

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 6, 2009

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THIS WEEK:

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Guilty Plea

Davis v. State, A08A2302

Appellant appealed from the denial of his motion to set aside his negotiated guilty plea. He contended that his plea was not knowingly, intelligently, and voluntarily entered because he asked the trial court to appoint a new attorney to represent him on appeal before entering the plea. After sentencing, a guilty plea may be withdrawn only to correct a manifest injustice. In evaluating whether a plea is voluntary, the determinative issue is whether the plea represents a voluntary and intelligent choice among the alternative courses of action available to the defendant. After a review of the plea colloquy, the Court found that the trial court informed appellant of the rights he would be waiving by entering his plea, required the prosecutor to review the state's evidence as to each charge, carefully answered all of appellant's questions regarding the negotiated

sentence, and explained his appeal rights. At no time during the course of the proceedings did appellant express any doubts about entering a plea. Instead, he merely wanted to ensure that the judge would appoint new counsel to handle his appeal. Moreover, at the withdrawal hearing, the attorney who represented appellant at the plea hearing testified that appellant could have been sentenced as a recidivist to serve 150 years and that the plea offer of 40 years to serve 20 was a "gift." Therefore, the Court concluded, given that appellant would have faced more than an additional 100 years in prison had he been tried, convicted on all counts, and sentenced as a recidivist, the withdrawal of his plea was not necessary to correct a manifest injustice.

Nolle Prosequi; Search & Seizure

Bell v. State, A08A1785; A08A1786

Appellant contends that the trial court erred in denying his motion to suppress. First, he contends that the trial court's approval of the State's previous motion to enter a nolle prosequi precluded the State from contesting the motion to suppress. The record showed that the trial court had consented to a nolle prosequi of the charges against appellant on the ground that the "State could not prevail on a [m]otion to [s]uppress." The State then re-indicted appellant the following month. The Court held that a trial court makes no decision on the merits by granting a motion to enter a nolle prosequi. Rather, the entry of a nolle prosequi does not act as an acquittal or bar future prosecution for the same offense. Thus, an order of nolle prosequi is not necessarily the ending of the prosecution, but the continuance of the same as the State clearly

had the authority to re-indict the defendant for the same offense.

However, the Court also held that the trial court erred in denying the motion to suppress. The evidence showed that appellant was stopped for speeding. The officer thought that appellant may have been on drugs. Due to appellant's nervousness and his failure to look at the officer, the officer asked for his consent to search the vehicle. Appellant refused. The officer then requested that a K-9 unit from another county be dispatched to the scene. While waiting, the officer noticed an "ASP baton" used by law enforcement, in the passenger compartment. He considered it a deadly weapon. The officer therefore got appellant out of the vehicle and conducted a pat down and then a search of the vehicle for more weapons. The search of the vehicle led to the seizure of controlled substances.

The Court found that the stop was justified. But, the officer continued to detain appellant after he had asked him about the speeding, his license, and insurance and appellant refused to consent to a search of his vehicle. If an officer continues to detain the subject after the conclusion of the traffic stop without reasonable suspicion of criminal activity, the officer exceeds the scope of a permissible investigation of the initial traffic stop. The Court found significant that the officer here performed no sobriety tests whatsoever and did not detain appellant to perform a DUI investigation, instead focusing only on his nervousness as a reason for the continued detention. However, nervousness alone cannot provide reasonable suspicion of criminal activity. Accordingly, the Court held, the officer impermissibly exceeded the scope of the initial traffic stop when, due to suspicions raised by appellant's nervousness, he detained him to await the arrival of the K-9 unit from another county. The search of the vehicle was therefore conducted after appellant was illegally detained and was therefore unjustified.

The Court further rejected the State's contention that the presence of a weapon in appellant's vehicle authorized the search. The search of an automobile's passenger compartment, limited to those areas in which a weapon may be placed or hidden, is permissible if the officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in

believing that the suspect is dangerous and the suspect may gain immediate control of weapons. Here, the evidence failed to show the officer observed any conduct on the part of appellant, furtive or otherwise, that would cause him to reasonably believe that appellant was dangerous. Further, the presence of the baton in plain view did not itself authorize the search of the vehicle. "To allow the search of [appellant's] vehicle merely because a baton was present would arguably allow police to search the vehicle of any speeding motorist whose child left a baseball bat in the back seat."

Evidence; Venue

Frasier v. State, A08A2036

Appellant was convicted of battery of the victim and obstruction of an officer. He contended that the trial court erred by disallowing his evidence of the victim's violent character. The evidence showed that the victim walked into his ex-girlfriend's house, walked past appellant, who was lying on a sofa, and entered the bedroom where he began arguing with his ex-girlfriend. The ex's current boyfriend, who was also in the bedroom, then came up behind the victim, placed him in a chokehold and rendered him unconscious. When the victim came to, he was being beaten by his ex, her current boyfriend and appellant, who decided to join in. Appellant was arrested the following day and the circumstances of his arrest lead to the obstruction charge.

At trial, appellant raised the affirmative defense of justification, claiming that the victim was the aggressor and that appellant's conduct represented a reasonable attempt to defend himself and/or the ex-girlfriend. To support this defense, appellant sought to introduce evidence of the victim's prior acts of violence against third parties, including the victim's convictions for battery and simple battery. Before being allowed to introduce evidence of a victim's prior violent acts, a defendant must make a prima facie showing of justification. Such a showing requires the defendant to demonstrate: (1) that the victim was the aggressor; (2) that the victim assaulted the defendant or a third party; and (3) that the defendant was genuinely attempting to defend himself or a third party. Here, the Court found, the record showed that appellant failed to make the requisite showing. First, there was no evidence that the victim attacked

appellant. Also, the victim's initial act of aggression against the ex-girlfriend occurred in the bedroom and outside the presence of appellant. Thus, appellant could not have known whether the victim was the aggressor. Second, since the ex-girlfriend testified that she went to the living room to get appellant because her boyfriend and the victim were fighting, appellant could not have reasonably believed that he needed to defend himself or the ex-girlfriend from the victim. "The defense of justification is not designed to allow a defendant to go 'looking for a fight,' even if the victim had previously behaved aggressively against the defendant or a third-party." Finally, the evidence did not show that appellant's conduct represented a sincere attempt to defend either himself or a third-party. Both the victim and the ex-girlfriend testified that appellant joined the ex-girlfriend and the boyfriend in beating the victim as he lay on the floor. Thus, the trial court did not abuse its discretion in denying appellant to present evidence of the victim's violent character.

Appellant also contended that his conviction for obstruction should be overturned because the State failed to prove venue. The Court agreed. The day after the attack on the victim, the evidence showed that appellant was arrested on North Broad St. in the "North Rome area." Since there was no evidence presented to show that the City of Rome, the northern part of that city, or North Broad Street, was located in Floyd County, the State failed to establish that the crime of obstruction occurred in Floyd County.

Juveniles; Due Process

In the Interest of D. H., S08A1853

Appellant was convicted of possession of less than an ounce of marijuana. He contended that OCGA § 16-13-2 (b) is unconstitutional. This section provides as follows:

"Any person who is charged with possession of marijuana, which possession is of one ounce or less, shall be guilty of a misdemeanor..." Appellant argued that the "shall be guilty" language of the statute violates constitutional due process by creating a mandatory presumption of guilt. The Court, however, held that such a literal construction of OCGA § 16-13-2 (b) would result in the absurd consequences that any person charged with misdemeanor possession of marijuana

would not be presumed innocent and the State would not have any burden of proof. Instead, the accused would automatically be deemed guilty of the offense merely by virtue of the accusation. Such absurd consequences obviously were not contemplated by the legislature, and the Court will not construe the words of the statute in such an unreasonable way. Instead, the clear expression of legislative intent regarding the language of the statute was to mandate that possession of one ounce or less of marijuana is indictable and punishable only as a misdemeanor, not as a felony.

Discovery; Brady

Freeman v. State, S08A1802

Appellant was convicted for felony murder and possession of a firearm during the commission of a crime in connection with the death of Dixon. He contended that the State failed to disclose exculpatory material in violation of *Brady v. Maryland*. Both the GBI and appellant's counsel had a handwritten statement from an inmate who was incarcerated with appellant's co-defendant. It stated that appellant was not responsible for Dixon's killing; the co-defendant intended to make appellant a scapegoat for the crime; and if the co-defendant had to suffer, so did appellant. The notes of the interview stated the same things, with additional detail. Appellant argued that the notes of the interview would have bolstered the inmate's credibility and allayed his counsel's fear of calling the inmate to testify on behalf of appellant. But, the Court found, defense counsel testified at the hearing on the motion for new trial that his decision not to call the inmate to testify was based not upon concerns about credibility and prospects of impeachment, but upon a wholly different trial strategy. Accordingly, the Court held, even assuming that the notes of the interview were evidence favorable to appellant that were suppressed by the State, appellant failed to show either that the notes were not available to him through reasonable diligence, or that the course of his trial would have been any different had they been produced. Therefore, there was no error.

Evidence; Double Jeopardy

Jackson v. State, S08A1773

Appellant was convicted of malice murder,

felony murder and other serious offenses. The evidence showed that when the victim decided to tell appellant that he could no longer stay in the victim's apartment because appellant was not contributing to expenses, the appellant shot the victim in the head. He was arrested in Kentucky the following day driving a vehicle stolen from a third roommate. Appellant first argued that the trial court erred in admitting statements made by the victim under the necessity exception to the hearsay rule. The Court found that the trial court properly admitted the testimony (concerning the victim's reason for asking appellant to move out) under the necessity exception for the following reasons: 1) the victim was deceased; 2) there were guarantees of trustworthiness since the victim made the statements to his father and brother, whom he was close to, confided in, and trusted; and 3) the statements showed the relationship between the victim and appellant, and were also probative on the issues of motive and intent.

Appellant also contended the trial court should have sustained his demurrer to the charge of theft by taking an automobile on the ground that he previously was convicted in Kentucky for theft by receiving that automobile, and thus prosecuting him for the same theft in Georgia violated the constitutional protection against double jeopardy. Under the Dual Sovereignty Doctrine, successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause. Thus, even if appellant's theft by taking the automobile in Georgia constituted the same conduct as his theft by receiving the automobile in Kentucky, Georgia may still prosecute him for the theft committed here without violating the constitutional protection against double jeopardy.

Brady; Closing Arguments

Manley v. State, S08A1921

Appellant was convicted of malice murder in this "cold case" dating back to 1987. Appellant's defense during trial was to place the blame for the murder on the victim's boyfriend. He argued that the trial court erred by denying his motion for a mistrial after the State allegedly violated discovery rules by introducing evidence that a knife found after the murder had been located in the trunk of the victim's car, not at the boyfriend's home.

The record showed that, following the victim's disappearance, police recovered a knife with fibers on it from the trunk of her abandoned car. A property receipt for the knife was placed in her original missing persons file. The body was discovered two years later and for some unknown reason, a copy of the property receipt for the knife did not make its way into the case agent's death investigation file, from the original missing persons file. When the case was re-opened in 2005, the original case agent reviewed the file for the new investigator and noted that the origin of the knife was uncertain and stated that the items could have come from either the boyfriend's home or the victim's vehicle. As part of trial discovery, appellant received this death investigation file which included the original case agent's synopsis but excluded the original property receipt. In his opening statement, defense counsel argued that the knife in question had been taken from the boyfriend's home, had been lost by the State, and had fibers on it which would have shown that it was used to cut the victim's clothing prior to her murder. Later, during trial, appellant elicited testimony to support his contentions, including an admission by the boyfriend that police had searched his house and found the knife there. However, the day after opening, the original case agent found the property receipt and the state sought to introduce it. Appellant objected, arguing that its admission would "destroy" his defense. The Court found no error. The knife was not exculpatory evidence under *Brady*. Also, defense counsel's defense was not "destroyed" since he was still able to show that the boyfriend had a volatile relationship with the victim and had threatened to kill her, and that the boyfriend, not appellant, was the actual murderer. Moreover, appellant was able to draw the accuracy of the property receipt into question based on the boyfriend's testimony that the knife had been found in his home.

Appellant also argued that the State, during closing argument, improperly bolstered the testimony of its witnesses by stating that the investigators, officers, and the prosecuting attorney involved in the murder investigation would not sacrifice their careers in law enforcement to frame him. The Court found that defense counsel, in his closing, first argued that the State's witnesses had an inappropriate and unjustified "agenda" to convict his client, purposefully "poisoned" witnesses, conveniently

lost important evidence, and purposefully and wrongfully manipulated other evidence to fit the theory of the prosecution. Thus, the State's arguments were proper rebuttal which did not constitute an opinion about the veracity of these witnesses, but instead, merely urged the jury to make a deduction about veracity from the facts.

Expert Witnesses; Judicial Comments

Manley v. State, S08A1921

Appellant was convicted of malice murder in this "cold case" dating back to 1987. He contended that the trial court erred by denying his request to call an expert witness to testify regarding the reliability of eyewitness identifications. The Court stated that the admission of expert testimony regarding eyewitness identification is in the discretion of the trial court. Where eyewitness identification of the defendant is a key element of the State's case and there is no substantial corroboration of that identification by other evidence, trial courts may not exclude expert testimony without carefully weighing whether the evidence would assist the jury in assessing the reliability of eyewitness testimony and whether expert eyewitness testimony is the only effective way to reveal any weakness in an eyewitness identification. Here, the State offered substantial evidence of corroboration. Therefore, the trial court did not abuse its discretion in disallowing the testimony of the defense's expert.

Appellant also contended that the trial court erred by coercing the jury into reaching a verdict after denying his motion for a mistrial due to a deadlocked jury. The record showed that, over the course of several days, the jury sent four notes to the trial court indicating that they were not able to reach a unanimous verdict. Following the third note, the trial court gave the jury an *Allen* charge, over appellant's objection. When the jury again indicated that it could not reach a verdict, the trial court called the jury into the courtroom. The foreman told the trial court that the split was presently 8-4, but that there had been movement on the vote that day. The trial court then sent the jury back for more deliberations, stating that "both sides would like to have a verdict if we could." The Court found that the statement was not coercive because it did not

indicate to the jury that they had no choice but to reach a verdict. Rather, the statement by the trial court could not be considered coercive because it did not imply in any way that a verdict was required.

Impeachment; Lesser Included Offenses

Hooper v. State, S08A1654

Appellant was convicted of malice murder, felony murder, voluntary manslaughter, two counts of aggravated assault, and possession of a knife during the commission of a crime. At trial, appellant's defense to the crimes was self-defense. Appellant contended that the trial court erred by not allowing him to impeach a State's witness through the use of the witness's prior nolo contendere plea to a shoplifting charge, and by refusing to charge the jury on the lesser included offense of involuntary manslaughter. The Court found no error. First, the Court held that OCGA § 17-7-95(c) provides that "a plea of nolo contendere shall not be used against the defendant in any other court or proceedings as an admission of guilt or otherwise or for any purpose." The Legislature, in enacting this section, did not carve out an exception for impeachment purposes.

The Court also found that a defendant who seeks to justify homicide under our self-defense statute is not entitled to an additional instruction on involuntary manslaughter in the course of a lawful act whatever the implementation of death. This must be true for if he is justified in killing under OCGA § 16-3-21, then he is guilty of no crime at all. If he is not so justified, the homicide does not fall within the 'lawful act' predicate of OCGA § 16-5-3 (b) because the jury, in rejecting his claim of justification, has of necessity determined thereby that the act is not lawful.

Evidence; Character

Matthews v. State, S08A1577

Appellant was convicted of malice murder and robbery by force. He argued that the trial court erred in admitting redacted letters he wrote to the victim from prison. Specifically, appellant contended the letters were irrelevant and prejudicial insofar as they placed his character into issue by alerting the jury he had been incarcerated. The Court disagreed. It found that the letters were relevant because

they established the relationship between appellant and the victim. The trial court reviewed all the letters, excluded some of the letters, and admitted redacted letters. Moreover, there was other admissible evidence of appellant's incarceration, in particular testimony from the police officer who arrested him. Thus, the allegedly prejudicial evidence was cumulative of other admissible evidence and therefore, no abuse of discretion in the trial court admitting this evidence.

Right to Jury Trial and Counsel

Yancey v. State, A08A1694

Appellant represented himself before the trial court and was convicted of loitering following a bench trial. He contended that he was entitled to a new trial because the State failed to meet its burden of showing that he validly waived his right to counsel or his right to a jury trial. The Court agreed. It held that the State failed to meet its "heavy" burden to show that appellant knowingly and intelligently waived these rights. The record contained no trial transcript and the only evidence as to either the waiver of the right to counsel or the waiver of the right to a jury trial was a form upon which a check mark was placed next to the words "non-jury," which appellant, apparently unrepresented by counsel, signed. It was incumbent upon the State to prove that the waivers were knowingly and intelligently made either by showing on the record that appellant was cognizant of the rights being waived or by filling a silent or incomplete record with extrinsic evidence which affirmatively showed that the waivers were knowingly and voluntarily made. Since no other evidence appeared in the record, the conviction was reversed.

Evidence; Res Gestae

Guilford v. State, A08A1704

Appellant was convicted of mortgage fraud. She contended that her conviction should be reversed because the trial court made numerous evidentiary errors that had a cumulative prejudicial effect on the jury. The Court, however, held that this State does not recognize the cumulative error rule. Appellant also asserted that the trial court erred in admitting evidence that she was hiding from police

officers when they came to her house with an arrest warrant. Specifically, she asserted that such evidence was irrelevant to the charges against her. The Court disagreed. It found that such evidence was part of the res gestae of the arrest, and thus, the manner of the arrest, and all the circumstances connected with the arrest, are proper matters to be submitted to the jury to be weighed by them for what they are worth.