

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 7, 2008

Legal Services Staff Attorneys

David Fowler
Deputy Executive Director

Chuck Olson
General Counsel

Lalaine Briones
Legal Services Director

Joe Burford
Trial Services Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Coordinator

Gary Bergman
Staff Attorney

Tony Lee Hing
Staff Attorney

Rick Thomas
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Brad Rigby
Staff Attorney

THIS WEEK:

- **Out of Time Appeal; Waiver of Right to Appeal**
- **Sexual Offender Registry; Vagueness**
- **Severance**
- **Crawford; Res gestae**
- **Due Process; Delay in Appellate Process**
- **Aggravated Assault; Jury Charge**
- **Speedy Trial**
- **Right to Jury Trial**
- **Severance**
- **Aggravated Stalking; Character**
- **Motions for New Trial**
- **Judicial Comments; Identification**
- **Capital Litigation**
 - *O'Kelley v. State SOP0916*
 - *Martin v. State S08A1257*

Out of Time Appeal; Waiver of Right to Appeal

Hooks v. State, S08A1489

Appellant was convicted of two counts of malice murder and two alternative counts of felony murder involving the same victims. Although the State did not file a notice of intent to seek the death penalty, the trial court, pursuant to OCGA § 17-10-7 (c), sentenced appellant as a recidivist to four consecutive terms of life imprisonment without parole for the murder counts. In exchange for waiving all further motions and appeals and any other appellate remedies that may be available to him, the State agreed to allow appellant to be

re-sentenced on the murder counts to two consecutive sentences of life imprisonment with the possibility of parole. Appellant, four years later, filed an appeal, contending that he did not knowingly, voluntarily, and intelligently waive his rights to appellate review.

The Supreme Court agreed. Georgia allows a defendant to enter into a negotiated agreement to forego the right to seek post-conviction relief, so long as the waiver is voluntary, knowing, and intelligent. The fact that a waiver of the right to appeal is voluntary, knowing, and intelligent may be shown in two ways. First, a signed waiver may indicate that the defendant understands the right he is waiving. Second, and more important, detailed questioning of the defendant by the trial court that reveals that he was informed of his right to appeal and that he voluntarily waived that right is sufficient to show the existence of a valid, enforceable waiver. In examining whether a waiver of appeal rights was voluntary, knowing, and intelligent, the agreement must not be illusory.

Here, the murder sentences originally imposed on appellant were void and, thus, were not ever enforceable against him. Then, he purportedly waived his appellate rights in exchange for new sentences which were not void, but which nevertheless constituted the most severe punishment possible for the murder of two persons where, as here, the death penalty was not sought and sentencing as a recidivist was not available. In these circumstances, he received only that to which he was already entitled as a matter of law. Accordingly, the sentencing agreement did not have any genuine value to appellant, was not knowingly made "in full apprehension of the value of the commitments made to him" and, therefore, was the result of an illusory bargain.

Sexual Offender Registry; Vagueness

Santos v. State, S08A1296

Appellant, a convicted sexual offender, appealed from the trial court's denial of his motion to quash an indictment charging him with failure to register a new residence address as required under Georgia's sex offender registration law. He contended that the OCGA § 42-1-12 registration requirements were unconstitutionally vague in their application to the homeless. The parties stipulated that during a three month period prior to his arrest, appellant did not possess a street or route address that complied with the requirements of OCGA § 42-1-12 (a) (1). The question presented was whether the reporting requirements of OCGA § 42-1-12 provided sufficient notice to appellant of what conduct was mandated by the statute when he left his previous residence address, a homeless shelter, but possessed no new permanent or temporary residence with a street or route address.

The Due Process Clause requires that the law give a person of ordinary intelligence fair warning that specific conduct is forbidden or mandated. Vagueness may invalidate a criminal law on either of two bases: a statute may fail to provide notice sufficient to enable ordinary people to understand what conduct it prohibits or requires, or the statute may authorize and encourage arbitrary and discriminatory enforcement. Here, the Court found, by its plain language, OCGA § 42-1-12 mandates that offenders register a change of residence by providing the sheriff of their county a specific street or route address. The statute, however, contains no objective standard or guidelines that would put homeless sexual offenders without a street or route address on notice of what conduct is required of them, thus leaving them to guess as to how to achieve compliance with the statute's reporting provisions. Therefore, the Court held, the challenged registration requirement is too vague to be enforced against appellant and thus, unconstitutional. Nevertheless, the Court stated that it was not holding that all homeless sex offenders are exempt from the statute's reporting requirements. Instead, the decision rendered unconstitutional the address registration requirement as applied only to homeless sex offenders who, like appellant, possess no street or route address for their resi-

dence. It does not exempt such offenders from reporting other information required under the statute and it does not exempt homeless sex offenders who are able to provide a street or route address, such as the address of a shelter at which they are staying.

Severance

Jackson v. State, S08A0779

Appellant appealed his convictions for felony murder, armed robbery, and burglary. He contended that the trial court erred in not severing his trial from that of his co-defendant. The Court found no error. A defendant who seeks a severance must show clearly that he will be prejudiced by a joint trial, and in the absence of such a showing, an appellate court will not disturb the trial court's denial of a severance motion. The trial court must consider whether a joint trial will create confusion of the evidence and law, whether there is a danger that evidence implicating only one defendant will be considered against a co-defendant despite limiting instructions, and whether the defendants are asserting antagonistic defenses. Here, appellant claimed that his defense was hampered by his being tried with his co-defendant, because, unlike him, appellant did not enter the house where the crimes were completed. However, the Court found that appellant and his co-defendant were not pursuing antagonistic defenses, the evidence of each of their roles was clear, and the jury was instructed on the law of criminal intent and participation, parties to a crime, and a defendant's mere presence at the crime scene.

Crawford; Res gestae

Thomas v. State, S08A1778

Appellant was convicted of murdering his ex-wife. A neighbor discovered the victim, who had been shot in the head, sitting at the wheel of her car within minutes of the shooting. The neighbor called another couple of neighbors to help and called 911. The 911 operator, through the neighbors, questioned the victim regarding her injuries and in the course of the questioning, the victim stated that she was shot by "[appellant], her ex-husband." The first officer on the scene was told by the victim that appellant shot her and described appellant's vehicle. When paramedics arrived,

she repeated that appellant shot her. By the time a police investigator arrived, the victim was being treated in an ambulance and no longer able to talk. But, the neighbors told him appellant did it. The victim died in the hospital thereafter. Appellant claimed on appeal that all the testimony of the neighbors, officers and paramedics was inadmissible hearsay under *Crawford v. Washington*.

The Court found otherwise. Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Here, the trial court correctly determined that the victim's statements to the neighbors were nontestimonial in that they were elicited as part of a 911 call and were made while the incident was still ongoing and the perpetrator was at large. Similarly, the statements to the paramedics were necessary to resolve a present emergency and were not testimonial. The Court also determined that under the rules regarding admission of hearsay, the testimony of the neighbors, paramedics and first officer on the scene were admissible as part of the *res gestae*. However, the Court found that the testimony of the investigating officer who arrived after the victim was being treated and interviewed the neighbors and first officer on the scene should not generally have been admissible. But here, the testimony was merely cumulative, and it was highly probable its admission did not contribute to the verdict.

Due Process; Delay in Appellate Process

Middlebrooks v. State, A08A1408

Appellant was convicted in 1999 of aggravated assault. After his appellate counsel withdrew, it took almost seven years before new appellate counsel was provided. Appellant claimed that his constitutional rights were violated by the lengthy delay in the appeals process. The Court disagreed. The procedures underlying the appellate process must comport with the demands of due process and equal

protection. The reviewing court should employ the test adopted by the United States Supreme Court for constitutional speedy trial violations to situations in which a defendant claims that his rights to due process have been violated by a delay in the appellate process. Utilizing that test requires consideration of the length of the delay, the reason for the delay, the defendant's assertion of his rights, and whether the defendant has established that he was prejudiced by the delay. Here, the Court found, pretermitted whether the record established the first three factors of the analysis, appellant failed to show prejudice because none of the issues he would have raised in his appeal, had it been timely, had any merit. Appellant's constitutional rights were therefore not violated.

Aggravated Assault; Jury Charge

Reynolds v. State, A08A0868

Appellant was convicted of aggravated assault. The indictment charged that the appellant caused serious bodily injury to the victim by striking her about the face and body with a wooden plank. Testimony and photographs admitted at trial reflected that as a result of being repeatedly struck with the wooden plank, the victim was bruised on multiple parts of her body and experienced soreness. The victim also testified that she "saw stars" and fell to the ground when first struck in the head with the plank. Appellant claimed on appeal that the trial court erred in refusing to give his requested charge defining "serious bodily injury" as "bodily injury which creates substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." The Court held that this is not the definition of serious bodily injury for purposes of aggravated assault, has never been adopted by the Court, and runs contrary to its aggravated assault precedent. Therefore, the request to charge was properly denied and given the evidence at trial, the jury had sufficient evidence to convict appellant.

Speedy Trial

Campbell v. State, A08A1289

Appellant contended that the trial court erred in not granting his statutory speedy trial

demand. The record showed that appellant was arrested for VGCSA on July 3. The following day, the state filed a "complaint" listing the charges, and appellant was released on bond. The "complaint" was signed by the district attorney and contained wording similar to the statutory language required in an accusation. Appellant next appeared for a preliminary hearing on July 18. The prosecutor informed appellant's attorney that no formal accusation or indictment would be filed until the state received the results from drug tests conducted in the case. Five days later, appellant filed a statutory demand for speedy trial pursuant to OCGA § 17-7-170. The State received the drug test results in August. Based on those results, the state obtained an indictment in October. The trial court subsequently set the case for trial beginning in December. Thus, the record showed that appellant filed his speedy trial demand several months before his indictment. Nevertheless, he argued the demand was timely because the "complaint" filed by the State, two weeks before his demand was filed, constituted an accusation.

The Court disagreed. Under OCGA § 17-7-170 (a), the time starts running on the time for the accused to make a speedy trial demand on the date an accusation or indictment is filed with the clerk of court. A demand filed before that date is premature and a nullity. Here, the state could have chosen to proceed by accusation but did not do so. Although the "complaint" may have contained language similar to that contained in an accusation, it was not "a charging instrument." Rather, it was merely a procedural mechanism used to notify the court clerk to place a case on the magistrate's calendar for a bond hearing. The record showed that the state did not proceed on the "complain" but instead, responsibly waited until it received the lab test results and confirmed the quantity of drugs involved before formally charging appellant by indictment. Given these circumstances, the "complaint" cannot be viewed as an accusation. The demand was therefore premature and a nullity. "To hold otherwise would allow [appellant] to usurp the state's power to decide when and how to bring its case."

Right to Jury Trial

Jones v. State, A08A1450

Appellant was convicted of two counts of

keeping a vicious animal. The record showed that after the case was twice set down for a jury trial, the defense filed a motion for a bench trial. The case was then tried before the court. Appellant contends that she did not knowingly and intelligently waive her right to a jury trial. The state bears the burden of showing that appellant's waiver was made both intelligently and knowingly, either (1) by showing on the record that she was cognizant of the right being waived; or (2) by filling a silent or incomplete record through the use of extrinsic evidence which affirmatively shows that the waiver was knowingly and voluntarily made. Here, the state failed to bring forward any such testimony, affidavits, or evidence. Nor did the record include a colloquy between the trial court and appellant regarding her right to a jury trial or any writing signed personally by appellant showing that she had waived her right. The state argued the Court should infer by the timing of the filing of the defense's request for a non-jury trial that appellant and her counsel had discussed her right to a jury trial. However, the Court found, no such inference is supported by the record, nor would such "discussions" be sufficient to establish that appellant made a knowing and intelligent waiver. An in-court announcement of a non-jury trial, and the failure of a defendant to object to such an announcement, is insufficient to establish a knowing and intelligent waiver of the right to a jury trial. The case was therefore reversed and remanded for a new trial.

Severance

Sampler v. State, A08A2212, A08A2213

Appellant appeals two convictions for possession of methamphetamine arising from two indictments, tried jointly. The record showed that one indictment was based on appellant possessing meth after a search of his residence in September and another based on possessing meth after a search of a different residence in December. On the first day of trial, the court notified appellant that both indictments were being tried in the same trial. Appellant objected, and asked for an explanation. The trial court responded, "Because I said it. Anything else?" The next day, the trial court stated that the joinder was based on the fact that there were only the two cases and that they were similar.

Appellant argues that the trial court improperly joined the two indictments for trial. The Court agreed and reversed. When deciding whether to join separate offenses for trial, the trial court must first determine whether the offenses at issue are joined solely because they are of the same or similar character. If not, the trial court must then consider whether, in view of the number of offenses and complexity of evidence, whether the jury can distinguish the evidence and apply the law intelligently as to each offense.

The trial court's perfunctory analysis fell short of that which a trial court is required to perform when deciding whether to jointly try offenses from separate indictments. Where the offenses share a similarity that reaches the level of a pattern evincing a common motive, plan, or scheme or where the modus operandi of the perpetrator is so strikingly alike, that the totality of the facts unerringly demonstrate and designate the defendant as the common perpetrator, the trial court has discretion to join the offenses for trial. Instead of considering the similarity, commonality, and character of the offenses and the State's purpose in joining the offenses, the trial court instead focused on the relatively low number of separate indictments in this case, which is not dispositive. But here, the trial court gave no indication of what, if any, common plan, motive, or scheme it found to be evidenced by the circumstances of the charged offenses at issue in the two indictments, nor did the State offer any. While the low number of indictments (two), could weigh in favor of severance, it also raised the question as to whether, for example, possessing contraband only twice amounts to a pattern or scheme.

Aggravated Stalking; Character

Seibert v. State, A08A1494

Appellant was convicted of two counts of aggravated stalking based on violations of two permanent restraining orders issued by associate magistrates sitting by designation in the superior court. Appellant contended that his demurrers to the indictment should have been granted because under OCGA § 15-1-9.1 (b) (2), the only judges who could be designated to sit in superior court are the chief judge of any other court in the county, a senior judge of

the superior court, a retired judge, or a judge emeritus of any court within the county. The Court held that appellant misread the statute. The chief judge of the superior court may request assistance from the chief magistrate or his deputy or assistant magistrates and the designation of a magistrate to assist the requesting court cloaked the magistrate with statutory and constitutional authority to exercise the judicial power of the superior court.

Appellant also contends that the court should have granted him a mistrial when the state improperly placed his character into evidence. During the victim's direct examination she was asked, "Has [appellant] ever pulled a gun on you?" She replied, "I've seen him pull a gun on someone else." The trial court then gave a detailed curative instruction. The Court held that reversal is required only if a mistrial is essential to the preservation of the defendant's right to a fair trial. Here, even if the victim's testimony improperly injected evidence of appellant's bad character, there was no error in light of appellant's testimony admitting to each act listed in the indictment and the curative instructions given by the trial court. Therefore, a mistrial was not essential to preserve appellant's right to a fair trial.

Motions for New Trial

Wallace v. State, A08A0957

Appellant was convicted of rape, aggravated assault and kidnapping with bodily injury. He contended that the trial court erred in denying him the right to be present during his motion for new trial and in failing to admit the affidavit of a psychiatrist during the motion hearing. The record showed that appellant's counsel filed a motion for new trial alleging only general grounds after trial. Defense counsel's request that he be present, filed 11 days before the hearing, was denied. At the hearing, new defense counsel amended the motion, alleging ineffective assistance of trial counsel and again requested appellant's presence, which was denied. Appellant did not seek a continuance. The Court held a defendant's constitutional right to confrontation does not generally extend to post-verdict procedures such as a motion for new trial, but he has a "broader due process right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute

to the fairness of the procedure." Appellant's presence at the hearing was not necessary to consider his initial motion for new trial on the general grounds, and therefore the trial court did not err in denying his initial motion to be present. Moreover, his failure to file the amended motion until the hearing date made it impossible for the court to obtain his presence. He therefore cannot complain of a result he caused, and induced error cannot form the basis of a due process claim.

Appellant also contended that the trial court erred in sustaining the state's objection to his proffered affidavit from a psychiatrist who treated him in prison. Trial courts on motion for new trial have the discretion to receive evidence through affidavits or oral testimony. The court may consider as substantive evidence a properly executed affidavit made on personal knowledge setting forth facts that would be admissible in evidence. The affidavit in this case met all of those requirements, but the trial court did not use its discretion in excluding the affidavit, instead holding that it was inadmissible hearsay because the affiant psychiatrist was not present. Accordingly, the trial court erred in failing to exercise its discretion and in sustaining the state's hearsay objection to the psychiatrist's affidavit. Nevertheless, the Court examined the affidavit and determined that the failure to admit it was harmless error.

Judicial Comments; Identification

Rogers v. State, A08A1302

Appellant was convicted of aggravated assault and unlawful gang activity. The record shows that the defense attorney saw a state's witness talking to another witness outside of the courtroom. When that state's witness testified, the attorney cross-examined the witness concerning the conversation. The judge then explained the rule of sequestration and instructed the witness not to discuss her testimony with anyone. The judge also stated that because the conversation took place before any witnesses had been sworn, the rule of sequestration had not been violated. Appellant contends that the court violated OCGA § 17-8-57 by expressing an opinion on the credibility of the witness. "A ruling by the court on a point of law is not an expression of opinion;" neither are remarks by the court explaining the

court's rulings. Here, the court's explanation of the rule of sequestration and its ruling that the rule had not been violated because the witnesses had not been sworn was not a prohibited expression of opinion.

Appellant also argued that the trial court erred in allowing a state's witness to identify him on a videotape because the issue was within the province of the jury. At trial, the state showed a videotape of appellant engaging in gang activity several months prior to the incident for which appellant was being tried. A law enforcement officer, who was a member of the Gang Task Force, identified appellant through his street name, "Little Hammer." A lay witness's testimony concerning an identification should be admitted for the jury's consideration only if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the videotape than is the jury, as when the witness is familiar with the defendant's appearance around the time the videotape was made and the defendant's appearance has changed prior to trial, or when the witness knows about some other distinctive but presently inaccessible characteristic of the defendant's appearance. The Court held that this identification was error because appellant's street name did not relate to his physical appearance, and the witness did not testify that appellant's appearance had changed prior to trial. However, given the overwhelming evidence against the appellant, the error was harmless.

CAPITAL LITIGATION:

Penalty Phase Opening Statements

O'Kelley v. State SOP0916

Dorian O'Kelley was found guilty of two counts of malice murder and other assorted crimes and was sentenced to death by the jury. Among other issues the defendant raises as error, part 3 of the decision is relevant for all death penalty cases.

Part 3: During the penalty phase of the trial, the trial court ruled that the defense counsel may not give an opening statement since one was given during the guilt/innocence phase of the trial. The Supreme Court of Georgia has said the trial court's ruling is

error; however in this particular case, it was harmless error.

Only if a guilty verdict is returned on a capital offense does the trial proceed to a separate sentencing phase. The jury may consider evidence from the guilt/innocence phase when determining the appropriate sentence. However, the purpose of the sentencing phase is to introduce different evidence of the convicted defendant's background and character and what it is about him that the jury should consider in deciding to spare his life. Because the defendant stands in a different position with respect to guilt or innocence in each phase and because the separate phases have differing purposes, frequently counsel's strategies in each phase conflict.

The Court said that as a result, in almost all instances it would in reality not only be illogical and counterproductive, but also impossible for a defendant effectively to outline his sentencing phase defense and disclose his mitigation witnesses to the jury in his opening statement in the guilt/innocence phase. Without the opportunity to make an opening statement at the sentencing phase, a defendant is left without the means to provide a roadmap to guide the jurors during the presentation of his mitigating evidence.

The Court now holds "that the sentencing phase of a trial in which the State is seeking the death penalty is a "criminal matter" within the scope of USCR 10.2 and therefore, that a defendant is entitled to make an opening statement in the sentencing phase." The Court further held that the defendant's opening statement may be made following the State's opening statement or at the conclusion of the State's case. It is error for a trial court to refuse to honor defendant's choice provided in Rule 10.2.

Sentencing Phase issues are Substantially Similar to Guilt/Innocence Issues

Georgia Hearsay/Confrontation Clause

Martin v. State S08A1257

Interim review on death penalty case to determine whether the trial court erred in denying defendant's motion in limine to preclude the admission of victim witness's prior testimony.

Defendant pleaded guilty to all 16 counts of his indictment, including 3 murder charges, in January 2005. A bench trial followed on the issue of sentencing, during which Ms. Tymika Wright, the victim witness testified and was available for cross-examination. The trial court sentenced the defendant to death.

In December 2006, the defendant was allowed to withdraw his guilty plea due to the trial court's error in failing to inform him of all his Boykin rights. During the interim, Ms. Wright died and the defendant filed a motion in limine to exclude her prior testimony from the penalty phase in this new guilt/innocence trial.

The trial court denied his motion holding Ms. Wright's prior testimony is admissible under provisions of OCGA 24-3-10 and not in violation of the confrontation clause under *Crawford v. Washington*, 541 U.S. 36. The Georgia Supreme Court affirmed the trial court's decision.

In order for Wright's prior sworn testimony to be admissible it must satisfy both Georgia evidence law (hearsay) and federal constitutional law (confrontational clause). The trial court ruled that the prior testimony of the now unavailable witness was given under oath and the parties and issues are substantially similar per OCGA 24-3-10. However, the defendant contends that because the issues involved at the sentencing trial were not substantially similar to those in the guilt/innocence trial, the sentencing trial did not provide him with an adequate opportunity to cross-examine Ms. Wright.

The Georgia Supreme Court has repeatedly held that evidence related to guilt or innocence is relevant to sentence and thus admissible in a sentencing trial. The defendant's guilty plea to all counts of the indictment did not relieve the State of its burden, before a death sentence could be imposed, to prove beyond a reasonable doubt the existence of at least one statutory aggravating circumstance alleged in its notice to seek the death penalty.

The testimony of M. Wright was presented by the State to help meet its burden of the aggravating circumstances which included her own rape and her witnessing the murder of her family members. The trial court set no limitations on the defense in its ability to cross-examine this witness to these details of the crimes. It is now this evidence that the State seeks to admit in the new guilt/innocence trial. The Supreme Court says that the fact

that the defendant did not extensively cross-examine her does not mean he did not have an adequate chance to do so. Further, since she is not available for trial and the defendant had adequate opportunity to cross-examine her, the admission of her prior testimony does not violate the confrontation clause.