

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 3, 2008

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THIS WEEK:

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Video Gambling Foreiture

Damani v. State, S08G0601; S08G0602; S08G0603; S08G0608; S08G0611; S08G0613.

The Court of Appeals held that many types of the video games currently found in convenience stores throughout the state were illegal gambling devices because they violated the reward redemption scheme under OCGA § 16-12-35 (d) (i.e. the machines allowed payouts that exceeded \$5.00 per play). On certiorari to the Supreme Court, the Court vacated the decision of the Court of Appeals and remanded the case back to it because it did not have the entire record of the trial court before it when

it made its decision. Specifically, it did not have the written report of the gaming industry expert witness which the trial court had relied upon in his order determining that most of the defendant machines were legal.

Bottom line: Although this was a decision that anxiously had been anticipated by prosecutors and law enforcement throughout the state, the Supreme Court's decision means that it will probably be another six months to a year before the important substantive issues involved in this appeal are resolved on the merits.

Right to be Present at Trial

Rosser v. State, S08A1101

Appellant was convicted of malice murder and other crimes. He claimed that his constitutional rights were violated because he was not present at the hearing on his motion for new trial. The Court disagreed. It held that a defendant who is not facing the death penalty has no right to be present at the hearing on his motion for new trial. Here, there were no issues that required his presence and if any developments occurred during the hearing which would have required appellant's testimony, the trial court had indicated it would have postponed the hearing until such time as appellant's presence could be obtained.

Speedy Trial

Jones v. State, S080975

In January, 2003, appellant shot and killed the victim during an armed robbery. In January, 2007, he was indicted for the murder.

He filed a motion to dismiss the indictment alleging that the four year delay violated his constitutional right to a speedy trial, which the trial court denied. On appeal, the Court found that two types of pre-trial delay have been recognized as possible violations of a defendant's constitutional rights. First, an inordinate delay between the time a crime is committed and the time a defendant is arrested or indicted may violate due process guarantees under the Fifth and Fourteenth Amendments. A due process violation where a delay precedes arrest and indictment occurs if 1) the delay caused actual prejudice to the defense, and 2) the delay was the product of deliberate action by the prosecution designed to gain a tactical advantage. Appellant contends that the delay was attributable to the State's effort to gain a tactical advantage because even though there was probable cause to arrest him for the murder, the state sought to await the results of his prosecution for other robberies so as to use the convictions as similar transactions evidence in this case. The Court found that even if true, gathering evidence is an ongoing effort and such investigative delays are acceptable. Also, prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. Appellant asserted that he was prejudiced because he could no longer locate certain key defense witnesses. The Court found, however, that even if the witnesses would give admissible evidence, any prejudice which results merely from the passage of time cannot create the requisite prejudice to show a constitutional violation.

The second type of pre-trial delay which can implicate a defendant's constitutional rights is that which occurs after an arrest or indictment and is judged under the four-factor test stated in *Barker v. Wingo*, 407 U. S. 514 (1972). In considering these factors, 1) the length of the delay, 2) the reason for the delay, 3) the defendant's assertion of the right to a speedy trial, and 4) whether the defendant was prejudiced by the delay, the Court found that appellant was not denied his constitutional right to a speedy trial.

Harris v. State, S08A0701

Appellant was arrested in November, 2001. He filed a motion to dismiss on constitutional speedy trial grounds in May 2007. A

hearing was held before the trial court which denied his motion. On appeal, the Supreme Court affirmed. The Court analyzed the facts under the four-factor test of *Barker v. Wingo*, 407 U. S. 514 (1972).

First, as to the length of the delay, the Court found that the five and a half years was presumptively prejudicial to appellant. Second, the reason for the delay was largely due to the negligence of the state but there was no evidence that the delay was a deliberate attempt to cause prejudice to appellant. Third, appellant did not assert his right to a speedy trial until shortly before the hearing on his motion and this factor must be weighed against him. Finally, the appellant showed no actual prejudice resulting from the delay. Therefore, the Court held, on balance, because there was no demonstrable prejudice to appellant's defense and because he was dilatory in asserting his right to a speedy trial, the presumptive prejudice that arose from the delay in his trial was insufficient for him to prevail on his speedy trial claim, and that the trial court did not err in denying the motion to dismiss.

Jury Charges

McKenzie v. State, SO8A1178

Appellant was convicted for felony murder, aggravated assault and a weapons offense. On appeal, he contended that the trial court erred in its instructions to the jury on witness identification and felony murder. First, Appellant argued that the trial court erred by using the "level of certainty" charge in instructing the jury on assessing the reliability of eyewitness identification. However, the Court held that under *Swanson v. State*, 282 Ga. 39, 44 (5) (2007), "the giving of such an instruction does not require reversal when there is other significant evidence corroborating the eyewitness identification." Here, the victim and another eyewitness identified appellant as the shooter, and their version of events corroborated each other. Additionally, a forensic pathologist corroborated the circumstances related by the eyewitnesses; appellant's flight and attempt to elude authorities supported the other evidence of his culpability for the crimes; and the jury was instructed properly about the State's burden of proof regarding McKenzie's identity as the perpetrator. Consequently, it was "highly probable that the trial court's charge to the jury

on level of certainty did not contribute to the verdicts, and was therefore, harmless."

Secondly, the jury charge on felony murder was proper. Appellant contended that the pattern charge given by the judge which states "A person also commits the crime of murder when, in the commission of a felony, that person causes the death of another human being with or without malice" was improper. He argued that the inclusion of the phrase "with or without malice" in the jury instruction caused unnecessary confusion for the jury and that such language was impliedly rejected in *Edge v. State*, 261 Ga. 865 (1992). The Court upheld the giving of the pattern charge. It found that the language was not confusing and that appellant's reliance on *Edge* was misplaced because *Edge* held that the presence or absence of "malice" is irrelevant to the commission of the crime of felony murder.

Search & Seizure

Sullivan v. State, S08A1363

Appellant was convicted of murder after he hired a person to shoot his wife. He argues that the trial court erred in denying his motion to suppress because the affidavit accompanying the warrant contained material misrepresentations. If a court determines that an affidavit submitted contains material misrepresentations or omissions, the false statements must be deleted, the omitted truthful material must be included, and the affidavit must be reexamined to determine whether probable cause exists to issue a warrant. The Court found no error. The record showed that the warrant in question granted the right to search appellant's home for diaries and calendars. At the suppression hearing, the trial court heard extensive argument regarding the contents of the affidavit supporting the warrant. The trial court balanced all of the information that had been presented and held that certain material had to be excised, most notably all information provided by an unreliable confidential informant, and certain other material provided by appellant had to be added to the facts in the affidavit. The trial court then properly reexamined all of the information and determined that the reconstituted affidavit still supported the grant of the search warrant. Moreover, the Court found, since the evidence found in the house was largely duplicative of other admissible evidence, any error was harmless.

Appellant was convicted of possession of cocaine with intent to distribute and other crimes. Appellant contended that the trial court erred in denying his motion to suppress. The record showed that an officer made a lawful stop of a vehicle in which he observed a male and female in the front seat and appellant in the back. The front seat passengers stated that they did not know appellant and were merely giving him a ride. The officer obtained consent to search the vehicle. He removed appellant from the back seat, and although suspicious that no one seemed to know him, he nevertheless had no reason to detain him. But, the officer testified, he did not like to let someone leave a traffic stop and lose sight of the person without, for his own safety, frisking the individual. Appellant agreed to a pat down. The officer felt “the corner of a hard object” in appellant’s pants pocket but could not state that it felt like a gun or other weapon. He pulled the object out and discovered a cigar box with the open part covered by cellophane. Through the cellophane, the officer saw cocaine.

The Court found that the motion should have been granted. The state offered no evidence that the officer thought the “hard object” was a weapon or had any particularized basis for believing that it contained a weapon. The officer’s general belief that “anything can house a weapon” did not, without more, authorize the intrusion. The court held that “[t]o hold otherwise would eviscerate the legal limitations on a weapons frisk.”

Prior Difficulties, Character of Victim

Allen v. State, S08A0889

Appellant shot and killed his ex-girlfriend and her new boyfriend. His defense at trial was that the boyfriend had a gun; he fired at appellant first and that in the struggle for the weapon the two victims died. He contended on appeal that the trial court erred in allowing into evidence the hearsay testimony of the ex-girlfriend’s sisters regarding prior difficulties between him and her. The testimony of third parties about prior difficulties between the defendant and the victim may be admitted

into evidence under the necessity exception to the hearsay rule if the testimony is necessary and trustworthy. Here, the trial court properly found that the sisters’ testimony regarding the problematic and abusive nature of the victim’s relationship with appellant was clearly relevant and probative on the question of his culpability for the violent slaying of the two victims. As to the question of the reliability of such testimony, the evidence established the sisters’ close personal relationships with the victim. She spoke with them almost daily and shared close, intimate details of her life, including her relationship with the other victim. The witnesses also viewed firsthand some of the abusive behavior the appellant exhibited toward their sister. These facts supplied the particularized guarantees of trustworthiness required for application of the necessity exception.

Appellant also asserted that the trial court erred in refusing to allow him to introduce as mitigating evidence the first offender plea of the boyfriend because it would have supported his assertion of the boyfriend’s possession of the handgun at the crime scene and his active involvement in the fatal incident. However, the Court found, the jury’s verdicts showed that it rejected any attempt by appellant to portray a justification defense to the shootings. Moreover, the record disclosed that appellant sought to introduce evidence of the plea in the penalty phase of the trial for the express purpose of attempting to impugn the deceased boyfriend. In these circumstances, the victim’s personal characteristics, including his bad character and criminal record, are not relevant and are not admissible.

Search & Seizure, Custodial Statements

Holmes v. State, S08A1079

Appellant was convicted of murder and rape. He asserted on appeal that the trial court erred in admitting DNA evidence and his custodial statements at trial. The evidence adduced at a hearing on appellant’s motion to suppress showed that appellant was arrested because he was exposing himself in public; that a detective asked him if he would be willing to give a DNA sample because it was department policy to seek such evidence whenever it “ran into cases like that”; but that, in fact, there was no such department policy. There was also

evidence that the detective informed appellant that any time a DNA sample was obtained from an individual in custody it would be used and tested for comparison purposes; and that appellant gave his consent orally and in writing. Appellant’s argument that the DNA evidence should have been suppressed because it was obtained deceptively was without merit. Although blood samples taken from a suspect in a criminal matter may not be used for purposes for which a suspect was not advised and to which he did not, therefore, consent, the rule is not applicable here because the detective informed defendant that his DNA sample would be used for comparison with other such samples and no limits were placed on the scope of appellant’s consent.

Appellant also asserted that custodial statements given to police should have been ruled inadmissible because he invoked his right to counsel. When appellant was questioned initially, he informed the detective that he wanted a lawyer; the detective stopped the interview and told him he would be going to jail and charged with murder. Appellant then said that if he could speak with his family, he would tell the detective what happened. After speaking with his family, he was willing to converse with the detective. He was again advised of his constitutional rights, and he signed a waiver of rights form. Asked again if he was willing to talk without a lawyer, he replied affirmatively. The next day, appellant again asked to speak with police. Again, he was advised of his rights; and he signed yet another waiver of rights form. The Court found the statements were admissible. When a defendant invokes his right to counsel, police must cease all further interrogation until counsel is made available. However, if after invoking his right to counsel a defendant initiates further communication with police and knowingly and intelligently waives his right to counsel, police can question defendant further.

Discovery

Holmes v. State, S08A1079

Appellant contends that the trial court should have suppressed his statement to a co-worker because it was not provided in discovery in a timely manner. OCGA § 17-16-6 authorizes a trial court to prohibit the introduction of evidence not disclosed.

However, it also gives the court broad discretion to ensure a fair trial. Thus, a trial court can grant a continuance, order the discovery or inspection of documents, or make any additional order it deems just and proper under the circumstances of the case. Here, the State made its entire police file available to appellant almost two weeks before trial, well in advance of the statutory ten-day requirement. The file contained appellant's statements. The State was unaware of the statement until six days before trial; however, it informed appellant about the statement as soon as it was discovered. Two days later, appellant was made aware of the fact that the State had subpoenaed the witness. Appellant attempted to keep him from testifying. Finding no bad faith on the part of the State in failing to disclose appellant's statements, the trial court allowed the statements and permitted the witness to testify. In so ruling, the court added that it was willing to make the witness available to appellant for an interview and to give him all the time he needed to question the witness before he took the stand. In light of these facts, the trial court did not abuse its discretion in this matter.

Search & Seizure, Hearsay

Smith v. State, S08A0843

Appellant was convicted of murder, felony murder and aggravated assault. He argued on appeal that the trial court erred in denying his motion to suppress the boots he was wearing when arrested and in allowing in testimonial hearsay evidence in violation of *Crawford v. Washington*. The appellant contended that the boots were seized following an unlawful warrantless arrest. However, the Court found that the evidence adduced at trial showed that the arrest was supported by probable cause. The arrest being lawful, a search incident to arrest requires no additional justification. Furthermore, an accused's clothing or other belongings may be seized upon arrival of the accused at the place of detention.

Appellant also contended that the trial court erred in allowing witnesses to testify about statements the victim, his ex-girlfriend, made to them before she was killed because the statements were inherently testimonial in nature and that their admissibility should therefore have been evaluated under the Sixth Amendment Confrontation Clause analysis of

Crawford v. Washington. However, the Court called appellant's argument a "red herring" and held that the Confrontation Clause prohibits the introduction of only "testimonial statements of witnesses absent from trial." Thus, because, none of the out-of-court statements by the victim recounted at trial were even arguably "testimonial" as the United States Supreme Court has used that term in its recent Confrontation Clause jurisprudence, his claim was without merit.

Hearsay, Res Gestae

Cuyuch v. State, S07G1789

The Supreme Court reversed the conviction of appellant for aggravated battery because the evidence used to convict him was primarily inadmissible hearsay. At trial, an officer testified that the victim approached him and stated that he had been cut by his roommate who was still at home. As a second officer went to investigate, he was flagged down by a witness who was yelling that his friend needed help but because of a language barrier, did not identify his friend. The officer and witness went to the home and found appellant and another person sitting peacefully and watching television. Through a translator, the witness identified the victim as his friend who needed help, identified appellant as the one who cut the victim and showed the officer where the knife used to cut the victim was located. The officer with the victim then returned to the scene, where appellant had already been handcuffed and placed in a patrol car. The victim identified appellant as the person who cut him. Neither the victim, witness, nor the translator testified at trial.

Under *Crawford v. Washington*, statements made by witnesses to police officers investigating a crime are testimonial in nature when the primary purpose of the statements is to establish or prove past events potentially relevant to later criminal prosecution. However, statements made by witnesses to questions of investigating officers are nontestimonial when they are made primarily to enable police assistance to meet an ongoing emergency. Here, the primary purpose of the victim's statement that his roommate had cut him and was still at home may have been made to meet an ongoing emergency and thus was nontestimonial in nature. But, the primary purpose of the

victim's identification of appellant at the crime scene was to establish past facts with a view to a future prosecution and thus inadmissible hearsay. Moreover, the statements by the witness concerning the location of the knife and his identification of appellant as the perpetrator cannot be said to have been given primarily to assist in providing aid to the victim. Instead, these statements were describing past events and the witness was effectively "acting as a witness" against appellant.

Continuing Witness Rule

Clark v. State, S08A1225

During the trial, the defense attorney proffered and the trial court admitted into evidence two written statements that the victim (the only witness to the crime) gave to police, and attempted to show that the two statements were inconsistent with one another and with the victim's trial testimony. Near the beginning of deliberations, a juror asked for the statements. The trial court permitted the statements to go out with the jury, despite appellant's objection based on the continuing witness rule, because he had tendered them into evidence. As a general rule, allowing the written statement of an alleged victim to go out with a jury violates the continuing witness rule. But, it is not reversible error for a written statement to go out with the jury if that statement is consistent with the theory of the defense. Whether written testimony is consistent with the theory of the defense depends upon whether it is advantageous to the defendant, and whether and how defense counsel utilizes that evidence.

Here, the written statements were consistent with the theory of the defense because 1) they revealed inconsistencies in the victim's accounts of the crime and served to weaken the credibility of the victim; 2) defense counsel made use of the victim's prior written statements by offering them into evidence and utilizing them for purposes of impeachment; 3) defense counsel extensively relied on them, as well as a prior oral statement, during cross-examination of the victim and closing argument; and 4) defense counsel explicitly stated during his opening statement that the victim's prior inconsistent statements were "the basis for our defense." Thus, the trial court did not commit reversible error in permitting the

victim's written statements to go out with the jury, because the statements were consistent with appellant's theory of defense.

Merger, Indictment

Elamin v. State, A08A1330

Appellant was convicted of robbery by intimidation, aggravated assault and other crimes. He argued that the robbery and aggravated assault counts should have merged. He also contended that the State's arguments that he and his co-defendants acted in concert as parties to the crime, and the court's jury instructions on parties to a crime and conspiracy constituted a "constructive amendment" to the indictment which made the indictment, and the proceedings which followed, void ab initio. As to the merger claim, the court applied the "required evidence" test and found that because the offense of aggravated assault requires proof of at least one additional fact (assault) which the offense of robbery by intimidation does not, the aggravated assault conviction does not merge into the robbery by intimidation conviction. As to his other argument, the Court held that while the state was required to prove appellant was a party to the crimes, it was not required to allege these provisions in the indictment. Moreover, a conspiracy may be proved though not alleged in the indictment or accusation. Thus, the presentation to the jury of the theories of parties to the crime and conspiracy did not constitute a constructive amendment to the indictment in this case.

Custodial Statements

Simpson v. State, A08A1562

Appellant was convicted of numerous crimes, including armed robbery and false imprisonment. He challenged the admission of his custodial statements, alleging that it was not voluntary because it was induced by an officer's promise that he would get a "favor" if he cooperated with the police and that the officer should have stopped questioning him when his father asserted appellant's right to an attorney. The record shows that appellant, a 15-year-old, wanted his father to be present during the interview, so the officer postponed the interview until his father arrived. Both appellant and his father signed the waiver of rights form. During the interview, the officer

said that one of the co-defendants had told him the truth but the other two did not, so they would get no "favors" from him. When asked about this statement, the officer testified that he was not telling appellant that if he told him the truth about the robbery, he would get a favor. The officer testified that instead, he was telling appellant that the other men would no longer have the chance to talk to him and "come clean" because they had lied to him and "wasted [his] time." The record further showed that appellant's father was very emotional and was "thinking aloud" while he, his wife and appellant discussed whether appellant needed an attorney. Neither appellant nor his father testified or presented any evidence that showed that they told the officer that they wanted to speak to an attorney.

The court found the arguments to be without merit. First, the Court stated, the promise of a benefit that will render a confession involuntary must relate to the charge or sentence facing the suspect and the phrase 'hope of benefit' generally means the reward of a lighter sentence. The officer's testimony supported the trial court's conclusion that the officer's reference to "favors" did not suggest that appellant might receive a lighter sentence or otherwise render his statement inadmissible. Second, if as here, appellant was properly informed of and knowingly waived his Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney. Since appellant did not make an unambiguous or unequivocal request for counsel, the officer had no obligation to stop questioning him.

Photo Line-up

Shabazz v. State, A08A1339

Appellant was convicted of armed robbery and other offenses. He challenged the admission of the victim's pre-trial and trial identification of him. First, he argues that the array was impermissibly suggestive because his picture was included based on an unverified, anonymous tip. However, he cited no authority to support his claim that the police cannot use an anonymous tip to prepare a lineup. Moreover, he did not show that the victim knew about the tip before she saw the lineup or that the tip influenced her selection in any way. Second, he argued that the investigating officer told

the victim that he had been arrested on other charges and thus, in effect, that she picked the "right guy." The Court found that such a statement is a practice the Court "has frowned upon" in other cases, but even a "right guy" reference will not taint an in-court identification if that identification does not depend upon the prior identification but has an independent source. Here, the investigating officer only told the victim that the appellant had been arrested on other charges and only after she had picked him out of the photo array. Also, the victim testified that while the information made her "feel better" about her identification, she did not view the statement as confirmation that she had picked the "right individual." Finally, the victim had ample opportunity to view the appellant during the course of the robbery and when asked how she recognized appellant at trial, she testified unequivocally: "Because he's the one that robbed me." Therefore, neither the trial identification, nor the victim's pre-trial identification, was tainted.