Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 6, 2015

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THIS WEEK:

Jury Charges; Voluntary Manslaughter

Johnson v. State, S15A0937 (10/19/15)

Appellant was found guilty but mentally ill of malice murder and other crimes in connection with the shooting death of his stepfather. He contended that the trial court erred in failing to give his requested charge on voluntary manslaughter. The Court disagreed.

The evidence showed that appellant lived in a home with his mother and the victim. The victim believed that appellant was using his mother financially and instigated many fights with the victim. Appellant's mother at some point told appellant he needed to move out and that she was in the process of finding a new place for her to live, apparently away from both the victim and appellant. According to appellant's own statements, he came home one evening and discovered the furniture missing and the victim sitting in a lawn chair inside the home, watching television, drinking a beer, and laughing. Appellant claimed that he became angry because he believed the furniture had been repossessed due to the victim's lack of financial responsibility and the victim was laughing about it. appellant then went to his room, took out his new gun, unlocked the hammer with the safety key, loaded it, and went back to where the victim was sitting. Appellant said that he "snapped" and shot the victim four times in the back of the head.

Appellant argued that he was provoked to kill his step-father due to passion — anger and frustration — caused by his antagonistic relationship with the victim, the family's financial problems, and the victim's laughter when Appellant arrived home on the evening of the shooting. But, the Court stated, it has consistently held that, as a matter of law, these sorts of provocations are not sufficiently serious to provoke a "sudden, violent, and irresistible passion" that would compel a reasonable person to kill. Thus, the evidence of appellant's generally antagonistic relationship with the victim, even to the extent it involved physical confrontations, did not require a voluntary manslaughter charge. Moreover, this was especially so given the lengthy interval between the past altercations and the killing. Likewise, arguments over money are not serious provocations requiring a voluntary manslaughter charge, nor in general are any words alone sufficient. As a matter of law, angry statements alone ordinarily do not amount to "serious provocation" within the meaning of O.C.G.A. § 16-5-2(a). Finally, the Court

stated, even assuming that the victim was laughing at appellant and not at the television, laughter does not constitute serious provocation. Accordingly, the Court concluded, there was no evidence of serious provocation in this case, where appellant's anger was not triggered by an immediate argument and instead of just pulling out a gun and shooting, he had to go to his bedroom to get his gun, unlock the hammer, load the gun, and return with it to the living room, where he shot the unarmed, television-watching victim four times in the back of head without exchanging a word.

Involuntarily Medicating the Mentally Ill Defendant; Competency to Stand Trial

Warren v. State, S15A0795 (10/19/15)

Appellant was indicted for shooting five people, killing four of them and paralyzing the fifth. The State gave notice that it is seeking the death penalty. Appellant filed a special plea of mental incompetence to stand trial. The State filed a motion seeking to medicate appellant involuntarily in an attempt to make him mentally competent to stand trial. After an evidentiary hearing, the trial court granted the motion and appellant appealed.

In another lengthy opinion (53 pages) written by Justice Nahmias, the Court reversed and remanded with directions. Briefly stated, the Court found that in *Sell v. United States*, 539 U. S. 166 (2003), the Supreme Court of the United States established a four-part test for determining the "rare" instances when it is constitutionally permissible to involuntarily medicate a mentally ill criminal defendant for the sole purpose of making him competent to stand trial. Under that test, the State must demonstrate the following: (1) important governmental interests are at stake; (2) involuntary medication will significantly further those governmental interests; (3) involuntary medication is necessary to further those governmental interests; and (4) the administration of the drugs to be used is medically appropriate for the defendant. The Court found that, in agreement with the majority of other courts, the first part of the test generally presents a legal question and thus should be reviewed de novo on appeal, while the remaining three parts present primarily factual questions and thus should be reviewed only for clear error by the trial court. The Court also held that the State should bear the burden of proof on the factual questions involved under the clear and convincing evidence standard.

In reviewing the trial court's application of the four-part test enunciated in *Sell*, the Court found that the trial court's findings as to whether there were important government interests at stake, was incomplete. However, the trial court did not err in its conclusion that the State demonstrated important governmental interests in rendering appellant competent to stand trial, and those interests are not offset by any special circumstances of the case.

The second part of the *Sell* test requires the trial court to determine that involuntary medication will significantly further the governmental interests in bringing the defendant to trial. This Court stated that this inquiry has two components. The court must find that administration of the drugs is substantially likely to render the defendant competent to stand trial and, at the same time, that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair. The Court held that this second part of the Sell test can be properly applied only in relation to an *individualized treatment plan* that specifies, at a minimum, (1) the drug or drugs the treating physicians are permitted to use on the defendant, (2) the maximum dosages that may be administered, and (3) the duration the drugs may be used before the physicians report back to the court.. And here, the trial court's order with respect to this second part of the test was "plainly insufficient" because it did not contain such an individualized treatment plan.

The third part of the *Sell* test requires the trial court to conclude that involuntary medication is necessary to further the governmental interests in proceeding with the defendant's prosecution. To reach this conclusion, the court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results, and the court also must consider less intrusive means for administering the drugs, e.g., a court order to the defendant backed by the contempt power, before considering more intrusive methods. Here, the Court found, as with its other rulings, the trial court's order simply recited a portion of the relevant language from *Sell*: "Involuntary medication is necessary to further those interests and any alternative less intrusive treatments have been and are unlikely to achieve substantially the same results." These findings were again held to be insufficient to allow proper appellate review, and the, the Court stated, the trial court also failed to fully address this part of the *Sell* test.

The fourth and final part of the *Sell* test requires the trial court to conclude that administration of the drugs is medically appropriate, i.e., in the patient's best medical interest in light of his medical condition. The Court noted that this part of the test is closely related to the second part. However, the Court found, the findings of the trial court were merely conclusory without any supporting factual basis. In other words, the court's order simply recites that "[t]he administration of medications is medically appropriate and involuntary medication is in Defendant's best interest in light of his medical condition," without identifying what medications in what dosages for what durations the court was blessing. Thus, there must be a specific treatment plan for the defendant's particular medical condition in order to satisfy the second and fourth parts of the *Sell* test.

Accordingly, the Court concluded that the trial court's order was insufficient in numerous respects to justify appellant's involuntary medication for the sole purpose of making him mentally competent to stand trial for the very serious crimes he is accused of committing. Therefore, it vacated the trial court's order and remanded the case for further proceedings in light of this opinion.

O.C.G.A. § 17-10-6.2(c)(1)(C); Relevant Similar Transactions

Evans v. State, A15A0860 (10/7/15)

Appellant was convicted of one count of child molestation and one count of sexual exploitation of children. In sentencing, the trial court refused to deviate from the mandatory minimum sentence for child molestation under O.C.G.A. § 17-10-6.2(c)(1)(C) because the trial court found that appellant's conviction for sexual exploitation of children was a "relevant similar transaction." Appellant argued that the trial court erred in finding that the sexual exploitation of children conviction was a relevant similar transaction for

purposes of O.C.G.A. § 17-10-6.2(c)(1)(C) because two charges joined for trial are not similar transactions as a matter of law and the legislature intended for "relevant similar transactions" to be limited to independent, extrinsic acts separate from the tried offenses. The Court disagreed.

First, the Court noted, the phrase "relevant similar transaction" is not defined by O.C.G.A. § 17-10-6.2. However, the Court found, the Legislature's intent is clear. The Legislature unambiguously considers the offenses of sexual exploitation of children and child molestation to be relevant similar transactions because they are both defined as "sexual offenses" for O.C.G.A. § 17-10-6.2 purposes. Moreover, it is well established that, at sentencing, the trial court could consider *any* evidence that was properly admitted during the guilt-innocence phase of the trial. And, while appellant relied on O.C.G.A. § 24-4-404 to support his contention that the phrase "similar transaction" has generally been understood to mean independent, extrinsic acts, the Court found that he "fails to appreciate that …the law he relies upon governs the admissibility and limited purpose of evidence of similar transactions in the guilt-innocence phase, not evidence used at the sentencing phase."

Finally, the Court found, it must read O.C.G.A. § 17-10-6.2 in conjunction with O.C.G.A. § 24-4-414, which provides that in a criminal proceeding in which the defendant is accused of a child molestation offense, evidence of the defendant's commission of another offense of child molestation, the definition of which includes the offense of sexual exploitation of children, shall be admissible and may be considered for its bearing on any matter to which it is relevant. And here, the trial court denied appellant's motion to sever the child molestation count from the two counts of sexual exploitation of children. Had the trial court granted his motion, there would have been no question that the evidence underlying his sexual exploitation of children was admissible as a similar transaction in the trial on the child molestation count. Accordingly, since severance of the similar sexual offenses was not required, it seems implausible that the Legislature would allow a defendant convicted of more than one sexual offense to be eligible for a downward deviation from the mandatory minimum sentence simply because the offenses were tried together, rather than severed from one another. Therefore, the Court concluded, the phrase "relevant similar transaction" under O.C.G.A. § 17-10-6.2(c)(1)(C) includes a conviction for a sexual offense charged within the same indictment as the offense for which a deviation from the mandatory minimum sentence is considered.

Prior Difficulties; Victim as Aggressor

Agyemang v. State, A15A1364 (10/8/15)

Appellant was indicted for family violence battery, simple battery, simple family violence battery, disorderly conduct, and two counts of cruelty to children in the third degree. However, he was convicted of only simple battery. The evidence showed that while bathing their ten-year old special needs daughter, appellant became tired of holding the child aloft so his wife could clean her, and he dropped the child in the tub. His wife testified that she "had to hit him" to express her frustration at his act of dropping the child. His wife testified such hitting was "normal" for their relationship. However, she testified that appellant then retaliated by hitting her repeatedly all over her body while their child remained in the bathtub.

Appellant argued that the trial court erred in denying his motion to introduce prior difficulties between himself and his wife that would demonstrate that she had "a history of unprovoked violence" towards him. The Court agreed. The Court stated that a defendant's right to introduce evidence of prior acts by the victim against him is still contingent upon the defendant making out a prima facie case of justification. To make such a prima facie showing, the defendant must show that the victim was the aggressor, that the victim assaulted the defendant, and that the defendant was honestly seeking to defend himself. Such evidence is admissible to show the victim's character for violence or tendency to act in accordance with her character as it relates to the defendant's claim of justification.

Here, the victim testified that she struck him first and that her act of striking him had nothing to do with any act of aggression by appellant. Also, appellant testified that he struck her only in his attempt to defend himself from his wife's blows. Thus, the Court found, since appellant set forth a prima facie case of self-defense, the trial court was authorized to allow him to present evidence of his prior difficulties with the victim in order to support his justification claim. And, contrary to the State's assertion, the fact that he also argued that he did not intentionally strike his wife when attempting to protect himself did not render his prima facie case of self-defense invalid.

Furthermore, the Court determined, the trial court erred in finding that the evidence was more prejudicial to the victim than probative. Here, the victim testified at trial that she had hit appellant in the past after disagreements in their marriage and that she was the initial aggressor during the present incident. In light of such evidence, it would not be unfairly prejudicial to allow the jury to hear of specific acts of violence she committed towards her husband in the past. Further, the evidence of the victim's prior violent acts towards appellant was more probative than prejudicial. For a probative connection between the prior difficulties and the present case to exist, there must be some link of association, something which draws together the preceding and subsequent acts, something which gives color of cause and effect to the transaction, and sheds light upon the motive of the parties. Here, the evidence shed light on how the victim reacted to appellant during arguments in their marriage. Further, the evidence of prior difficulties was probative for its impeachment value. The victim testified that although she first hit appellant, that such hitting was not forceful. Appellant testified otherwise, explaining that the victim was "throwing punches" at him and that she hit him with a pail. He was entitled to impeach her testimony with similar acts of violence she had exhibited towards him in the past.

Thus, the Court concluded, in light of the conflicts in the testimony and the fact that the jury obviously believed portions of appellant's testimony when it acquitted him of all other counts, save for the single count of simple battery, it found that the trial court's exclusion of this evidence was not harmless.. Accordingly, appellant's conviction was vacated and the case remanded for a new trial.

Speeding; Missing Witnesses

Lafavor v. State, A15A0902 (10/8/15)

Appellant was convicted of speeding. The evidence showed that the officer clocked him on an interstate at 108 mph using a laser speed detection device. Appellant was arrested

and another officer arrived on the scene and transported him to jail. At trial, appellant testified that he was not speeding and that the transporting officer would have corroborated his claim that the arresting officer deleted the laser-speed-detection-device's recording of the exact speed of his vehicle.

Appellant contended that the trial court erred in admitting the laser-speed-detection-device evidence. Specifically, the State failed to comply with the requirements for admission of such evidence under O.C.G.A. § 40-14-17. The Court disagreed.

The Court noted that the statutory text of O.C.G.A. § 40-14-17 provides that a certified copy of the Department's "list of approved models . . . shall be self-authenticating" for adjudicatory purposes, but does not dictate that "only such a document can supply evidence that the device was so approved." In fact, circumstantial evidence arising from the testimony of the trained and certified individual who operated the machine and performed the test is sufficient to meet the statute's authenticating procedures. And here,, the arresting officer testified that he was certified to use laser-speed-detection devices and that the Department of Public Safety had approved the devices used by his police department. The officer also provided lengthy testimony regarding his familiarity with calibrating the device and, more specifically, the fact that at the start of his shift on the night in question, he calibrated the device that he ultimately used to clock appellant's vehicle. Given these particular circumstances, the State sufficiently complied with the authenticating procedures under O.C.G.A. § 40-14-17.

Appellant also made a variety of challenges regarding the fact that the transporting officer had moved to Ohio. First, he argued that the trial court abused its discretion for failing to grant him a continuance of the trial because the State failed to provide him with the officer's Ohio address. But, the Court found, appellant failed to meet several of the requirements delineated in O.C.G.A. § 17-8-25, including showing that the transporting officer resided within 100 miles of the place of trial and that he could procure the officer's testimony at the next term of court. Given these particular circumstances, the trial court did not abuse its discretion in denying his request for a continuance to secure the transporting officer's testimony.

Next, appellant contended that the trial court erred in denying his request for a continuance because the State violated its discovery obligations when it failed to provide him with the transporting officer's out-of-state address. The Court noted that appellant opted into reciprocal discovery, and more than a year before trial, the State disclosed its initial witness list, which consisted of only the arresting and transporting officers. The list indicated the police department's address and telephone number as contact information for both of the officers. And this information was all the State was required to disclose under O.C.G.A. § 17-16-8(b). Furthermore, the State on the first day of trial told the trial court that the transporting officer had moved to Ohio and that she did not intend to call him as a witness. Thus, the Court found, although appellant argued that his right to a fair trial was denied by the State not providing more detailed contact information for the transporting officer, the State, acting in its role as the prosecution, has no obligation to locate defense witnesses.

Appellant also argued that the State's failure to provide detailed contact information for the transporting officer constituted a violation of *Brady v. Maryland*. But, the Court stated, in order to prevail on a *Brady* claim, a defendant must show that the State possessed evidence favorable to the defendant; the defendant did not possess the evidence nor could he obtain it himself with any reasonable diligence; the prosecution suppressed the favorable evidence; and had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different. Here, the State did not suppress any information, but simply did not provide appellant with detailed contact information for a witness that he was more than aware of and which could have been discovered had he exercised reasonable diligence. Given these particular circumstances, the trial court did not err in ruling that there was no *Brady* violation.

Restitution; Apportionment of Liability

Hettrick v. State, A15A0868, A15A0869 (10/8/15)

Appellants, Michael and James Hettrick, were tried together and convicted of theft by taking. James Hettrick argued that the trial court erred in ordering him jointly and severally liable for the amount of restitution because he was less culpable than his co-defendant, Michael Hettrick. The Court disagreed.

The Court stated that it is within the sound discretion of the trial court to sentence within the limits allowed by law; the sentence of one joint defendant is irrelevant in the sentencing of the other. The amount of restitution ordered in this case — $24,000, for which appellants were jointly and severally liable — was within the limits allowed by law. The amount did not exceed the victim's damages, which the trial court found to be $42,443.10. And in setting this amount, the trial court specifically considered the factors set forth in O.C.G.A. § 17-14-10. In the restitution order, the trial court also specifically noted that James and Michael Hettrick "were each parties to the crime of the other[.]"

Under O.C.G.A. § 17-14-7(c), where a court ordering restitution "finds that more than one offender has contributed to the loss of a victim, the court *may* make each offender liable for payment of the *full amount* of restitution or *may* apportion liability among the offenders to reflect the level of contribution to the victim's loss and economic circumstances of each offender." (Emphasis supplied.) The language of this Code section permitted, but did not require, the trial court to apportion liability to reflect James Hettrick's level of contribution to the victim's loss. In so holding, the Court distinguished *Rice v. State*, 226 Ga.App. 770 (1997), because, unlike here, that decision involved a criminal defendant who had been convicted of a different and lesser offense than his co-defendants.

Ineffective Assistance of Counsel; Pre-Arrest Silence

Turner v. State, A15A1291 (10/8/15)

Appellant was convicted of child molestation and enticing a child for indecent purposes. He contended that his counsel rendered ineffective assistance by failing to object to comments concerning his pre-arrest silence. The evidence showed that after the victim's outcry to her mother, the mother confronted appellant. Then the mother called her pastor and the police. The pastor and his wife arrived before the police and engaged appellant in a conversation about the allegations. Before the police arrived, appellant fled, stating, that he could not "go to prison for the rest of [his] life."

Initially, the Court rejected the State's arguments that the comments were admissible under *Gibson v. State*, 291 Ga.App. 183, 187-188 (3) (2008), because the Supreme Court overruled the holding in *Gibson* in *Reynolds v. State*, 285 Ga. 70 (2009). Nevertheless, the Court found no reversible error. First, several of the comments were permissible comments on his flight rather than impermissible comments on his silence.

Second, several of the comments concerned appellant's failure to answer questions during conversations with witnesses. As to these, the Court stated that they were not squarely governed by the principle prohibiting mention of a defendant's silence or failure to come forward because appellant was not silent and did not fail to come forward. Rather, he willingly engaged in conversation with his wife, his pastor, and the pastor's wife, making certain admissions, answering certain questions, and supplying detail about the molestation. The testimony of these witnesses about appellant's silence simply highlighted the inconsistencies between what appellant told them and what he failed to say in the same conversations. The testimony was not subject to the bright-line rule.

Finally, the Court held, counsel's failure to object to any comments that were improper did not entitle appellant to a new trial, given the overwhelming evidence of his guilt.

Party to the Crime; Sufficiency of Evidence

Higuera-Guiterrez v. State, S15A0834 (11/2/15)

Appellant was convicted of two counts of felony murder, two counts of voluntary murder, conspiracy to traffic cocaine, and possession of a firearm during the conspiracy to traffic cocaine. The evidence showed that Vincente, a close friend of appellant, had five kilos of cocaine at the Magnolia Apartments. He supplied two kilos to Hernandez in another apartment at the complex. Hernandez then attempted to sell the kilos, but after receiving a large amount of cash, he shot and killed one of the victims. Another victim was also fatally shot and Hernandez was wounded in a gunfight. Hernandez fled and hid in some bushes until he was taken to the hospital by others. Hernandez was overheard during the drive to the hospital to tell another to instruct Vincente and appellant to retrieve the money from the bushes outside of the apartment where he was picked up. Another witness also testified that it was appellant's responsibility to retrieve money, drugs and weapons from the bushes after the shootout. Appellant also followed Hernandez to the hospital and later met with others to discuss the retrieval of the drugs left behind by Hernandez.

Appellant contended that the evidence was insufficient to support his convictions. The Court agreed. Here, the Court found, the State failed to elicit any evidence showing that appellant participated in the criminal scheme either before or during the actual commission of the crimes. The only evidence that the State presented for this critical time period was the fact that appellant lived in the Magnolia Apartments, where testimony indicated that the drugs were originally delivered. There was no testimony, however, that the drugs were taken to appellant's apartment, and, as a result, the best that could be inferred was that the drugs were taken somewhere within the complex. As for the time period in which the drug transaction and the shootings occurred, the State presented no evidence that appellant was present. As a result, there was simply no competent evidence that appellant was present or otherwise involved in the planning or execution of the underlying drug transaction or subsequent shootings. Therefore, the evidence was insufficient to support his convictions.

The Court noted that although the State and the trial court relied on appellant's actions and knowledge *after* the commission of the crimes to support his convictions, this evidence was insufficient to satisfy the standard of O.C.G.A. § 16-2-20. At best, it showed that appellant was an accessory after the fact, not a party to the crimes. At common law and under modern practice, an accessory after the fact is not considered an accomplice to the underlying crime itself, but is guilty of a separate, substantive offense in the nature of obstruction of justice. The State, however, did not charge appellant with being an accessory after the fact.

Venue; Sufficiency of the Evidence

Twitty v. State, S15A0906 (11/2/15)

Appellant was tried and convicted in Richmond County of murder of Mosley and other related offenses. The evidence showed that appellant and two codefendants put Mosely in the trunk of Mosely's car and drove him to a park known as the "Lock and Dam." In or near the park, they backed the car down a boat ramp, where appellant pulled Mosley from the trunk, fired three shots (one to Mosley's head), and dumped him into the water. The next morning, a local fisherman found Mosley's body in the water at the Lock and Dam.

Appellant contended that the evidence of venue was insufficient. The Court agreed and reversed his convictions. Here, the Court found, the cause of death — the shooting of Mosley — was inflicted on a boat ramp in or near the Lock and Dam. The evidence showed that appellant made several statements, accompanied investigators to a particular boat ramp in the Lock and Dam, and admitted that Mosley was shot on that boat ramp. A codefendant testified as well that Mosley was shot on a boat ramp in the vicinity of the Lock and Dam. Mosley's body was found in the water at the Lock and Dam, a location consistent with his having been shot on a boat ramp in or near the park. And although no forensic evidence of the shooting was found at the boat ramp to which appellant accompanied the investigators, there was no evidence that the cause of death was inflicted anywhere other than the boat ramp. The State's theory of the case pointed to the boat ramp as the scene of the shooting. And there was no evidence that the county in which the boat ramp was located could not be ascertained. Proper venue under O.C.G.A. § 17-2-2(c) for the murder lay, therefore, in the county in which the boat ramp is situated. Venue for the other crimes of which appellant was convicted necessarily lay in the same county. The State failed, however, to adduce any evidence identifying that county.

The State, however, argued that there was evidence that Mosley's body was found in Richmond County. However, the county in which a body is found establishes venue for a homicide only when "it cannot be readily determined in what county the cause of death was inflicted." O.C.G.A. § 17-2-2(c). The State also argued that there was evidence that Richmond County law enforcement officers undertook to investigate the killing of Mosley, citing *Chapman v. State*, 275 Ga. 314, 317-318 (4) (2002). Thus, the State argued, this evidence was some proof that the crime was committed in Richmond County. But, the Court stated, even if evidence of the

county in which an investigating officer is employed might be sufficient in some cases without more to establish venue, the evidence here that Richmond County officers were involved in the investigation was no evidence of the location in which the cause of death was inflicted, which was, of course, the relevant location for venue purposes. Here, the officers were not called to respond to that location, but instead to the separate location at which the body was found, which indisputably was in Richmond County. That Richmond County law enforcement officers would be involved in an investigation of the discovery of a body in Richmond County was unsurprising, and their involvement proved nothing about the location in which the cause of death was inflicted, especially when evidence showed clearly that the cause of death was inflicted somewhere other than the place in which the body was found. The State further argued that there was evidence that Mosely was still alive when he was dropped into the water. But, the Court stated, even if the place in which death occurred was uncertain, the place in which the cause of death was inflicted was not. Accordingly, the State failed to prove venue beyond a reasonable doubt.

In so holding, the Court noted that its reversal is not a bar to retrial, and urged prosecutors to make sure that they do not overlook this essential part of their cases.

Venue; Sufficiency of the Evidence

Martin v. McLaughlin, S15A0883 (11/2/15)

In 2006, appellant was convicted in Dawson County of aggravated sexual battery, aggravated child molestation, and child molestation. The habeas court denied his claim that he received ineffective assistance of counsel in his direct appeal because his appellate lawyer never raised a claim of error with respect to proof of venue.

Initially, the Court found, appellant failed to put the entire record of his trial — that is, a comprehensive and complete record of all of the evidence that was put before his trial jury, which would have been the very record upon which his appellate lawyer would have had to make any claims of error about the sufficiency of the proof — before the habeas court. Although appellant brought the transcripts of his trial into the habeas court, he did not bring forward an exhibit that was admitted into evidence at his trial. Importantly, that exhibit — a video recording of an interview of the victim, at whose home appellant committed his crimes — might well have included evidence of venue. As a petitioner in habeas, appellant bore the burden of proof, and with respect to claims of ineffective assistance of counsel, a silent or ambiguous record is not enough to carry the petitioner's burden.

But, the Court found, even with the evidence before it, there was sufficient evidence to prove venue. First, an investigator with the Dawson County Sheriff's Office testified that she was "on duty and working as an investigator with Dawson County" when she was dispatched to the victim's home to investigate the crimes that appellant committed there. Second, the victim's father testified that the restaurant at which his daughter met appellant was near their home, but the restaurant was not in Dawson County. Instead, the father explained, the restaurant was "just right across the line" in Pickens County. The Court stated that this testimony, while ambiguous about the location of the home, could lead a reasonable jury to understand the father to mean that the restaurant was in Pickens County, "just right across" the Pickens-Dawson line from the home of the victim. And ambiguities in the trial evidence must be resolved by the trial jury, not habeas or appellate courts.

Third, and most importantly, the victim was asked at trial "what county [her] house is in," and she responded: "[I]n Dawsonville." Because there is no "Dawsonville County," the jury reasonably could have taken the response in one of two ways. The jury could have understood the victim to mean that she lived in Dawson County, or it could have understood her response as not actually responsive to the question and to mean only that she lived in the City of Dawsonville. The victim in this case was, at the time of her testimony, thirteen years of age, and she was described in the trial record as being "soft-spoken." She often responded to questions by nodding her head, and she had to be repeatedly reminded to speak into the microphone at the witness stand. The jury was entitled to decide for itself the most reasonable way in which to understand her ambiguous testimony about her home in "Dawsonville" County, and it would not have been unreasonable for the jury to decide that she meant that her home was in Dawson County. Viewed in the light most favorable to the verdict, this evidence would have been sufficient to authorize a rational jury to find beyond a reasonable doubt that appellant committed his crimes in Dawson County.

Since there was sufficient evidence of venue, the Court found that appellant failed to show that his appellate lawyer rendered ineffective assistance by failing to raise proof of venue on direct appeal. Accordingly, the habeas court did not err when it denied the petition for a writ of habeas corpus.

Search & Seizure; Officer Safety

State v. Allen, S14G1765 (11/2/15)

Scott and Allen were charged with possession of marijuana. The facts, briefly stated, showed that a police officer initiated a traffic stop of the car being driven by Scott, in which Allen was a passenger. About eight minutes into the stop, the officer completed writing the warning ticket and radioed for a computer records check on both Scott and Allen. While awaiting the response based on Allen's South Carolina identification card, the officer conducted a free-air dog sniff of the car, and about 11 1/2 minutes into the stop, the dog alerted, giving the officer probable cause to continue the detention of Scott and Allen and to search the car. The search led to the discovery of almost 10 pounds of marijuana in the trunk. The trial court granted the motion to suppress and the Court of Appeals affirmed, 4-3, with the majority opinion holding that "the officer — having accomplished the tasks related to his investigation into lane infractions and having no reasonable, articulable suspicion of criminal activity aside from the traffic violation — unreasonably prolonged the duration of the traffic stop when he initiated the computer check." *State v. Allen*, 328 Ga.App. 411, 415-416 (2014).

The Court noted that there was no dispute that the vehicle was lawfully stopped for lane change violations. Citing *Rodriguez v. United States*, __U.S.__, 135 S.Ct. 1609,191 L.E.2d 492 (2015), the Court stated that the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission" — to address the traffic violation that warranted the stop, and attend to related safety concerns. "Related safety concerns" involve both roadway and officer safety. However, a dog sniff of a traffic-

stopped vehicle is not fairly characterized as part of the officer's traffic mission because it is a measure aimed at detecting evidence of ordinary criminal wrongdoing.

Nevertheless, the Court found, asking a passenger for identification and then running a computer records check on the identity provided is unlike a dog sniff because it is squarely related to an officer's safety while completing the mission of the traffic stop. Thus, the Court concluded, the officer's computer records check on Allen was an ordinary officer safety measure incident to the mission of the traffic stop, and it therefore could permissibly extend the stop for a reasonable amount of time. Accordingly, the trial court erred as a matter of law in concluding otherwise.

Moreover, the Court stated, the Court of Appeals erred because the sequence of the officer's actions during a traffic stop is not determinative; instead, the primary question is whether the activity at issue was related to the mission of the stop. If it is not, like a dog sniff, it can be done only concurrently with a mission-related activity, or it will unlawfully add time to the stop. If, on the other hand, the task is a component of the traffic-stop mission, it may be done at any point during the stop. It does not matter if a mission-related activity takes place as soon as the stop begins or, as was the case here, after other mission-related activities had been completed. Moreover, the Court stated, the officer need not articulate a subjective fear for his safety in order to run such computer checks. "An officer in today's reality has an objective, reasonable basis to fear for his or her life every time a motorist is stopped." Accordingly, because the dog sniff was conducted while the officer was waiting for the return of the computer records check on Allen's identification, which was an ordinary officer safety measure related to the mission of the traffic stop, the dog sniff did not prolong the stop *at all*. (Emphasis in original).

But, the Court stated, that did not end the inquiry because the overall duration of the traffic stop must always be reasonable in light of all of the circumstances. In other words, the authority for the seizure ends when tasks tied to the traffic infraction are — or reasonably should have been — completed. Thus, while it is generally appropriate for an officer to conduct a records check on passengers as a component of the traffic stop's mission, conducting that task, like conducting all other mission-related tasks, must not lengthen the traffic stop beyond what is reasonable. Here, the Court found, the records check on Allen's South Carolina identification card had been underway for only about three and a half minutes before the drug dog alerted on the car, providing reasonable suspicion for the ongoing seizure of Scott and Allen (and the result of the check was reported within six or seven minutes). The Court found this was not an unreasonable time to obtain a records check on a passenger's out-of-state identification document. Furthermore, the record showed that the officer completed all of the mission-related steps of the traffic stop in a reasonably diligent manner. The entire initial seizure — from the vehicle stopping to the dog alerting — took about 11 1/2 minutes. Whether the duration of a traffic stop was reasonable is often a highly fact-specific inquiry, but ultimately it is a question of law, and, the Court noted, similar stops of this length (and much longer) have routinely been deemed lawful. Therefore, the trial court and the Court of Appeals majority erred in concluding that the traffic stop at issue violated Allen's and Scott's Fourth Amendment rights and in ruling that the resulting drug evidence must be suppressed.

Jury Charges; Sufficiency of the Evidence

Wetzel v. State, S15A0650 (11/2/15)

Appellant was convicted of computer pornography, tracking the language of O.C.G.A. § 16-12-100.2(d)(1) (Count 1) and electronically furnishing obscene material to minors, tracking the language of O.C.G.A. § 16-12-100.1(b)(1)(A) (Count 3). He was acquitted of child molestation (Count 2). The evidence showed that appellant was a high school paraprofessional who engaged in highly inappropriate, sexually oriented electronic communications with a 15-year-old student, which included emailing her two photographs of his erect penis.

Appellant first challenged his conviction for computer pornography. In Count 1 of the indictment, the State alleged that appellant "did intentionally utilize an electronic device, to wit: a cellular phone, to seduce, solicit, and entice [S.B.J.], a child under 16 years of age, to engage in the sending and receiving of nude photographs, conduct that is, by its nature, an unlawful sexual offense against a child; in violation of O.C.G.A. § 16-12-100.2(d)[.]" The issue was the meaning of the final clause in O.C.G.A. § 16-12-100.2(d)(1) (2011) — "or to engage in any conduct that by its nature is an unlawful sexual offense against a child." The Court held that in saying that a person violates § 16-12-100.2(d)(1) by using an electronic device to seduce, etc. a child in order "to engage in any conduct that by its nature is an unlawful sexual offense against a child," the General Assembly was requiring the State to allege and prove that the defendant's conduct violated another specific criminal law; not, as the State argued, allowing the jury in each case to decide retroactively whether it believed the conduct at issue was "offensive."

Appellant also argued that the State was required to identify at least some underlying crime, and thus, the jury instruction on Count 1 was incomplete. The Court agreed. Although the instruction tracked the relevant statutory language, it did not give the jury any inkling of the underlying offense on which Count 1 was allegedly based or refer to the elements of any such offense. Nor did the indictment, the material allegations of which the trial court elsewhere directed the jury to consider, identify the "unlawful sexual offense" referenced in Count 1. Thus, the instruction failed to give the jury proper guidelines for determining guilt or innocence on Count 1. The Court further found this error was exacerbated when the State's closing argument told the jury that, as the "voice of the community" the jury had the power to create and then retroactively enforce an "unlawful sexual offense" based solely on its feelings, or its beliefs regarding how the community would feel, about appellant's conduct. Finally, the Court held, the errors were not harmless.

Going further, the Court also held that the State could not retry appellant on this Count. In interpreting O.C.G.A. § 16-12-100.2(d)(1), the Court found that it is not read naturally to allow the "unlawful sexual offense" in the final clause to be one of the four types of offenses specified earlier in the statute. Thus, the Court rejected the State's suggestion that the "unlawful sexual offense against a child" alleged in Count 1 could be the child molestation offense alleged in Count 2.

The Court also rejected the State's contention that the "unlawful sexual offense against a child" alleged in Count 1 could be the electronically furnishing obscene material to minors offense alleged in Count 3. Appellant's violation

of § 16-12-100.1(b)(1)(A), as alleged in Count 3, was complete as soon as he sent the pictures of his erect penis to S.B.J., thereby furnishing someone he knew or should have known was a minor with pictures depicting "sexually explicit nudity," regardless of whether or how S.B.J. responded to his pictures. Moreover, even assuming that the nude photographs themselves could serve as the seduction, solicitation, or enticement and further assuming that appellant sent them intending to seduce, solicit, or entice S.B.J. to send sexually explicit photos of herself back to him (since the allegations of Count 1 spoke of "sending and receiving of nude photographs"), appellant — an adult — would not violate § 16-12-100.1(b)(1)(A) by receiving sexually explicit pictures from a minor. Accordingly, as a matter of law, the violation of O.C.G.A. § 16-12-100.1(b)(1)(A) alleged in Count 3 could not be the "unlawful sexual offense" alleged in Count 1.

And finally, the State did not identify any other "unlawful sexual offense" within the meaning of O.C.G.A. § 16-12-100.2(d)(1) that it contended was properly alleged by the indictment against appellant and was then proved by the evidence presented at trial. "And like the jury that heard his case, we do not have the authority to declare [appellant]'s conduct illegal simply because we find it detestable."

Appellant also argued that the evidence presented at trial was insufficient to support this conviction on Count 3 because there was no evidence that he electronically furnished his nude pictures to S.B.J. through the operation of a "computer bulletin board." He similarly argued that the jury instruction on this count was defective because the jury was not told that it could find him guilty only if he operated a computer bulletin board. The Court disagreed.

The Court noted that at the time of appellant's alleged violation in 2011, "electronically furnishes" was defined, in relevant part, as "[t]o make available by allowing access to information stored in a computer, including making material available by operating a computer bulletin board." O.C.G.A. § 16-12-100.1(a)(3)(B) (2011).Appellant argued that the word "including" as used in this provision is a word of limitation, meaning that "allowing access to information stored in a computer" is defined exclusively as "making material available by operating a computer bulletin board."

But, the Court found, in looking at the history of electronic bulletin boards, the context in which the word "including" was used, the history of the statute, and the legislative intent, O.C.G.A. § 16-12-100.1 is properly read to prohibit providing obscene materials to minors not only through operating a computer bulletin board but also through any other method of "allowing access to information stored on a computer." Sending an email is one of those other methods. When an email is sent, the information is stored on the server of the recipient's email provider, and the recipient then accesses that information from that server. Thus, when appellant emailed the pictures of his penis to S.B.J.'s Gmail address, the pictures were stored on Google's computer server, and when she opened the emails, she retrieved that information. In this way, appellant "electronically furnishe[d]" the material alleged in Count 3 to S.B.J. by providing her with access to information stored on a computer, within the meaning of O.C.G.A. § 16-12-100.1(a)(3)(B). And the jury instruction on this count tracked the language of the statute on this point. Accordingly, the evidence was sufficient to convict him on Count 3.