

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 2, 2018

State Prosecution Support Staff

Peter J. Skandalakis
Executive Director

Todd Ashley
Deputy Director

Robert W. Smith, Jr.
General Counsel

Lalaine Briones
State Prosecution Support Director

Sheila Ross
Director of Capital Litigation

Sharla Jackson
Domestic Violence, Sexual Assault,
and Crimes Against Children
Resource Prosecutor

Gilbert A. Crosby
Sr. Traffic Safety Resource Prosecutor

Jason Samuels
Sr. Traffic Safety Resource Prosecutor

William Johnson
Adult Abuse, Neglect, and
Exploitation Prosecutor

Gary Bergman
State Prosecutor

Kenneth Hutcherson
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

- **Re-Opening of the Evidence**
- **Juveniles; Eighth Amendment**
- **Search & Seizure; Search Warrant Affidavits**
- **Jurors; Judicial Misconduct**
- **Notice of Intent to Seek the Death Penalty**
- **Rule 404 (b)**

Re-Opening of the Evidence

Walton v. State, S17A1756 (2/5/18)

Appellant was convicted of felony murder, aggravated assault with a deadly weapon and other crimes. The evidence, briefly stated, showed that Igidi's estranged girlfriend sold Igidi's lawn equipment to appellant without Igidi's knowledge. Igidi and two brothers, Byron and Bryant Phillips, followed appellant as he drove away with the equipment. After driving a short while, appellant parked near his cousin's house. Appellant and his cohorts rushed Igidi and the Phillips brothers. Appellant's cohorts then started firing weapons and one of the Phillips brothers died from a gunshot to the chest.

Appellant contended that the trial court erred by denying his request to reopen the evidence after deliberations had begun in order to allow him to introduce evidence of a statement made by the victim, Igidi, to a cellmate, Eugene Trammell.

The Court stated that the decision

to reopen evidence is a matter that rests within the sound discretion of the trial court. Here, the Court noted, the evidence at trial was closed on Thursday, and the jury began its deliberations that afternoon. The following morning, appellant requested that the court reopen the evidence to permit the testimony of Trammell. Appellant proffered that Trammell would testify that Igidi told him that Bryant Phillips shot first, and that Igidi allegedly told Trammell about the events in detail. The trial court decided not to reopen the record. Appellant then moved unsuccessfully for a mistrial. The trial court reasoned that the trial needed to come to an end, that Igidi had already been excused as a witness, and that the jury would have placed undue emphasis on Trammell's testimony. The trial court further found that the proffered testimony was mostly cumulative of other evidence and only served to challenge the credibility of Igidi, which had already been accomplished by trial counsel through cross-examination. These conclusions were well within the trial court's discretion. Therefore, the Court concluded, there was no abuse of discretion.

Juveniles; Eighth Amendment

Veal v. State, S17A1758 (2/5/18)

After appellant was convicted of malice murder and other offenses

charged in the indictment against him, the trial court sentenced him to imprisonment for life without parole ("LWOP") for malice murder; six consecutive life sentences for rape, aggravated sodomy, and four armed robbery convictions; and sentences totaling 60 consecutive years for other convictions involved in the case. Appellant contended that because he was under 18 years of age at the time of his crimes, his LWOP sentence was improperly imposed. Citing *Miller v. Alabama*, 567 U.S. 460 (132 SCt 2455, 183 LE2d 407) (2012) and *Montgomery v. Louisiana*, ___ U.S. ___ (136 SCt 718, 193 LE2d 599) (2016), the Court agreed and remanded for resentencing. *Veal v. State*, 298 Ga. 691 (784 SE2d 403) (2016). On remand, the trial court imposed two additional consecutive life with parole sentences (for the malice murder conviction and one of the armed robbery counts that the trial court previously incorrectly merged with the murder conviction), in addition to the other consecutive life sentences already imposed. The new cumulative sentence amounted to eight consecutive life sentences plus 60 years.

Appellant argued that the aggregate sentence imposed on him mandates 60 years of prison service before the first opportunity for paroled release. Given his life expectancy, appellant contended that even this new sentence is unconstitutional because it amounts to a de facto LWOP sentence, again without any determination of the factors a court is required to find before imposing an LWOP sentence on a convicted defendant who was younger than 18 at the time of the crime.

The Court noted that appellant's argument sought to have the Court expand the holdings of *Miller* and *Montgomery*. These two cases create a substantive rule that before an LWOP sentence may be imposed on one who was a juvenile at the time the crime was committed, the sentencing court must conduct a hearing to determine if that

person is one of the exceptionally rare juveniles for whom such a sentence is appropriate because of a specific determination that he is *irreparably corrupt*. But neither *Miller* nor *Montgomery* addressed the imposition of aggregate life-with-parole sentences for multiple convictions or whether sentences other than LWOP require a specific determination that the sentence is appropriate given the offender's youth and its attendant characteristics, and the nature of the crimes. And, the Court determined, because the Supreme Court has not expanded its mandate that the Eighth Amendment's prohibition of cruel and unusual punishment as it applies to juvenile offenders requires a sentencing court to consider a juvenile's youth and its attendant characteristics before imposing a sentence other than LWOP, it would not do so.

For the same reasons, the Court also rejected appellant's arguments that his new sentence violates the Supreme Court's ban on LWOP sentences for juveniles for non-homicide convictions, as set forth in *Graham v. Florida*, 560 U.S. 48 (III) (B) (130 SCt 2011, 176 LE2d 825) (2010).

Search & Seizure; Search Warrant Affidavits

Taylor v. State, S17G0501 (2/5/17)

Appellant Taylor was convicted of multiple sex crimes against multiple children. He contended that the trial court erred in denying his motion to suppress the search of his home. Specifically, he contended that the affidavit did not contain facts to establish that "the Taylor residence" was located at 1751 Bergen Court, and that, without this information, the magistrate had no basis upon which to conclude that evidence of the crimes could be found at that address. Thus, he argued, the magistrate did not have probable cause to issue a warrant for the search of 1751 Bergen Court. The Court of Appeals affirmed. Relying on

State v. Trujillo, 266 P3d 1, 6-7 (N.M. 2011), and *U. S. v. Hunter*, 86 F3d 679, 681-682 (7th Cir. 1996), the Court of Appeals adopted the rule that "when the affidavit describes only one place connected to the suspect, such as a residence, and lists a specific address to be searched, a connection between the address described where evidence can be found and the probable cause outlined in the affidavit 'is the only logical conclusion supported by a common-sense reading of the affidavit.'"

The Supreme Court granted certiorari. At issue was whether an affidavit executed in support of an application for a search warrant that does not specifically say that the residence to be searched is the residence of the suspect, may nevertheless be sufficient to establish that connection based on inferences that can be drawn from the affidavit, and thus be sufficient to establish a nexus between the evidence to be seized and the place to be searched. The Court noted that the affidavit and attachment were sworn to on the same day by the same detective before the issuing judge, and the affidavit incorporated the attachment by specific reference. Turning to the affidavit and attachment, it was clear that the attachment, which described numerous sexual assaults as occurring at appellant's home, firmly established a nexus between the evidence sought and his residence. The alleged deficiency in the affidavit and attachment was the failure to expressly link appellant's residence to 1751 Bergen Court, the address that the affidavit listed as the place to be searched. The Court concluded, however, that, given all the circumstances, the magistrate could easily have inferred a connection between appellant and the residence at 1751 Bergen Court. The affidavit stated that the evidence sought is "located at the particular place to be searched"; is "at the location described herein"; and is at the "geographic location" that is "more particularly described" as

the residence located at 1751 Bergen Court. There was no location other than Bergen Court described in the affidavit or attachment as a place where evidence of the crimes could be found. The affidavit also stated that the "facts establishing probable cause" for searching for evidence of those crimes were set forth in "Attachment 'A.'" Attachment "A" then described crimes of child molestation and sexual battery as occurring at "Taylor's residence" or some specific place at appellant's residence. The attachment concluded by stating that "there is probable cause to believe that a crime has been committed and there may be evidence to support such crimes at said location" and by "pray[ing] that the search warrant be granted so that the crime scene might be processed, photographed, and evidence of the crime documented and seized."

Thus, the Court found, the affidavit stated three times that evidence of the alleged crimes may be discovered at the "location" described in the affidavit. Consequently, when the attachment stated that evidence of the alleged crimes may be found at "said location," which was particularly described as 1751 Bergen Court, and described appellant's house as the crime scene, the magistrate could have reasonably inferred the "crime scene" was 1751 Bergen Court. And, as the crime scene was clearly appellant's residence, the magistrate also could have reasonably inferred a nexus between appellant and evidence connected with the crimes and 1751 Bergen Court. And, because of this nexus that the magistrate could infer between appellant and 1751 Bergen Court, this case was not one in which the magistrate had to make his probable cause determination based only on one place connected to the suspect, such as a residence and the listing of a specific address to be searched. Therefore, the Court found, the Court of Appeals did not need to adopt the broad rule that it did to resolve this case.

Jurors; Judicial Misconduct

Wallace v. State, S17A1900 (2/5/18)

Appellant was convicted of murder and other crimes. The record showed that after deliberating for almost nine hours over two days, the jury indicated it had a partial verdict on three counts, but was deadlocked on the other four. The trial court, with the parties' agreement, gave an *Allen* Charge. Less than an hour later, the jury sent another note stating that one juror did not want to further deliberate. After discussion and questioning of the foreman, and at the urging of defense counsel, the trial court excused the holdout juror without further instruction or inquiry, with the understanding that deliberations would begin anew with the first alternate the following day.

The following morning, defense counsel informed the court that she had received a voicemail from the released juror. She returned the call, but directed the juror to call the trial court if she had some concerns. Defense counsel requested the court bring the released juror back in for questioning. The prosecutor objected and the trial court refused the request. Less than two hours later, the newly-constituted jury convicted appellant on all counts.

Appellant first argued that the trial court decision to replace the holdout juror with an alternate was not preceded by sufficient inquiry. But, the Court found, appellant urged the trial court to dismiss the holdout juror without questioning her first. Affirmative waiver, as opposed to mere forfeiture by failing to object, prevents reversal.

Next, appellant argued that the trial court erred when it refused to reconsider its decision the next morning. The Court noted that alternate jurors generally should not serve to substitute for minority jurors who cannot agree with the majority, as taking such a minority position does not by itself render a juror incapacitated or legally

unfit to serve, and making such a substitution may constitute an abuse of discretion. But the trial court's decision to not recall a juror who already had been dismissed is quite different from merely replacing a holdout juror. The Court found that the record provided no indication that, in dismissing that juror, the trial court gave her any instruction that the usual strictures on jurors in active service still applied. It was only the following morning, after having a phone conversation with that juror, that defense counsel protested replacement of the juror. By that time, the alternate juror had returned to the courthouse after having been recalled and was ready to proceed. And, certainly the prospect of reinstating a juror who had been free from the constraints of juror service overnight was fraught with pitfalls, such as the potential that the juror spoke to others about the case, overheard someone else discussing the case, researched something related to the case, or otherwise encountered some extrajudicial information. Moreover, the trial court had been apprised that the dismissed juror had a telephone conversation with defense counsel, which itself could be a basis for the juror's dismissal. Thus, the Court concluded, the trial court did not abuse its discretion in declining to reconsider its decision to substitute an alternate for the holdout juror.

Appellant also argued that the trial court erred by informing the jury that two witnesses were held in contempt for refusing to testify on behalf of the State. The Court noted that it has questioned the relevance of a State's witness's refusal to testify. Also, the better practice here would have been for the trial court not to have informed the jury of the witnesses' refusal to testify. But given that appellant failed to preserve his objection, he bore the burden to show that the complained-of error probably affected the outcome of his case. And, the Court noted, generally speaking, there is no harm to a defendant in a

witness simply refusing to testify in the jury's presence. Furthermore, informing a jury that a State witness was held in contempt for refusing to testify despite a grant of immunity is unlikely to prejudice a defendant.

Nevertheless, appellant argued, the trial court's remarks were prejudicial in that they "compounded the unavoidable inference" that the two witnesses refused to testify because their testimony would harm the defense. But, after reviewing the transcript, the Court found that the jury was given no clue as to the expected nature of the testimony. But even if, as the defense argued, the trial court's remarks did give rise to some suggestion that the testimony would point to appellant as the perpetrator in the shooting of the victim, such a suggestion was not at odds with appellant's defense at trial. Appellant did not point to another perpetrator but claimed essentially that the victim accidentally shot himself while tussling with appellant. He made no argument as to how the jury would have gleaned something from the trial court's remarks that was contrary to that defense. Therefore, the Court found, appellant failed to meet his burden to show that the trial court's remarks prejudiced his case.

Notice of Intent to Seek the Death Penalty

Franklin v. State, S17A1599 (2/5/18)

After filing a notice of intent to seek the death penalty, the State filed a notice of three statutory aggravating circumstances which, according to the State, would support the imposition of the death penalty. Prior to trial, appellant moved to dismiss and exclude the notice of statutory aggravating circumstances on the ground that the facts alleged in the indictment and the evidence were insufficient to establish the statutory aggravating circumstances necessary to support the imposition of the death penalty in the event he was

convicted of murder. The trial court denied the motion, finding that it lacked authority to rule prior to trial that the State cannot prove its case for imposing the death penalty. The trial court considered the motion again after the close of the evidence in the guilt-innocence phase of the trial for purposes of determining whether the imposition of the death penalty should be submitted to the jury, and again the court denied it. After a period of jury deliberation, the trial court declared the jury to be deadlocked on the issue of punishment. The trial court then sentenced appellant to life without parole.

Appellant argued that the trial court wrongly assumed it had no authority to determine prior to trial whether the aggravating circumstances alleged by the State would be sufficiently proved by the evidence to support the imposition of the death penalty. In support of his argument, appellant cited to cases in which our State's Supreme Court has examined factual and legal issues raised by a defendant's pre-trial motion to quash the State's notice of intent to seek the death penalty. But, the Court found, those cases addressed, for example, the legal sufficiency of the allegations in the notice of intent to state a basis for the imposition of the death penalty; they did not approve a pre-trial determination of whether the facts a defendant expected to be established at trial would prove, or not, the State's allegations.

And, the Court found, here, the allegations asserted in the notice of aggravating circumstances would support the imposition of the death penalty if they were proved at trial. In his motion to quash the notice of aggravating circumstances, appellant asked the trial court to make a pre-determination of factual issues. Factual disputes, however, are to be resolved by a jury where, as here, the defendant sought a trial by jury. That rule applies to factual disputes regarding proof

of aggravating circumstances for the imposition of the death penalty, just as it applies to factual disputes regarding proof of the elements of the crimes charged. Furthermore, the Court found, appellant pointed to no authority under Georgia law for his argument that factual disputes relating to statutory aggravating circumstances for the imposition of the death penalty may be determined by the judge prior to trial.

Nevertheless, appellant contended, the pre-trial determination of whether the death penalty may be sought in a murder case has been approved by the courts of certain other states, and he urged our Court to follow suit. The Court declined. In Georgia, a prosecutor's discretion to seek the death penalty is limited by the statute defining the aggravating factors that must be shown to impose the death penalty, as well as the jury's decision, based on the evidence, of whether to impose it. And the Court noted that it has repeatedly rejected challenges to the legislature's determination that district attorneys should have the discretion to decide whether a murder defendant meets the statutory criteria for the death penalty and whether to pursue the death penalty when a defendant is eligible. Thus, the Court concluded, except in cases in which the death penalty notice is challenged on legal grounds (which was not the basis for the challenge in this case), and not factual ones, it would not adopt the views of what appears to be a minority of states that a prosecutor's decision to pursue the death penalty is subject to pre-trial review.

In so holding, the Court also noted that the assertion that "the death-qualification of jurors leads to the selection of juries that are slanted in favor of conviction at the guilt-innocence phase of a death penalty trial" has been resolved adversely to appellant.

Rule 404 (b)

Brown v. State, S17A1582 (2/5/18)

Appellant was convicted of murder and related offenses. Prior to trial, pursuant to OCGA § 24-4-404 (b), the State filed a notice of intent to introduce appellant's 2006 guilty plea to four counts of aggravated assault. The trial court admitted the evidence for the purposes of demonstrating appellant's intent, absence of mistake or accident, and plan, after concluding pursuant to OCGA § 24-4-403 that the probative value of the other acts evidence was not substantially outweighed by undue prejudice. Appellant contended that the admission of this evidence at trial was error. The Court agreed.

The three-part test for determining the admissibility of other acts evidence, requires a trial court make the following findings: (1) the evidence is relevant to an issue in the case other than the defendant's character; (2) the probative value is not substantially outweighed by undue prejudice; and (3) there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant committed the prior act. Here, the Court found, appellant did not claim that the shooting was the result of an accident or mistake. Instead, defense counsel argued in his closing remarks that appellant's actions were justified, claiming that appellant shot the victims in self-defense; thus, whether his actions were the result of an accident or mistake was irrelevant. Accordingly, because accident or mistake was not at issue, it was error for the trial court to admit the 2006 guilty pleas on that ground pursuant to Rule 404 (b).

Next, premitting whether the other acts evidence relating to intent was relevant as required by the first prong of the Rule 404 (b) analysis, given appellant's *closing argument* that he committed the shooting, but his actions were justified, the Court concluded that the trial court abused its discretion by admitting the 404 (b) evidence because the prior aggravated assaults were clearly more prejudicial than

probative. Here, in light of appellant's self-defense claim, the probative value of the other acts evidence was extremely low at best. This is 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. By asserting self-defense, appellant did not deny the intent to inflict injury, but claimed authority for the act under the legal excuse of reasonable fear of immediate serious harm to oneself or another. As such, the only factual issue in the case was whether self-defense was the reason for the admitted act. The fact that appellant had committed an assault on another person nine years earlier had nothing to do with his reason for shooting the victims and really had no purpose other than to show appellant's propensity toward violence. In fact, the State had other admissible evidence available to rebut appellant's self-defense claim without the introduction of the prior aggravated assaults. Because self-defense claims are fact specific to each individual case, and because the other acts evidence filled no narrative holes in the State's presentation of evidence, the slight cumulative probative value toward proving intent that could be ascribed to the extrinsic evidence was substantially outweighed by its danger of creating prejudice. Consequently, the trial court erred in admitting the other acts evidence for the purpose of showing intent.

Next, the Court addressed whether the other acts evidence could be admitted for the purposes of establishing a plan. Appellant's 2006 convictions of aggravated assault did not tend to establish a larger goal, nor were they so connected with the crime charged that the murder could not be fully shown without proving the prior assaults. Finally, they were not relevant to the ultimate issue in the case - i.e., whether he acted in self-defense. Instead, the other acts

evidence primarily established one thing - appellant's propensity toward violence, which the State seemed to acknowledge at the pretrial hearing by stating that the purpose of these convictions was to show appellant's propensity to respond to verbal altercations by "using a firearm, shooting at folks when he's not in an immediate danger at the time." Thus, the Court found, because appellant's prior aggravated assault convictions did not show that he was engaged in a larger plan or scheme, the trial court erred in admitting the 2006 convictions as Rule 404 (b) evidence establishing a plan.

Finally, the Court addressed whether the error in admitting the evidence was harmless. The Court found that the evidence of appellant's guilt was not overwhelming and in light of the entirety of the evidence presented at trial, it could not be said that the error did not contribute to the verdict. Accordingly, the Court reversed appellant's convictions.