

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 30, 2018

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Todd Ashley
Deputy Director

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General Counsel

Lalaine Briones
State Prosecution Support Director

Sheila Ross
Director of Capital Litigation

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and Crimes Against Children
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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:

- **Statements; Objections**
- **Right to Conflict-free Counsel**
- **Record Restriction; Appellate Jurisdiction**
- **Self Defense; Relevancy**
- **Appellate Jurisdiction; O.C.G.A. § 15-3-3.1**
- **Residual Hearsay; Jury Charges**

Statements; Objections

Taylor v. State, S17A1627 (3/5/18)

Appellant was convicted of felony murder. The evidence showed that appellant was the live-in caretaker for the victim, Theodore Crew, a disabled older man. During interrogation, officers commented to appellant that she had not been truthful with them, made various statements suggesting how and why appellant killed Crew, and told appellant that the interrogation would be played for a jury and that “ain’t nobody in Columbia County gonna believe you didn’t have something to do with this.” One officer stated, “I know you caused [Crew’s] injuries.” Appellant contended that these statements were inappropriate opinions of the police as to her guilt, veracity, and character and that the statements unduly prejudiced her defense.

As an initial matter, the Court stated that it must consider the substance of appellant’s objection to this evidence at her *Jackson-Denno* hearing and at her subsequent trial. At the *Jackson-Denno* hearing, appellant objected to “the instances where officers were throwing out scenarios about how [appellant murdered Crew].” She argued that these scenarios should be redacted and

that it was improper to admit the police officer’s “varied ideas of how [appellant] might be guilty.” Appellant, however, gave no underlying basis for her objection. At trial, appellant renewed her objection as to the “issues made at the *Jackson-Denno* hearing.” She repeated that she found it objectionable to admit “scenarios thrown out by the police officers [as to] what might have happened.” But, again, appellant gave no specific grounds for this objection before the trial court denied it. For the first time, appellant provided a reason for her objections in her motion for new trial, arguing that the police officers’ statements improperly presented opinions regarding her guilt, veracity, and character. Thus, the Court found, appellant failed under OCGA § 24-1-103 (a) (1) to state a specific ground for her objection. Therefore, under OCGA § 24-1-103 (d), the Court’s review was limited to whether the admission amounted to plain error.

The Court then stated that read broadly, appellant’s contentions could trigger consideration under OCGA § 24-7-704 and OCGA §24-4-403. But, pretermitted whether the statements about which appellant complained would have been inadmissible under either of these statutes, she failed to prove the third prong of the plain error test: that the error must have affected the appellant’s substantial rights, which in the ordinary case means a demonstration that it affected the outcome of the trial court proceedings. Here, appellant ultimately confessed that she cut Crew on the night in question. Therefore, the statements made by police, which were interrogation ploys stating that she did exactly what she later confessed to doing, did not affect the outcome of her trial.

Therefore, the Court concluded, there was no plain error.

Merger; Cross-Appeals

Hood v. State, S17A1753 (3/5/18)

Appellant was convicted of felony murder and other crimes in connection with the shooting death of Dorsey and the aggravated assault of Bilal. Appellant contended — and the State agreed — that the trial court erred in “merging” the guilty verdict for felony murder based on possession of a firearm by a convicted felon into the conviction for felony murder based on possession with intent to distribute cocaine. Instead, the felony murder verdict based on the firearm charge was actually vacated by operation of law. However, the Court found, this error in nomenclature did not affect the trial court’s judgment, as either way, appellant was not convicted of, or sentenced for the felony murder count based on the firearm charge.

The State argued that the trial court erred more significantly in failing to enter a judgment of conviction and sentence on the guilty verdict for possession of a firearm by a convicted felon, which did not merge into any of appellant’s other convictions. The Court agreed that this may be correct. However, the Court noted, the State failed to raise this merger error by cross-appeal (and also did not raise it at the sentencing hearing). And, as the Court recently decided, “when a merger error benefits a defendant and the State fails to raise it by cross-appeal, we henceforth will exercise our discretion to correct the error upon our own initiative only in exceptional circumstances.” *Dixon v. State*, ___ Ga. ___, ___ (808 SE2d 696, 704) (2017). Thus, the Court found, because there were no exceptional circumstances here, it would not exercise its discretion to correct the trial court’s merger of the possession of a firearm by a convicted felon count.

Right to Conflict-free Counsel

Tanner v. State, S17A1417 (3/5/18)

Appellant was convicted of malice murder and other crimes. He contended that he was denied his Sixth Amendment right to conflict-free counsel at trial. The record showed that appellant’s lead counsel

before and during trial was Blevins, a circuit public defender. As the trial date approached, Wegel of the same office joined the defense. About ten days before trial, Blevins became aware that Wegel was also representing a man named Dennis Love on charges not related to this case. The State had contacted Love about testifying regarding a prior robbery by appellant and had listed Love as a witness in appellant’s case, and Wegel had discussed with Love the possibility of testifying against appellant. When Blevins learned of this conflict of interests, the Public Defender’s Office found a lawyer not associated with the office to represent Love and also appointed an unaffiliated lawyer to represent appellant. A week before trial, however, Blevins, Wegel, and the prosecutor met with the trial court in chambers, and the State announced that it would not call Love as a witness. The trial court considered the conflict resolved and instructed Blevins and Wegel to continue their representation of appellant. The other attorney’s brief appointment as Appellant’s counsel was rescinded.

The Court stated that an “actual conflict” for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel’s performance, not just a mere theoretical division of loyalties. Wegel’s representation of both appellant and Love posed a significant conflict issue when Love became a potential witness against appellant, and Blevins and Wegel dealt with that issue appropriately by ensuring that both clients were appointed new, unaffiliated counsel. Just a few days later, however, and a week before trial, the concern about simultaneous conflicting representations dissipated, when the State announced that it would not call Love as a witness. Moreover, the Court noted, when appellant expressed concern at the outset of his trial about Wegel’s (but not Blevins’s) representation of him, the court, despite explaining that the conflict with Love that appellant referenced had been resolved, gave appellant the opportunity to discharge Wegel. And when Wegel rejoined the defense team later that day, both Blevins and appellant advised the court that he wanted her back.

Finally, the Court found, appellant failed even to allege that the conflict he claimed existed had an adverse effect on his lawyers’ performance at trial, and indeed the record belies any such claim. At the motion for

new trial hearing, Blevins testified that Wegel did not attempt to influence the case against appellant’s interests. Blevins also confirmed that both he and Wegel represented appellant’s best interests and that she was helpful in preparing for trial. Thus, the Court concluded, because appellant failed to show any actual conflict that adversely affected the performance of his counsel, he could not prevail on his Sixth Amendment claim.

Record Restriction; Appellate Jurisdiction

Doe v. State, S17A1694 (3/5/18)

Pursuant to OCGA § 5-6-34 (a) (12), “John Doe” directly appealed to the Court of Appeals from the denial of a motion to seal the records of a criminal case pursuant to OCGA § 35-3-37 (m). In response to the merits of the appeal, the State raised for the first time that OCGA § 5-6-34 (a) (12) and OCGA § 35-3-37 (m) as applied in this case violate the separation of powers clause of the Georgia Constitution as found in Art. I, Sec. II, Par. III. Specifically, the State maintained that, “[i]n OCGA § 5-6-34 (a) (12), the legislature confers appellate jurisdiction in the Court of Appeals for all decisions under OCGA § 35-3-37. However, OCGA § 5-6-34 (a) (12), as applied to rulings under OCGA § 35-3-37(m), and OCGA § 35-3-37(m), itself, violate the separation of powers clause of the Georgia Constitution. (Emphasis supplied.) It argued that there is a conflict with Uniform Superior Court Rule 21 (“USCR 21”), which provides a procedure for limiting access to court records that are otherwise public records. Thus, inasmuch as OCGA § 35-3-37 (m) establishes a different procedure from that found in USCR 21, OCGA § 35-3-37 (m) represents “an impermissible intrusion” on the part of the General Assembly into the administrative record-keeping authority of this Court as mandated by the Georgia Constitution of 1983. The Court of Appeals then transferred the case to the Supreme Court on the sole basis that the Supreme Court has exclusive appellate jurisdiction in “all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question.” Ga. Const. of 1983, Art. VI, Sec. VI, Par. II (1).

The Supreme Court sent it back. The

Court stated that as a general matter, it will not rule on a constitutional challenge to a statute unless the issue has been raised and ruled on in the trial court. There is a “limited exception” to this requirement where a challenge to the constitutionality of a statute governing appellate procedure that is necessarily made for the first time on appeal. Here, the Court found, the State’s constitutional challenge to a statute applicable to proceedings in the trial court could have been raised in the trial court, and therefore, does not fall within the exception for issues of appellate procedure arising only on appeal.

Nevertheless, the State argued, it could not have brought a constitutional challenge to OCGA § 5-6-34 (a) (12) in the lower court because it then had no standing to do so, and therefore, had not waived it. But, the Court stated, the State did not make a separate and discrete constitutional challenge, either facial or as applied, to OCGA § 5-6-34 (a) (12); its constitutional attack on the jurisdictional statute is inextricably bound with and entirely dependent upon a threshold determination by the Supreme Court that OCGA § 35-3-37 (m) is unconstitutional. And, the State forfeited its present constitutional challenge to OCGA § 35-3-37 (m) by failing to raise it and secure a ruling below; it cannot circumvent such requirements by its invocation of OCGA § 5-6-34 (a) (12). Accordingly, the appeal of the denial of a motion to seal criminal history record information failed to present a viable challenge to the constitutionality of a statute. Consequently, it was properly before the Court of Appeals.

Self Defense; Relevancy

Ramirez v. State, S17A1662 (3/5/18)

Appellant was convicted of malice murder, attempted murder, and other crimes associated with a shooting in which Rodriguez was killed and Flores was injured. The evidence, briefly stated, showed that appellant, who was underage, attempted to enter Las Delicias bar. Flores was a security guard who was checking identification. Flores refused appellant entry. Appellant pulled a gun. Flores was injured in an attempt to wrestle the gun from appellant. Appellant shot Rodriguez, another security guard, who came to the assistance of Flores.

At trial, appellant claimed self-defense.

Appellant argued that the trial court erred in excluding evidence of ten other incidents of criminal activity at Las Delicias bar. Appellant contended that the evidence was relevant, and that it should have been assessed under the framework of cases governing *Terry* stops, in which the fact that an area is known to have a high crime rate may be relevant in determining whether police reasonably suspected that the defendant was engaged in criminal activity. The Court disagreed, finding the contention “plainly incorrect.” The reasonableness of a police officer’s suspicion of criminal activity is a wholly different matter from a defendant’s belief that he is in danger of being killed or severely injured unless he uses deadly force to defend himself.

The State argued that to the extent the violent “character” of the bar was relevant to appellant’s self-defense claim, evidence of that character should be limited to general reputation or opinion evidence under the rules governing the admissibility of a victim’s reputation for violence in a self-defense case. The Court found that the State’s analysis also fails because a place cannot be a victim. And the reputation of a place is not “character evidence” subject to the same rules as evidence of a witness’s character or propensity for violence.

Instead, the Court stated, as with many evidentiary decisions under Georgia’s current Evidence Code, determining the admissibility of the evidence of other incidents appellant set out involves the familiar process of weighing its probative value against the prejudice, confusion, or waste of time likely to result from admission. Here, appellant did not contend that he knew about any of the proffered occurrences at the time of the shooting; nevertheless, he argued that the specific instances of criminal activity at the bar should have been admitted to show the jury that his perception of danger at the bar was reasonable. However, the Court stated, it was difficult to see how the occurrence of events of which appellant had no knowledge could be relevant to his state of mind on the night of the shooting, or how they could have influenced his sense of immediate danger from a bar employee checking identification at the front door. Only three of the incidents involved either of the security guard victims, Flores or

Rodriguez: in addition to the citation for failure to check identification, Rodriguez assisted in evicting an individual who was harassing two bar employees on one occasion, and on another occasion, a bar customer hit Flores on the head with a bottle. But none of the incidents showed a propensity for violence in either of the victims. Nor do they tend to make it more likely that appellant reasonably believed that deadly force was necessary to defend himself against Flores or Rodriguez. The probative value of this evidence would be remarkably small even if appellant had alleged that he was aware of the incidents at the time of the murder. But without such an allegation, the evidence failed to clear even the low hurdle of relevance under Rule 401.

Moreover, the Court found, to the extent that the bar’s reputation for violent incidents influenced appellant’s state of mind, that reputation and its effect on him was well established through other evidence admitted at trial. None of the other witnesses who addressed the issue denied that the bar was a violent place, such that evidence of specific instances of violence could be relevant for impeachment purposes. To the contrary, Flores testified that bar fights and patrons throwing or hitting others with bottles were frequent events. Thus, even if the proffered incidents had some marginal relevance to appellant’s self-defense claim, any slight probative value was substantially outweighed by considerations of waste of time or needless presentation of cumulative evidence, and the trial court acted within its discretion in excluding the evidence.

Appellate Jurisdiction; O.C.G.A. § 15-3-3.1

Henderson v. State, S17A1785 (3/5/18)

In 2011, appellant pled guilty to felony murder. He did not file a direct appeal, but in 2016, he sought an out-of-time appeal. The trial court denied his motion and the Supreme Court affirmed. *Henderson v. State*, 300 Ga. 526 (2017). On March 7, 2017, under the criminal docket number of his murder prosecution, appellant filed a pro se “Motion to Disclose Grand Jury Testimony and Evidence,” which was denied on March 13, 2017. On March 22, 2017, appellant filed an “Objection to Order Denying Defendants Motion for Disclosure Grand

Jury Testimony and Evidence,” which the trial court denied on March 28, 2017. Appellant timely appealed to the Georgia Court of Appeals. The appeal was then transferred by the Court of Appeals to the Supreme Court.

The Court first addressed the question of its jurisdiction. The Court noted that prior to the enactment of OCGA § 15-3-3.1, if an appeal in a murder case invoked its equity or extraordinary remedy jurisdiction, it was not necessary to decide which provision of the Constitution established jurisdiction in the Supreme Court. The Court retained such appeals in murder cases without the necessity of clarifying the provision under which it did so. But with the transfer of most equity and extraordinary remedies jurisdiction to the Court of Appeals by OCGA § 15-3-3.1 (a) (2) and (4), some clarification is necessary, particularly in light of the Court of Appeals' decision in *Coles v. State*, 223 Ga. App. 491, 491 (1) (1996). In *Coles*, the Court of Appeals considered a prisoner's appeal from the denial of a motion for a post-conviction copy of the transcript of his murder trial at public expense. The *Coles* Court treated the motion as civil and as “a petition in the nature of mandamus” and retained jurisdiction.

The language of OCGA § 15-3-3.1 (a) (2) and (4), excluding from Court of Appeals jurisdiction those cases concerning proceedings “in which a sentence of death was imposed or could be imposed,” duplicates the constitutional language under which the Supreme Court has taken jurisdiction over matters that arise in the course of a murder case. However, the Court found, this appeal was neither an equity nor a mandamus case, but simply a motion filed in appellant's original murder case. Appellant filed no separate petition, but continued to file this and other pleadings under the original criminal docket number. Accordingly, the Court held, such a post-trial motion seeking a record or transcript filed in a murder case is not a “civil action in the nature of mandamus” as described in *Coles*, and therefore, *Coles* is overruled. Instead, the Supreme Court retains jurisdiction because the appeal arises from a case “in which a sentence of death was imposed or could be imposed” under Ga. Const. Art. VI, Sec. VI, Par. III (8).

Having decided that it has jurisdiction,

the Court addressed the merit of appellant's appeal. The Court found that appellant failed to file a direct appeal, his motion for an out-of-time appeal was denied, and the denial was affirmed on appeal. Because the law does not recognize a motion for a transcript at public expense filed in a criminal case after the opportunity for a direct appeal has ended, the trial court should have dismissed appellant's motion as a nullity, and he had nothing cognizable to appeal. Therefore, the Court dismissed the appeal.

Residual Hearsay; Jury Charges

Jacobs v. State, S17A1892 (3/5/18)

Appellant was convicted of malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony in connection with the shooting death of his wife, Harriette. At trial, the trial court allowed various witnesses who were close friends and confidantes of Harriette to testify about statements allegedly made to them by Harriette before she died. Appellant argued that the trial court erred by admitting into evidence these hearsay statements. The Court disagreed.

The Court stated that the admissibility of the statements in question is governed by the residual hearsay exception contained in OCGA § 24-8-807 (“Rule 807”). Relying on *Smart v. State*, 299 Ga. 414, 421-422 (3) (2016), the Court found that the statements and text messages consistently spoke to appellant's abusive, controlling, and violent behavior towards Harriette during their marriage and during her efforts to leave him, and Harriette's own anxiety connected to her husband's threats and abusive behavior. Also, the Court concluded that the trial court did not abuse its discretion in determining that the statements from Harriette to her friends and her own text messages describing the nature of her abusive relationship with appellant prior to her death had the requisite “exceptional guarantees of trustworthiness” to be admissible at trial pursuant to Rule 807. In fact, the Court stated, in light of the secretive nature of domestic abuse, it was not convinced that the statements from appellant's wife to her friend or her own writings, which describe acts of domestic

violence, did not, in fact, bear an increased level of trustworthiness. In this connection, the Court also found no abuse of discretion in the trial court concluding that Harriette's statements about the abusive threats that her husband made to her; the fact that she would not harm herself; and her fears that appellant might do something to her; carried the requisite guarantees of trustworthiness to be admissible. This was so, the Court stated, because those statements also stemmed from the very domestic abuse about which she had been informing her close confidantes.

Appellant also contended that the trial court committed plain error in its charge to the jury on good character evidence and that the trial court allegedly commented on the evidence through this charge. The jury charge in question stated: “Now, you have heard evidence of the character of the defendant and his character for a particular trait, more specifically violence, in an effort to show that the defendant likely acted in keeping with such character or trait at pertinent times or with reference to the issues in this case. This evidence has been offered in the form of opinion of other witnesses. You should consider any such evidence along with all the other evidence in deciding whether or not you have a reasonable doubt about the guilt of the accused. Now, good character is not just a witness credibility issue, nor is it an excuse for crime. However, you may consider it as weighing on the issue of whether or not the defendant is guilty of the charges in the indictment.”

Appellant argued that the charge was erroneous because it used the word “violence” to describe the character trait allegedly at issue in appellant's trial, which speaks to a bad character trait rather than a good one. However, the Court found, when considered in the context of the actual evidence presented at trial, and in the context of the entire charge on good character, there was no error. Specifically, appellant's counsel made a point of asking each and every one of appellant's four character witnesses at trial if they knew appellant to be “violent or aggressive” or if he acted “violently or aggressively,” to which each of the witnesses replied “no.” Appellant himself used the idea that he did not have a reputation for “violence” as a means of attempting to show his good character, and

the trial court merely reflected that in its charge to the jury. The jury was properly left to determine whether appellant would have acted consistently with his purported character with respect to “violence,” which was to not act violently towards anyone, including Harriette. In this manner, the jury charge was adjusted to the specific evidence presented in this case. Therefore, the Court found, the jury would not have been confused from the charge given under the circumstances, and no error, let alone plain error, from the trial court giving it. Nor would the giving of this proper charge somehow amount to the trial court commenting on the evidence.