Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING DECEMBER 7, 2018
Issue 49-18

THIS WEEK:

- **Ineffective Assistance of Counsel; Waiver**
- **Discovery; Exclusion of Witness Testimony**
- **Aggravated Sexual Battery; Consent**
- **Pleas in Bar; Statutes of Limitation**

Ineffective Assistance of Counsel; Waiver

Pugh v. State, A18A0898 (10/23/18)

Appellant was convicted on one count each of smash and grab burglary, criminal damage to property, possession of tools for the commission of crime, and loitering or prowling. He contended that his waiver of trial counsel was not made knowingly, voluntarily, and intelligently because his decision to waive counsel "was mere acquiescence rather than an intentional relinquishment or abandonment of his right to counsel. …" The Court disagreed. After detailing the pre-trial record, the Court found that the trial court's detailed explanation and warnings of proceeding pro se, coupled with appellant's steadfast desire to represent himself — expressed on multiple occasions prior to trial as well as during trial — demonstrated that the trial court correctly found that appellant knowingly and intelligently waived his right to counsel.

Nevertheless, appellant contended, although he received appointed counsel, he effectively had no representation because neither of his appointed pre-trial attorneys visited him while he was in custody and only spoke with him when he appeared for court. Accordingly, he argued, "the mere formality of appointing a lawyer to represent him, without the receipt of any actual assistance from the lawyer, constituted sham and nothing more than formal compliance."

The Court noted that although presented as a claim of a wholesale denial of counsel, appellant's argument was more properly construed as a claim of ineffective assistance of counsel. And here, the Court found, his claim of ineffective assistance was waived. Specifically, the Court noted that following his April 11, 2017 judgment of conviction, appellant filed a pro se motion for new trial on May 15, 2017, in which he argued, inter alia, that "counsel was ineffective whether representing [him] as first or second chair. …" Appellant also requested appointed counsel to pursue his motion for new trial and subsequent appeal if necessary. In fact, appellant received appointed counsel, who entered an appearance on June 29, 2017. Determining that appellant's pro se May 15, 2017 motion for new trial was untimely, the trial court dismissed it.

Appellant then filed a second pro se motion for new trial, in which he again raised ineffective assistance of counsel and asked for appointed counsel. Two days later, appellant's appointed counsel filed an amended motion for new trial, asserting ineffective assistance of counsel. However, upon discovering that appellant's original motion for new trial had been dismissed as untimely, appellant's counsel filed a motion for an out-of-time appeal and a withdrawal of appellant's amended motion for new trial. The trial court granted appellant an out-of-time appeal, after which counsel filed a notice of appeal.

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Thus, the Court found, in order to preserve any potential claim for ineffective assistance of pre-trial counsel, appellant's appointed appellate counsel was required to file a motion for new trial and seek an evidentiary hearing at the earliest practicable moment — that was, after the trial court granted appellant an out-of-time appeal. Because that did not occur, appellant's claims of ineffective assistance of counsel were barred and may only be raised in a petition for habeas corpus.

Discovery; Exclusion of Witness Testimony

Diaz v. State, A18A1394 (10/23/18)

Appellant was convicted of felony theft by receiving stolen property, which in this case was a tractor. He contended that the trial court erred by excluding his witness' testimony. The Court agreed.

The record showed that the trial court excluded the witness from testifying because it found that appellant acted in bad faith by violating OCGA § 17-16-8 (a) for failing to provide the State with a phone number and birth date for appellant's witness, his nephew. Pursuant to OCGA § 17-16-8 (a), "the defendant's attorney . . . no later than five days prior to trial, or as otherwise ordered by the court, shall furnish to the opposing counsel as an officer of the court, in confidence, the names, current locations, dates of birth, and telephone numbers of that party's witnesses." Additionally, OCGA § 17-16-10 provides, "[t]he defendant need not include in materials and information furnished to the prosecuting attorney under this article any material or information which the prosecuting attorney has already furnished to the defendant under this article." The Court noted that the corrective actions available to the court are set out in OCGA § 17-16-6. Although the exclusion of evidence is among the potential remedies, such a harsh remedy should be imposed only where there is a showing of both bad faith and prejudice.

Here, the record showed that appellant filed his witness list in November 2005, listing his nephew as a potential witness and indicating that his telephone number was "[t]o be disclosed." A brief summary of appellant's nephew's anticipated testimony was included. The summary stated, "[Appellant's nephew] was present with him at the time that the [tractor] was offered and later purchased. [Appellant's nephew] is also expected to testify as to how the [tractor] was offered for sale to [appellant] and later on purchased by [appellant]."

Over a year after appellant filed his witness list, the State filed supplemental discovery including the complaint report from the traffic stop when the tractor was recovered. A photocopy of appellant's nephew's Mexican identification card with what appears to be his birth date was attached. At trial, the deputy testified that he had the occupants in the car write down their names and dates of birth.

After the State closed its case, it moved to exclude appellant's nephew's testimony for failure to comply with OCGA § 17-16-8.2 The Court noted that the State argued that appellant's nephew's testimony should be excluded simply because appellant failed to provide the State with his phone number, address, and date of birth. The State focused its entire argument on appellant's failure to strictly comply with OCGA § 17-16-8 without explaining how it was prejudiced by appellant's failure to provide the missing information. Appellant's trial counsel argued that the State already possessed all of the information about appellant's nephew because he was an occupant of the vehicle during the traffic stop and the State had his identification card and date of birth. The trial court granted the State's motion to exclude appellant's

nephew's testimony, specifically finding that appellant acted in bad faith in failing to give the State any information so that they could contact appellant's nephew and not providing the State with his date of birth so the State could check his criminal history.

But, the Court stated, regardless of whether the appellant provided the State with his nephew's birth date, the trial court did not require the State to show prejudice as required by OCGA § 17-16-6 when ruling on the State's motion to exclude appellant's nephew's testimony. Without a basis to conclude that the State would be prejudiced unless the witness' testimony was excluded, the trial court abused its discretion by excluding appellant's nephew as a defense witness. Nevertheless, the Court, after reviewing the evidence, determined that the exclusion of this testimony was harmless in light of the overwhelming evidence of appellant's guilt.

Aggravated Sexual Battery; Consent

Croft v. State, A18A1198 (10/23/18)

Appellant was convicted of child molestation, aggravated sexual battery and other crimes involving a 15 year old victim. He argued that the trial court erred in its charge to the jury on a child's incapacity to consent to aggravated sexual battery. The Court agreed.

The trial court, in its charge to the jury concerning the essential elements of aggravated sexual battery and sexual battery, told the jury that "[a] child under the age of 16 is incapable of consenting as a matter of law." Since appellant did not object to the charge (the instruction was a correct statement of the law at the time of trial in January 2015), the Court stated that its review was limited to whether it was plain error.

The Court stated that the question of whether an error is considered "clear or obvious" under the plain-error test is judged under the law existing *at the time of appeal*, regardless of whether the asserted error in the trial court was plainly incorrect at the time of trial, plainly correct at the time of trial, or an unsettled issue at the time of trial. In September 2015, *Watson v. State*, 297 Ga. 718 (2015), held that OCGA § 16-6-22.1 (d), the sexual battery statute, "require[s] actual proof of the victim's lack of consent, regardless of the victim's age," and overruled precedent to the contrary. Thus, although the portion of the jury charge suggesting that the victim was incapable during that time of consenting to appellant's penetration of her vagina with his finger was correct as of the time of his trial, that portion of the charge nonetheless amounted to "clear or obvious error."

Moreover, the Court held, because this instruction effectively relieved the State of its burden to prove lack of consent as an essential element of the crime of aggravated sexual battery, the error affected appellant's substantial rights and seriously affected the fairness of the proceedings at trial. Accordingly, the Court reversed his conviction on this count. However, appellant may be retried on this count because the evidence was sufficient to uphold his conviction.

Pleas in Bar; Statutes of Limitation

Davis v. State, A18A0901 (10/24/18)

In 1996, a woman was the victim of rape, aggravated sodomy, aggravated assault, and burglary. The alleged perpetrator was unknown until March 2009, when appellant was identified by DNA evidence. Appellant was incarcerated when he was identified, but he was released from prison in June 2016, and since then has been held on these subsequent charges in the county jail. He has not been indicted.

Appellant filed a plea in bar, alleging that the State was barred from prosecuting him for any charges arising from the 1996 crime because the statute of limitation had run. The trial court ruled that the State could not prosecute appellant for aggravated assault or burglary because the four-year statute of limitation had run, but that the state could prosecute appellant for rape and aggravated sodomy because the statute of limitation on those charges had not run. The Court granted interlocutory review.

The Court stated that a special plea in bar is a plea that, rather than addressing the merits and denying the facts alleged, sets up some extrinsic fact showing why a criminal defendant cannot be tried for the offense charged. OCGA § 17-7-110 provides, "[a]ll pretrial motions, including demurrers and special pleas, shall be filed within ten days *after* the date of arraignment, unless the time for filing is extended by the court." (Emphasis supplied). Here, there has been no arraignment. Although Uniform Superior Court Rule 31.1 states that "special pleas shall be made and filed at or before the time set by law[,]" the fact remains that there can be no challenge to an indictment through a special plea in bar until there is an indictment filed.

Nevertheless, the Court added, individuals who allege they are being illegally detained are not without recourse to challenge the actions of the State prior to being indicted. Because appellant alleged that he is being unlawfully detained before the indictment against him has been filed, the proper remedy is to file a petition for writ of habeas corpus. But, since appellant did not attempt to avail himself of this remedy, the trial court did not err in denying his plea in bar because that was not the proper mechanism to challenge his detention. In so holding, the Court expressed no opinion as to the legality of appellant's detention or the merits of his argument that the statute of limitations has expired on the prosecution at issue.