictment added two new counts of child molestation and one count for cruelty to children in the first degree. **It was undisputed that defendant did not file a demand for speedy trial as to the original indictment. The Court of Appeals held that the charges identical from the original to the second indictment were not subject to a speedy trial motion because "if a defendant fails to file a demand as to an original indictment, but later files a timely demand with respect to a re-indictment that adds additional charges, he waives his rights with respect to the repeated charges, but not as to the new charges.**

Evidence – Intoxication

State v. Palmaka, A03A1899 (03/26/04), 04 FCDR 1324, 2004 Ga. App. LEXIS 438

The State appeals from the trial court's grant of the defendant's motion to suppress results of defendant's Intoxilyzer 5000 breath test. The Court of Appeals reversed the trial court's grant of defendant's motion to suppress. At trial, defendant complained that defendant's breath test was inadmissible because the test had been performed 20 minutes after an initial, ineffective breath test was taken, not in accord with the operator's training manual. **The Court of Appeals held that such an act went to the credibility and weight of the results of the exam and its admissibility because the State had proven that the test was done in accord with GBI directives. The State proved such, thus the motion to suppress was granted in error.**

Evidence – Opinion

Carter v. State, A04A0637 (03/31/04), 04 FCDR 1333, 2004 Ga. App. LEXIS 456

Defendant's conviction for armed robbery and possession of a firearm during the commission of a crime was affirmed. Defendant complained that he should have been allowed to put on opinion testimony from his mother and his aunt that he was not the person depicted in a video of the armed robbery shown at trial. **The Court of Appeals held "[i]t is improper to allow a witness to testify as to the identity of a person in a video when such opinion evidence clearly goes to a matter of fact being offered to establish a fact which average jurors could decide thinking for themselves and drawing their own conclusions."**

Evidence – Inaccessibility of a witness

Carter v. State, A04A0637 (03/31/04), 04 FCDR 1333, 2004 Ga. App. LEXIS 456

Defendant's conviction for armed robbery and possession of a firearm during the commission of a crime was affirmed. Defendant complained that the trial court should have allowed in a transcript of a witness's statement on the grounds that the witness was inaccessible. **Defendant tried to serve the witness three times with a subpoena but was not successful. Defendant offered no other evidence that the witness was unavailable. The Court of Appeals held that "under these circumstances, we cannot say that the superior court abused its discretion in refusing to allow [the witness's] former testimony, defendant having failed to show inaccessibility upon the exercise of due diligence."**

As many of you now know, Glen Holingshed has resigned from the Prosecuting Attorneys' Council to become Court Administrator of the Paulding County Superior Court. We all wish Glen continued success in his new venture. However, the loss of Glen has slowed production of the Case Law Update which is currently being compiled by our interns. We ask that you bear with us until we are successful in our search for a replacement for Glen. Your patience is appreciated.

J.F. Burford
Trial Support

PAC Summer Interns

Logan Butler
404-969-4001

Erin O'Mara
404-969-4001

**The Prosecuting Attorneys' Council encourages you to add commentary or creative prosecution suggestions for any of this Caselaw. The responses will be published in a PAC publication, please e-mail David Fowler at dfowler@pac.state.ga.us, or Joe Burford at jburford@pac.state.ga.us with feedback.*