Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 3, 2018

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THIS WEEK:

Mental Competency Evaluations; Constitutionality of O.C.G.A. § 17-7-130(c)

Carr v. State, S18A0100 (6/18/18)

Appellant was arrested on June 16, 2016 and released on bond the same day. Five months later, he was indicted for rape, aggravated sexual battery, two counts of child molestation, and criminal attempt to commit a felony. Dr. Perri of the Georgia Department of Behavioral Health and Developmental Disabilities (the "department") evaluated the mental competency of appellant following a consent order. He opined that appellant was not mentally competent to stand trial, but that his competency could be restored and recommended that his restoration occur in a community setting rather than in a psychiatric facility. The trial court found, however, that it was required under O.C.G.A. § 17-7-130 (c) to place appellant in custody to have his competency restored. In so holding, the court overruled appellant's constitutional objections.

The Court noted that O.C.G.A. § 17-7-130(c) provides in relevant part: "If the court finds the accused is mentally incompetent to stand trial, the court may order a department physician or licensed psychologist to evaluate and diagnose the accused as to whether there is a substantial probability that the accused will attain mental competency to stand trial in the foreseeable future. The court shall retain jurisdiction over the accused and shall transfer the accused to the physical custody of the department. At its discretion, the court may allow the evaluation to be performed on the accused as an outpatient *if the accused is charged with a nonviolent offense*. Such evaluation shall be performed *within 90 days* after the department has received actual custody of an accused or, in the case of an outpatient, a court order requiring evaluation of an accused …" (Emphasis supplied). OCGA § 17-7-130 (a) (7) defines "[n]onviolent offense" as "any offense other than a violent offense," and § 17-7-130 (a) (11) (A) defines "[v]iolent offense" to include "(i) A serious violent felony; (ii) A sexual offense; (iii) Criminal attempt to commit a serious violent felony; [and] (iv) Criminal attempt to commit a sexual offense … ." The Court found that the trial court did what the statute mandates: because appellant is charged with violent offenses, once the court found him mentally incompetent to stand trial, the court had no statutory discretion to consider Dr. Perri's recommendation of attempted restoration in an outpatient setting or any other evidence regarding appellant's mental condition, but rather was required to transfer appellant to the physical custody of the department to be detained there for up to 90 days while he was evaluated. Thus, the Court stated, it needed to determine whether the statutorily mandated confinement at a government institution complies with the constitutional requirement of due process.

First, the Court looked at the *duration* of the detention, recognizing that this is an issue only if the person can lawfully be detained in the first place. The Court noted appellant did not contend that the 90-day maximum evaluation period in OCGA § 17-7-130 (c) is necessarily excessive to achieve the government's purpose of accurately

evaluating a defendant, and the Court concluded that it is not. However, appellant contended, while the express time limit of 90 days for completion of the evaluation may be reasonable, the statutory scheme actually allows a defendant detained due to § 17-7-130 (c) to be confined much longer than that, because there are no explicit provisions governing how quickly he must be transferred to the department, how quickly after the evaluation is done the department must provide it to the court, how quickly he will be returned to the court, or how quickly the court will act on the evaluation. The Court found that the statute says the 90-day clock begins to run only when a defendant is physically delivered to the department and stops as soon as the evaluation is complete; but there are no express time limits on the steps that must happen before and after that evaluation if the defendant remains incompetent. If the lack of explicit deadlines for each of these steps meant that a defendant could be detained indefinitely under § 17-7-130 (c), the statute would be unconstitutional. However, § 17-7-130 (c) is not facially unconstitutional, because the Georgia statute does not *mandate* indefinite detention (that is, detention until an unattainable condition is achieved); the statute simply does not include express time limits for each of the several steps required to compete the statutory process. Thus, a reasonable time limit for each step should be implied to preserve the statute's constitutionality. Specifically, to maintain the facial constitutionality of OCGA § 17-7-130 (c) the Court construed the statute to require that each step it prescribes last only as long as reasonably necessary to serve the State's legitimate purpose of accurately determining the likelihood of the defendant's attaining competency, and that the total period of detention based on the statute is also reasonable in relation to that purpose. Specific defendants can enforce this constitutional requirement by bringing as-applied challenges, either by challenging the trial court's evaluation order if it is believed to specify an unreasonable duration of confinement or by filing a petition for habeas corpus under OCGA § 9-14-1 (a) if their detention pursuant to § 17-7-130 (c) order is alleged to have extended for an unreasonable time. And here, appellant could not prevail on such a challenge. He initiated this appeal only days after being ordered detained for evaluation under § 17-7-130 (c), so he could not show from the record that the duration of his actual confinement was unreasonable (assuming he could be properly detained at all).

Next, the Court addressed the *nature* of the detention. No matter how short the duration of the detention, if the nature of the confinement is not reasonably related to the government's purpose of accurately evaluating the individual defendant's potential to attain competency, the detention is unconstitutional. Appellant challenged the *automatic nature* of the detention under § 17-7-130 (c) for all defendants who are charged with violent offenses, as he is. The Court concluded that this challenge had merit.

The Court found that rather than the particular *crime* with which a defendant is charged, it is his particular *mental condition* that affects whether his commitment is reasonably related to the goal of accurately evaluating his likelihood of attaining competence so he can be tried. Only in those cases where detention is in fact reasonably related to this objective does the State's interest justify depriving the defendant of his strong liberty interest. In fact, in some cases the evidence presented at the competency hearing may indicate that confinement will *not* serve the government's purpose of accurately evaluating the defendant's likelihood to attain competency. For example, the facility in which the defendant would be confined may not have the means to effectively care for or communicate with the defendant. Or the department doctor who initially evaluated the defendant's competency to stand trial may be able to conclude with reasonable medical certainty that the defendant will not be able to attain competence. In these cases, at least without a showing by the State and a finding by the court that the proposed examination and treatment of the defendant in a confined setting has a realistic possibility of altering the status quo, commitment serves no legitimate purpose at all, and so does not justify the deprivation of the defendant's liberty.

But, the Court acknowledged, in many cases the constant observation and increased control afforded by a defendant's detention in a department facility may reasonably promote the government's purpose of accurate evaluation. For example, in cases where the doctor or the court itself suspects that the defendant may be feigning or exaggerating symptoms to avoid trial, or where the defendant's diagnosis is truly uncertain or holds the potential for improvement rather than stasis or deterioration, close and extended observation and control may be beneficial to the department's doctors. But the existence of such cases does not justify *automatic detention* for *all* defendants in Georgia's courts who are accused of a violent crime and found incompetent to stand trial.

Thus, the Court held, because the nature of automatic commitment for all those defendants does not bear a reasonable relation to the State's purpose of accurately determining the restorability of individual defendants' competence to stand trial, that aspect of OCGA § 17-7-130 (c) violates due process when applied to defendants who have been deprived of their liberty based solely on that statutory provision. In such cases, the trial court should proceed as it does in determining how to evaluate mentally incompetent defendants accused of nonviolent offenses. To ensure that the nature of commitment to the department is appropriate for the particular defendant, the court should consider all relevant evidence and make a finding as to whether the evaluation required by § 17-7-130 (c) should be conducted on an inpatient or outpatient basis. A defendant who is not already lawfully detained should be committed to the department only if the court finds that such confinement is reasonably related to the purpose of accurately evaluating whether that particular defendant can attain competency. A hearing on this issue should be held at the same time or promptly after the court initially determines the defendant's competency to be tried. To the extent the prosecutor or the defendant wishes to present or contest evidence that speaks to the detention determination that should be permitted. If the court determines that inpatient evaluation is not appropriate for a mentally incompetent defendant charged with a violent offense and not already detained for another, lawful reason, then the portion of § 17-7-130 (c) requiring commitment of that defendant to the physical custody of the department cannot be applied as a matter of constitutional due process.

Therefore, the Court concluded, that part of the trial court's judgment concluding that OCGA § 17-7-130 (c) is constitutional was reversed, and that part of the judgment ordering appellant to be delivered to the custody of the department for evaluation was vacated. The trial court's unchallenged finding that appellant is incompetent to stand trial was affirmed. On remand, the trial court should exercise its discretion in deciding whether appellant should be committed to the department's custody for evaluation or should be evaluated on an outpatient basis.

OCGA § 17-8-57 (2015); Retroactivity

Willis v. State, S18A0035 (6/29/18)

Appellant was convicted in 2011 of murder, rape, and other charges arising out of the strangulation death of a victim whose body was discovered in the parking lot of a tire company where appellant had previously been employed and where he frequently slept. The evidence

showed that appellant made two statements to law enforcement; one that was noncustodial and another that was custodial. The trial court instructed the jury as follows: "[T]here are two statements attributable to the defendant. The first statement was allegedly made on May 23rd, 1996, when the defendant [rode] a bicycle to *the scene of the crime* and allegedly made some statements to Detective Mathis. In that circumstance where an accused is neither in custody nor so restrained as to equate to a formal arrest, any statements made to an investigating officer are made under non-custodial circumstances and *Miranda* warnings (constitutional rights) are therefore not required." (Emphasis supplied.) Appellant's counsel did not object to the charge as given.

Appellant contended that the scene of the crime was a contested fact at trial and therefore, the trial court's instructions violated the version of OCGA § 17-8-57 that was in effect at the time of trial. The Court agreed. However, the Court noted, OCGA § 17-8-57 was amended in 2015 and under the current version of the statute, reversal and remand for retrial would not be required without a showing of plain error because appellant did not object at the time. Thus, the Court stated, the issue was whether the statute should be applied retroactively.

The Court stated that when a statute governs only court procedure, it is to be given retroactive effect absent an expressed contrary intention. The 2015 amendment to OCGA § 17-8-57 contains no express limitation to cases tried on or after its effective date. Moreover, the presumption against a retrospective statutory construction does not apply to statutory enactments which affect only court procedure and practice, even when the alteration from the statutory change results in a disadvantage to a party. Statutes typically apply to activity occurring after the effective date of the statute, and the appeal in this case was filed after the effective date of the 2015 amendment to OCGA § 17-8-57. This militates in favor of applying subsection (b) of the statute as the standard of review to apply to the appeal in this case. Subsection (b) of OCGA § 17-8-57, as amended, addresses the standard of appellate review that applies when a trial judge violates the prohibition against expressing an opinion about whether a fact at issue has been proved. It states that when the party asserting such a violation fails to make a timely objection, appellate review is authorized only if the "violation constitutes plain error which affects substantive rights of the parties." Thus, subsection (b) is specifically directed to appellate review, and not to proceedings in the trial court, which, in this case, predated the amendment. Taking these factors into consideration, the Court held that because subsection (b) of OCGA § 17-8-57 is not aimed at regulating any conduct at trial, but instead addresses the standard of appellate review of an error already made at trial, the standard of appellate review set out in that subsection is properly given retroactive effect to cases tried before the enactment date but appealed after that date.

And here, the Court found, given the strong evidence of appellant's guilt, appellant failed to demonstrate the court's reference to his appearance at the scene of the crime likely affected the outcome of the proceedings. Accordingly, appellant failed to establish plain error arising from the jury instruction in question.

Jury Instructions; Corroboration of Accomplice Testimony

Stripling v. State, S18A0176, S18A0277 (6/29/18)

Appellant and his co-defendants, were convicted of malice murder and other crimes in connection with the shooting death of Walton, a drug dealer. The evidence, very briefly stated, showed that Walton and Traylor went to a rooming house to see if it was suitable as a place to sell cocaine. As Walton was backing his vehicle up to leave, a man got out of a Suburban-like vehicle, approached the driver's side of Walton's car, and asked to buy some drugs. After Walton prepared the cocaine, there was a struggle between him and the man standing outside the car. Traylor then saw three guns pointed in the driver's side window; she heard shots and ducked down. Walton drove into a pole, and Traylor got out of the car screaming. Walton had been shot four times; he died from his injuries soon after he arrived at the hospital. Traylor could not identify the man who asked to buy drugs or any of the people holding the guns.

Appellant argued that the trial court committed plain error by failing to instruct the jury under OCGA § 24-14-8 that the testimony of an accomplice must be corroborated to establish a fact. The Court stated that a jury instruction on the need for accomplice corroboration should be given if there is slight evidence to support the charge. An accomplice is someone who shares a common criminal intent with the actual perpetrator of a crime. Appellant argued that there was evidence that Neddrick, Nemiyas, and Nierris Smith, all of whom testified for the State, were his accomplices because there was evidence that they were involved in the fatal shooting. The Court stated that appellant was correct that there was at least slight evidence that all three of those men were involved in the murder. Neddrick was identified as the shooter by an eyewitness, and there was evidence that Nemiyas and Nierris were with Neddrick before, during, and after the shooting. But, the Court stated, appellant was incorrect that this evidence could be construed to support the finding that those men were *his* accomplices.

The evidence showed that Neddrick, Nemiyas, and Nierris were in and around one vehicle (a sedan) around the time of the shooting, while appellant and his co-defendants were in and around another vehicle (an SUV). There was no evidence that Neddrick, Nemiyas, or Nierris committed the crimes charged with appellant and any of his co-defendants. In fact, the Court noted, based on the evidence presented at trial, if Neddrick, Nemiyas, and Nierris committed the crimes, they would be guilty and appellant would be completely innocent. Moreover, appellant cited no precedent requiring an accomplice corroboration instruction under similar circumstances. Accordingly, the Court held, the trial court did not commit plain error in not giving that charge.

Ineffective Assistance of Counsel; Prosecutorial Misconduct

Menzies v. State, S18A0541 (6/29/18)

Appellant was convicted of felony murder, criminal attempt to commit armed robbery, and related crimes in connection with the shooting death of appellant's sister Jennifer during an attempted armed robbery. The evidence showed that appellant arranged an armed robbery that went bad and during the botched robbery, one of the victims shot and killed appellant's sister. Appellant dragged her sister into a vehicle and drove away. When officers stopped her, appellant told them she was the victim of a robbery and that she did not know the dead woman sitting beside her.

Appellant contended that her trial counsel provided constitutionally ineffective assistance by failing to move for a mistrial when the prosecutor made the following statement during closing argument: "And at least what you know of Christina Menzies, and what you have seen of Christina Menzies—it's nice of [Menzies's counsel] to concede things, but Ms. Menzies never has—is she might not know the truth if it hit her in the backside." Appellant argued that the State's argument was an improper comment on her failure to testify at trial. At the motion for new trial hearing, appellant's trial counsel initially testified that he did not

believe the prosecutor's comment to be objectionable, either at the time of trial or upon re-reading the comment at the motion for new trial hearing. After further questioning, however, trial counsel reconsidered, saying, "Quite honestly, if I think about it more, if it is objectionable, it's probably so egregious that it wouldn't require an objection. I am not sure it's there, but that is the idea."

But, the Court stated, that conclusion, whatever it may mean, was not enough. In order to prevail on an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was objectively deficient and that the deficient performance prejudiced the defense—that is, that there is a reasonable probability that counsel's errors affected the outcome of the trial. To meet the first prong of the *Strickland* test, appellant must overcome the "strong presumption" that trial counsel's performance was adequate and that his decisions were made in the exercise of reasonable professional judgment. And if the defendant fails to satisfy either prong of the *Strickland* test, we need not address the other prong.

A prosecutor's argument will be deemed an improper comment on the accused's right to remain silent if either the prosecutor's manifest intention was to do just that, or the remarks were such that a jury would naturally and necessarily take the remarks to be a comment on the accused's right to remain silent and not to testify. Here, the Court found, the prosecutor's remarks were not intended as a comment on appellant's decision not to testify. Instead, they were more naturally seen as a comment on appellant's recorded statement to police, which was played for the jury and in which appellant claimed that she was a victim of the robbery and that she did not know her sister. Because the prosecutor's remarks did not rise to the level of prosecutorial misconduct, trial counsel's failure to object and move for a mistrial did not constitute deficient performance, and therefore, appellant's ineffective assistance of counsel claim failed.

Plea Negotiations; Judicial Intervention

Winfrey v. State, S17G1270 (6/29/18)

Appellant pled guilty to six counts of violating Georgia's Street Gang Terrorism Prevention Act in connection with a drive-by shooting. The evidence showed that he entered his plea during a pre-trial hearing where the status of his plea negotiations was put into the record. The prosecutor advised that the State had made three offers, each of which appellant had rejected, and that no additional offers were anticipated. Defense counsel explained that he had discussed the offers with appellant "ad nauseam," but appellant was hesitant to enter a plea because of the effect the Gang Act or RICO convictions might have on his parole eligibility and therefore, he was ready to proceed with his pending motions. The trial court then made lengthy comments to appellant concerning the plea negotiations. Thereafter, the court took an approximate 90 minute break. When court resumed, appellant agreed to the State's plea offer.

Appellant subsequently appealed, contending that his plea was involuntary because the trial judge improperly participated in plea negotiations in violation of Uniform Superior Court Rule 33.5 (A). The Court of Appeals affirmed, finding that the trial judge "did not improperly interject herself into the negotiation process," but added that it did "not condone" the trial court's comments, which "appear to violate the spirit of USCR 33.5 (A)." *Winfrey v. State*, 340 Ga. App. 344 (2017). The Supreme Court granted appellant's petition for writ of certiorari.

The Court stated that trial judges are not permitted to participate in plea discussions under Rule 33.5 (A). In addition to the error inherent in a Rule 33.5 (A) violation, judicial participation in plea negotiations is prohibited as a *constitutional* matter when it is so great as to render a guilty plea involuntary. Thus, a trial judge may violate Rule 33.5 (A) without rendering a plea constitutionally involuntary. Accordingly, the Court stated, it must consider not only whether the trial court impermissibly participated in appellant's plea negotiations, but also whether that participation was so significant that it led to an involuntary plea.

The Court noted that several factors have been consistent in involuntary-plea cases involving trial court participation in plea discussions. First, if there was evidence that the trial court threatened the defendant that he would receive a stronger sentence if he were convicted after trial. Here, the Court agreed with the Court of Appeals that although the trial court "never explicitly told [appellant] that he would be facing a longer sentence if he rejected the State's offer and went to trial," the court "strongly suggested that result." However, the Court disagreed that because the trial court's strong suggestion of a harsher sentence was not explicitly stated, the judge did not improperly interject herself into the negotiation process. Thus, the Court stated, "Let us be plain: if a trial judge communicates—either explicitly or implicitly—to a criminal defendant that his sentence will be harsher if he rejects a plea deal and is found guilty at trial, then Rule 33.5 (A) has been violated and the plea may be found involuntary." Furthermore, the Court found, there is a distinction between whether a trial judge threatens that a sentence *will* be harsher after conviction if a plea offer is rejected, or advises that the sentence *may* be harsher—the former should not occur, and it is of little significance whether the trial court accomplishes that communication with explicit or implicit language.

And here, the Court determined, the comments by the trial court crossed the line. The trial court made repeated statements that referenced the judge's own proclivity to sentence harshly, along with other statements strongly implying that if appellant were found guilty by a jury, his sentence would be (not could be) harsher than that recommended in the plea offer. In fact, the Court stated, the implication was unmistakable—if appellant rejected the plea offer and the jury found him guilty at trial, he would be sentenced more harshly.

The Court also found that expressions by a judge of a personal interest in giving the defendant a heavy sentence is another factor that Georgia courts have looked to in analyzing involuntary plea cases like this one. And here, the comments by the trial court intimated a desire to sentence the defendant, including the additional statement, "If you think you're so smart and you've got it all figured out, you go to trial." The Court found that this part of the colloquy strongly suggested that the court would hold it against appellant if he went to trial. Indeed, the judge's statements that if appellant wanted to "go up against" her reputation, then "be my guest.," Furthermore, the trial court knew that parole was a key decision point for appellant, and specifically told him that if she were called upon to sentence him after trial, "I don't care when you get paroled."

Finally, the Court found remarkable the trial court's statement to appellant that he would have to "convince a jury.… [he] didn't do most of this," an explanation that shifted the burden of proof from the State to appellant. Thus, the Court found, it is entirely reasonable to believe that this burden discussion further impressed upon appellant that he should plead guilty because he would not be treated fairly at trial.

Accordingly, the Court concluded, taken in their entirety, the trial court's repeated comments communicated to appellant, albeit implicitly, that if he rejected the plea offer and was found guilty by a jury, he would—not merely may or could—receive a harsher sentence. Consequently appellant's guilty plea was involuntary.