

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 19, 2008

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THIS WEEK:

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Evidence, Variance

In the Interest of J. H. M., A08A1757

Appellant contended that the juvenile court should have dismissed the petition of delinquency against him because of a fatal variance between both of the allegations in the petition and the proof that was adduced at the adjudication hearing. Appellant was charged with attempt to commit armed robbery by striking the victim in the head with a beer bottle. He was also charged with aggravated assault by striking the victim in the head with a beer bottle. At trial, the evidence showed that an adult co-perpetrator struck the victim with a beer bottle and the appellant struck the victim in the face with his fist. The Court held that a variance between indictment and the evidence at trial is fatal if the allegations fail to meet these two tests: (1) the allegations must definitely inform the accused as to the charges against him so as to enable him to present his defense and not be taken by surprise by the evidence offered at trial, and (2) the

allegations must be adequate to protect the accused against another prosecution for the same offense.

Applying these two tests, the Court upheld the finding of delinquency. Ignoring the beer bottle language and focusing instead on the “hitting” portion of the allegations, the Court held that the petition adequately informed appellant that he was being charged with assaulting the victim by “hitting [the victim] in the head,” and the evidence that appellant struck the victim with his fist was enough to sustain his conviction of attempted robbery and aggravated assault. Thus, because appellant was sufficiently apprised of the charges facing him, and because he could not be prosecuted again for these offenses, the variance between the allegations and the proof was not fatal.

Search & Seizure

Robinson v. State, A08A1208

Appellant was convicted of VGCSA. He contended on appeal that the trial court erred in denying his motion to suppress. The evidence showed that appellant was sitting in the driver’s seat with a female passenger in a parked vehicle when officers approached them. The officers were looking for a third person. One of the officers, while talking to the passenger, noticed that she was very nervous and exhibited signs that she was under the influence of drugs. She consented to a search of the car. The officers got both appellant and the passenger out of the vehicle and drugs were found in the vehicle and subsequently other drugs were located and determined to have been in appellant’s possession.

Appellant contends the detention leading to the search was based on nothing more than

the passenger's display of nervousness, which he contends is insufficient to provide reasonable articulable suspicion to support their further detention. However, the officer testified that the passenger's behavior went beyond mere nervousness in dealing with police to behavior that raised the suspicion that she was under the influence of an intoxicant. Although he termed her behavior nervous and fidgety, the gist of the officer's testimony was that she appeared to be under the influence of drugs. In addition, when the passenger exited the vehicle, she was unable to stand, thus lending support to the officers' suspicions. Therefore, the officers could lawfully detain both appellant and his passenger to maintain the status quo while obtaining more information as to the possible use of illegal drugs in the car.

Matthews v. State, A08A1020

Appellant contends that the trial court erred in denying his motion to suppress. The evidence showed that the officer stopped appellant for speeding. Appellant's much younger female passenger exhibited signs that she was under the influence of alcohol and/or drugs. The passenger had no identification and twice, the name and age (19) she gave to the officer came back "did not return." After the officer wrote the ticket for speeding, he again returned to the vehicle and gave the passenger an alco-sensor test which was positive. She then gave a third name and an age of 17 and claimed that appellant was her "uncle" giving her a ride home. In questioning appellant, the officer noticed a box under his leg. Appellant consented to a search of the box which revealed methamphetamine. Appellant and the passenger were arrested. The ticket for speeding was not issued and a warrant for speeding was taken instead.

Appellant contended that the officer illegally prolonged his detention because the officer should have issued him a ticket for speeding after completing his first check on his and his teenage companion. Appellant argued, therefore, that the fruits of the search should have been suppressed because he gave consent to search during a prolonged detention. The en banc Court disagreed. The police may lawfully ask questions unrelated to the purpose of a valid traffic stop, so long as the questioning does not unreasonably prolong the detention. A reasonable time includes the time necessary

to verify the driver's license, insurance, registration, and to complete any paperwork connected with the citation or written warning. A reasonable time also includes the time necessary to run a computer check to determine whether there are any outstanding arrest warrants for the driver or the passengers. Based upon the particular facts and circumstances of this case, the officer's conduct did not unreasonably prolong appellant's detention and render his consent to search invalid. Moreover, the Court held, the information developed during the course of the valid traffic stop provided a reasonable, articulable suspicion to prolong appellant's detention beyond the time reasonably required for completion of the traffic stop standing alone.

Evidence

Gordon v. State, A08A1886

Appellant was convicted of aggravated assault. He claimed at trial that he shot the victim in self defense. He contended on appeal that the trial court erroneously limited his testimony and denied him his constitutional right to present a defense when it prevented him from testifying that he did not intend to assault the victim. At trial, his attorney asked him "[Y]ou've been accused in this Bill of Indictment that on February 2, 2005, [you assaulted] David Jackson with a deadly weapon, a pistol, and it says you knowingly, intentionally and unlawfully assaulted him. Did you intend to assault him?" The trial court sustained the state's objection. The Court held that the trial court did not err in sustaining the State's objection to defense counsel's question. The trier of fact is solely responsible for determining whether an accused committed an act with the requisite criminal intent. Thus, the Court held, whether appellant shot the victim with the intention of assaulting him (in other words, with the intention of injuring him or of placing him in reasonable apprehension of receiving a violent injury) or whether appellant shot in the direction of the victim while acting in self-defense, was an issue of ultimate fact to be decided by the jury. Furthermore, appellant was allowed to testify at length about his version of the events before and after the shooting, during which he insisted that he did not intend to shoot the victim and that he only shot the gun in self-defense. Therefore, even if the trial court erred in trying to prevent

appellant from testifying that he did not intend to "assault" the victim, the error was harmless in that it would have been merely cumulative of other evidence supporting appellant's claim of self-defense.

Williams v. State, A08A1203

Appellant was convicted of armed robbery, aggravated assault, hijacking a motor vehicle and possession of a firearm during commission of a felony. He contended that the trial court violated his due process rights by refusing to admit a hearsay statement from a minor that someone else had stolen the car and by refusing to allow him to cross-examine an investigator about the minor's statement. The minor was not called to testify at trial because he was apparently unavailable. Outside the jury's presence, defense counsel read from the statement where the minor was asked who had stolen the vehicle and he named someone other than appellant. To support his due process claim, appellant relied on the special circumstances test derived from *Chambers v. Mississippi*, 410 U. S. 284 1038, (1973). That test is an exception to the general rule that hearsay statements from third persons who claim to have committed the crimes for which the defendant is being tried are inadmissible. The general rule applies even though the statement is against the declarant's penal interest. But in exceptional circumstances, i.e., when the hearsay bears "persuasive assurances of trustworthiness" and is critical to the defense, it is admissible.

Here, however, the minor's statement did not fit within the *Chambers* test for several reasons. First, the statement that someone other than him had stolen the victim's car was not the same as a statement that the declarant minor had committed the crime; it was not self-incriminatory. Second, there was no other evidence to corroborate the statement that the person he named stole the car. Third, unlike in *Chambers*, the minor was not present and could not have been cross-examined by the State so that his demeanor and responses could be weighed by the jury. Thus, the trial court did not err in disallowing the statement into evidence. Moreover, because the trial court did not err when it excluded the proffered evidence, the trial court also did not err by refusing to allow appellant to cross-examine the investigator about the inadmissible statement.

Speedy Trial

West v. State, A08A2442

Appellant appealed from the denial of his motion to dismiss his indictment on constitutional speedy trial grounds. The four factors that form the core of the constitutional speedy trial balancing test are: (1) whether the delay before trial was uncommonly long, (2) whether the government or the criminal defendant is more to blame for that delay, (3) whether, in due course, the defendant asserted the right to a speedy trial, and (4) whether he or she suffered prejudice as the delay's result. The Court found that the 34-month delay in bringing a defendant to trial on drug charges is uncommonly long. The delay was attributable to the State, but the delay was also the result of an overcrowded docket and thus, considered relatively benign and weighed more lightly than deliberate action by the State to harm the defense. Third, appellant never filed a statutory demand for speedy trial and only raised his constitutional right to a speedy trial in a motion to dismiss filed 30 months after indictment. Finally, there was no actual prejudice shown by appellant. Therefore, the trial court did not abuse its discretion in denying appellant's motion.

Statements

State v. Lee, A08A1654

Appellee was charged with electronically furnishing obscene material to a minor. The State appealed the trial court's grant of his motion to suppress the inculpatory statements he made during a police interview. The trial court found that the statements were inadmissible because they were made after a detective had promised appellee that he would not be charged with an offense requiring him to register as a sex offender.

The evidence showed that appellee was transported to the police station, read Miranda, and then agreed to speak with a detective. During the interview, he admitted that he had been communicating with the victim over the phone and had been sending him pornographic photographs. He further admitted that he knew the victim was a minor and apologized for what he had done. After making these statements to the detective, he expressed concern that he would have a

lasting criminal record and would have to register as a sexual offender. The detective then promised appellee that he was not being charged with an offense that would require such registration. Subsequently, appellee stated that he would accept "full responsibility" and would like to apologize to the victim's mother.

The State contended that the trial court erred in excluding the inculpatory statements because the motion to suppress did not comply with OCGA § 17-5-30 (b). The Court held, however, that OCGA § 17-5-30 (b) applies only to cases where the defendant seeks the suppression of tangible evidence; the statute is inapplicable where, as here, the defendant is challenging the admissibility of a confession. Nevertheless, the Court agreed with the State that the trial court erred in excluding the inculpatory statements made prior to the time when the detective promised appellee that he was not being charged with an offense that would require sex offender registration. Any hope of benefit given by the police to a defendant after the defendant has already confessed cannot be said to have induced the confession and thus does not affect its voluntary nature. The Court therefore reversed the trial court to the extent that it excluded the inculpatory statements that appellee made during the interview before the detective's erroneous promise.

DUI; Similar Transactions

Wade v. State, A08A1647

Appellant was convicted of DUI less-safe. Appellant contended that the admission of two prior DUI's as similar transactions violated her constitutional rights. Specifically, she contended that her bent of mind or intent is not an element of the offense of DUI and that the use of similar transaction evidence to show the same is prejudicial, not needed by the State and a violation of her due process rights. The Court of Appeals tended to agree but stated, "we are not authorized to depart from the precedent of the Supreme Court of Georgia authorizing the bent of mind rationale for admitting similar transaction evidence here. [cite]. Only the Supreme Court of Georgia or the Georgia General Assembly has the authority to depart from this state's established (and unique) rule on the admissibility of similar transaction evidence. Accordingly,

we are constrained to affirm the trial court's judgment, notwithstanding appellant's due process arguments."

A petition for certiorari has already been filed.

Photographs

Overton v. State, A08A1192, A08A1193, A08A1194 and A08A1717

Appellants were convicted of RICO and numerous other crimes. Appellants challenged the admission of post-autopsy and pre-autopsy photographs of their victims. A photograph which depicts the victim after autopsy incisions are made or after the state of the body is changed by authorities or the pathologist will not be admissible unless necessary to show some material fact which becomes apparent only because of the autopsy. A photograph which shows mutilation of a victim resulting from the crime against him may, however gruesome, have relevance to the trial of his alleged assailant. The necessary further mutilation of a body at autopsy has no such relevance and may cause confusion, if not prejudice, in the minds of jurors. Further, mid-autopsy and post-autopsy photographs are admissible only when they depict injuries or other relevant matters not otherwise apparent. Here, the State asserted that the post-autopsy photographs were admissible to show the nature and extent of the wounds and the cause of death. But, the State failed to make a showing that the photographs were "necessary" to establish a material fact that could only become apparent because of the autopsy and a connection between that and some material issue at trial. The trial court therefore abused its discretion by admitting the photographs into evidence. However, in light of the overwhelming evidence of appellants' guilt, the admission of the photographs was harmless error.

The Court also found that the introduction of 24 pre-autopsy photographs appeared excessive. But, pre-autopsy photographs are usually relevant and material to issues in the case, and are admissible even if they may inflame the jury because photographs showing the extent, location, and nature of the victim's wounds are material and relevant. The trial court therefore did not abuse its discretion in the admission of these photos.

Severance; Evidence

Overton v. State, A08A1192, A08A1193, A08A1194 and A08A1717

Appellants were convicted of RICO and numerous other crimes. Appellants contended the trial court erred by denying their motions to sever their cases from the other defendants. They asserted that the complexity of the evidence presented a danger that the jury would be confused, and that the bulk of the evidence was directed toward only two of the defendants. A defendant seeking severance is required to do more than raise the possibility that a separate trial would give him a better chance of obtaining an acquittal. The test is whether the number of defendants will create confusion during the trial; whether the strength of the evidence against one defendant will engulf the others with a “spillover” effect; and whether the defendants’ claims are antagonistic to each other’s rights. The Court found that the appellants had failed to meet their burden. Each defendant was charged with the RICO violation, all of the evidence was admissible against all the defendants, and would have been admissible even if they had separate trials on the RICO violations. The appellants did not present antagonistic defenses at trial. Further, the fact that some of the testimony might have been stronger against some of them did not demand a finding that denial of a motion to sever was an abuse of discretion.

Appellants contended their convictions for the crimes associated with one particular crime must be reversed because they were based upon the uncorroborated testimony of an accomplice. The State contended that the witness was not an “accomplice” because he testified that his involvement was coerced by appellants.

An accomplice is one who acts as the result of free will and not of duress or coercion. Thus, if a witness testifies that he acted out of fear and coercion, not free will, the jury must decide whether the witness is an accomplice. Should the jury decide that the witness is not an accomplice due to coercion, the corroboration requirement is eliminated. Here, the witness testified that one of the appellants threatened him with a gun. He further testified that appellant told him where to go and what to do under threat of death if he did not follow orders, and after the crimes were committed

he was repeatedly threatened with death if he told anyone what he saw that night. This evidence authorized the jury to conclude that the witness was coerced and not an accomplice. Therefore, no corroboration was required and the evidence was sufficient to sustain the convictions of appellants for these crimes.

Res Gestae

Jones v. State, A08A1412

Appellant was convicted of trafficking in cocaine. He contended that the trial court erred in admitting his co-defendant’s testimony about a telephone conversation in August 2002. Appellant’s co-defendant pled guilty and testified against him. The witness testified that, some time in August, appellant came by his house driving the same car he was driving at the time of his October arrest on the conviction at issue here. Appellant showed him some drugs, and told him “he had approximately 100 keys supposed to come in, said he needed my help to move them.” The witness told appellant he would get back with him. When a confidential informant later told the witness that “he had an associate that needed one to four kilos of cocaine,” the witness contacted appellant and arranged a date and time for the drug transaction. The transaction was interrupted when the police moved in.

The Court stated that acts are pertinent as part of the res gestae if they are done pending the hostile enterprise, and if they bear upon it, are performed while it is in continuous progress, and are of a nature to promote or obstruct, advance or retard it, or to evince essential motive or purpose in reference to it. The State is entitled to inform the jury of all the circumstances surrounding the commission of the crime or crimes charged.

In this case, the August conversation explains why the witness contacted appellant in October to arrange a drug transaction: he was helping appellant “move” the drugs as requested. As a result, the evidence was properly admitted as part of the res gestae.