

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 18, 2016

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THIS WEEK:

- **Wiretaps; Sealing of Recordings**
- **Bond Conditions; Pretrial Habeas Corpus**
- **Due Process; Procedural Errors**
- **Jury Instructions; Voluntary Manslaughter**
- **Discovery; O.C.G.A. § 24-9-923**
- **Ineffective Assistance of Counsel; Jury Charges**
- **DUI; Independent Testing**

Wiretaps; Sealing of Recordings

Finney v. State, S15A1739 (3/7/16)

Appellant was indicted for murder and other crimes. He moved to suppress evidence obtained by way of a Title III wiretap authorization, contending that the State had failed to immediately present recordings of intercepted communications for sealing. The evidence showed that investigators ceased their interception of communications on March 20, but the expiration of the wiretap order occurred on April 7. Nevertheless, the recordings of the intercepted communications were not presented for sealing until April 23, sixteen days after the expiration of the Title III authorization.

The Court stated that the use of wiretaps by law enforcement officers to intercept the content of communications is governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 as amended, 18 U.S.C. § 2510 et seq. Generally speaking, investigators may employ wiretaps only when they are authorized to do so by court order, see 18 U.S.C. § 2518 (1) - (6), and upon the expiration of such an order,

the investigators must “immediately” present recordings of any intercepted communications to the court to be sealed. 18 U.S.C. § 2518 (8) (a). If recordings are not presented immediately for sealing, the government may not use or disclose the content of any intercepted communication or any evidence derived therefrom in a judicial proceeding, unless there appears a “satisfactory explanation” for the failure to make an immediate presentation of the recordings. A “satisfactory explanation” is one that explains not only why a delay occurred but also why it is excusable. The trial court found that the State had failed to seal the recordings immediately, but offered a satisfactory explanation for the failure to do so. The Court disagreed and reversed.

The State first argued that the judge who originally had authorized the interception of appellant’s communications was unavailable for four days, beginning on April 7, 2008, the day the authorization expired. Because Title III requires presentation to “the judge issuing [the Title III] order,” 18 U.S.C. § 2518 (8) (a), the State argued, the recordings could not be presented until that judge was available to seal them. The Court stated that when Congress provided in 18 U.S.C. § 2518 (8) (a) that recordings must be presented for sealing “immediately,” it meant just what it said. But, for purposes of the appeal, the Court assumed that the unavailability of the judge who originally authorized the interception was an adequate explanation for the failure to present the recordings for sealing prior to April 11. “That said, and to give better guidance to prosecuting attorneys in Georgia, we note our agreement with those cases holding that recordings properly may be sealed by another judge of the same court when the authorizing judge is absent or otherwise unavailable. And although it still may be reasonable to wait a short

time for the authorizing judge, the reasonableness of delaying the presentation of recordings until the authorizing judge becomes available — when other judges are available sooner — is related inversely to the duration of the delay. The longer the delay, the less reasonable it is to await the availability of the authorizing judge.”

As to the additional delay of 12 days, the State argued that a prosecuting attorney who had assisted investigators with appellant’s case also was involved in the prosecution of a death penalty case. At the time the recordings should have been presented for sealing, an interlocutory appeal was pending in the death penalty case, and that appeal was scheduled for argument in the Supreme Court on the morning of April 15. The prosecuting attorney in question was preoccupied with preparations for that argument, the State contended, and as a result, she failed to more promptly present the recordings for sealing. However, the Court noted, the prosecuting attorney’s involvement was only “peripheral” to appellant’s case and two other prosecuting attorneys were involved in the wiretap investigation. Even if the lone prosecuting attorney to whom the State attributed the delay had been preoccupied with the appeal, the State offered no explanation at all why the other two prosecuting attorneys then involved with the investigation could not have assisted the investigators in presenting the recordings to the judge. Moreover, the pendency of the appeal in April 2008 was no surprise with which the prosecuting attorney in question suddenly and unexpectedly had to deal. Accordingly, the prosecuting attorney would have known of the pending appeal well before the time for presenting the recordings for sealing. In addition, even accepting that the prosecuting attorney was, in fact, preoccupied with preparations for appellate argument, that argument was heard on the morning of April 15. The State offered no explanation at all for why it took an additional eight days to present the recordings for sealing and a “no explanation” could not conceivably be a “satisfactory explanation.”

Accordingly, the Court found, the trial court erred in accepting the circumstances identified by the State as a “satisfactory explanation” for the delay in presenting the recordings for sealing. The State failed to comply with the requirements of 18 U.S.C. § 2518 (8) (a). Therefore, the trial court should have granted the motion to suppress.

Bond Conditions; Pretrial Habeas Corpus

Edvalson v. State, S15A1869 (3/7/16)

On Sept. 20, 2012, appellant was arrested for possession of child pornography. On Nov. 26, 2012, the Court granted him a bond with two express special conditions: 1) No computers /smart phones/ internet enabled appliances (Smart TV’s, etc.) in appellant’s house; and 2) No unsupervised contact with children less than 16 years of age. He thereafter was indicted on four counts of sexual exploitation of children and prior to trial, the State filed an emergency motion to revoke bond, contending that appellant had over a 160 images of child pornography on his computer and that he had been posting on the internet which suggested his continued participation in child pornography activities. However, the detective that testified at appellant’s bond revocation hearing acknowledged that he had not been inside appellant’s house or applied for a search warrant for it; that he had no evidence that appellant had a computer, smartphone, or internet-enabled appliance in his house; and that he was not alleging that appellant had unsupervised contact with anyone under the age of 16 since he posted bond. Based on this, the trial court denied the State’s motion, but imposed the following additional special conditions to the existing bond: 1) Appellant shall not use or otherwise access the internet by any means nor shall he access any online service of any nature; 2) Appellant shall not possess, either directly or indirectly, images in any form depicting a child under 18 years of age; and 3) Appellant shall not use or possess a computer, tablet, smart phone, or any other device capable of accessing the internet. Appellant filed a petition for writ of habeas corpus contending the additional bond conditions were overbroad, unduly restrictive, and imposed in violation of due process. After the trial court denied the petition, he appealed.

The Court found that appellant had clear notice that the originally-imposed bond conditions, and his alleged violation of those conditions, were at issue with the possible sanction of the complete revocation of his bond. Moreover, even in the situation of a complete revocation of bond, only minimal due process is required prior to the revocation. Appellant’s bond was not revoked and he was not deprived of his freedom by incarceration;

indeed, he prevailed in the State’s attempt to revoke his bond. Furthermore, he had a full and fair opportunity to be heard before his bond was modified. In the revocation proceeding, the superior court had the authority to impose additional reasonable restrictions on appellant’s behavior as conditions of his pretrial release on bond. And, the conditions of bond detailed by the superior court at the revocation hearing merely reflected and clarified the preventive nature of the special conditions of the original bond order in light of the new evidence regarding appellant’s conduct.

In fact, the Court noted, the additional conditions did not constitute unanticipated restrictions at all; they merely helped to effectuate the goal of the special conditions as stated in the original bond order. The plain purpose of the special conditions, from inception, was to prevent appellant from having access to children, images of children, and the internet for the purpose of creating, obtaining, promoting, or disseminating child pornography. This reflects the State’s compelling interest in safeguarding the physical and psychological well-being of minor children by protecting them from being subjects of pornography, which is obviously harmful to their psychological, emotional, and mental health. The special conditions of bond as summarily set forth in the initial bond order would ill-serve this compelling public safety interest if appellant could engage in the criminal conduct sought to be prohibited by merely doing so outside of the confines of his home. Thus, the special conditions imposed in this case were appropriate and reasonable under the facts, and therefore, did not constitute an abuse of the superior court’s discretion. Accordingly the trial court did not err in denying the petition for writ of habeas corpus.

Due Process; Procedural Errors

Moss v. State, S15A1736 (3/7/16)

Appellant was convicted of murder. He contended that a number of alleged procedural errors, considered cumulatively, violated his right to procedural due process. First, he argued that it took over a year to get full discovery from the prosecution. However, the Court noted, appellant’s counsel had the opportunity before trial to review everything in the State’s case file, including all the evidence that the State intended

to introduce, and appellant pointed to no evidence that the State deliberately withheld discovery to hamper the defense. Thus, he was not prejudiced by the length of time it took to get discovery.

Second, appellant contended that the indictment given to the jury should not have been redacted to remove the name of his co-indictee, Javonte Wright, whose charges had been nolle prossed. But, the Court stated, a trial court has discretion to give the jury a redacted indictment where the only thing deleted is the name of a co-indictee, and appellant failed to explain how that discretion was abused here.

Finally, appellant pointed to the State's failure to formally arraign him until after the close of evidence at trial, when the court noted that he had not been arraigned while reviewing the indictment before sending it to the jury. But, the Court noted, appellant never objected at trial to the lack of an earlier arraignment, and any error in the lack of arraignment was waived by his failure to raise the issue prior to verdict. Moreover, appellant's rights were not affected by the late arraignment, as he did not assert that he was unaware of the charges against him, both sides participated in discovery and filed motions, and it was clear from his proceeding to trial that he was offering a plea of not guilty. Accordingly, the Court held, appellant's claim that his right to due process was violated had no merit.

Jury Instructions; Voluntary Manslaughter

Clough v. State, S15A1708 (3/7/16)

Appellant was convicted of malice murder, felony murder (aggravated assault), felony murder (burglary) and numerous other crimes. The evidence, briefly stated, showed that appellant and his wife were separated. Appellant drove by his mother-in-law's home. He banged on the window of the home at 2 a.m. Sometime later, appellant broke into the house and attacked his wife and Watkins, the man she was sleeping with. He stabbed Watkins to death, attacked his wife and mother-in-law, and then fled.

Appellant contended that the trial court erred in refusing to give his requested charge on voluntary manslaughter. The trial court declined to give the charge because appellant entered his mother-in-law's house, a place appellant had no lawful right to be. The Court first found that there was slight evidence that

appellant acted out of irresistible passion. The record showed that when appellant came upon his wife and her paramour, appellant stabbed him while yelling "This is what you get for f***ing somebody's wife." Evidence of adulterous conduct can be evidence of "serious" provocation warranting the trial court giving a charge on voluntary manslaughter. What transpired up to the point of the murder of Watkins, including appellant's possible prior knowledge that his wife was having an affair, appellant's possible prior knowledge of Watkins' identity, the parties' separation after fifteen years of marriage, appellant's observing unfamiliar vehicles at his mother-in-law's home, and appellant's unlawful entry in to his mother-in-law's house all go to the sufficiency of the provocation which would excite a reasonable person. When there is evidence of alleged provocation, the sufficiency of the provocation is generally for the jury to weigh and decide, not the trial court.

But here, the Court noted, the trial court stated that the only reason it did not give a charge on voluntary manslaughter was because appellant was at his mother-in-law's house where he had no right to be. Presumably, had the same facts played out at the marital home, the trial court would have given the charge as requested. This reasoning, the Court found, was an overreach by the trial court. First, O.C.G.A. § 16-5-2(a) does not place such territorial restrictions on its application. Secondly, the trial court's conclusion was essentially a decision about the sufficiency of the provocation, rather than a decision about whether there is any evidence of voluntary manslaughter. Thus, under the circumstances of this case, the trial court should have given the charge as requested and its failure to do so was reversible error.

Accordingly, appellant's conviction and sentence for malice murder was reversed. And, because the malice murder conviction was now reversed, appellant's convictions for felony murder (aggravated assault of Watkins) and felony murder (burglary) were no longer vacated as a matter of law. However, because of the failure to give the charge on voluntary manslaughter, appellant's conviction for felony murder (aggravated assault of Watkins) was also reversed.

Discovery; O.C.G.A. § 24-9-923

Brannon v. State, S15A1724 (3/7/16)

Appellant was convicted of malice murder, felony murder, armed robbery and aggravated assault with a firearm. He contended that the trial court erred in denying his motion to compel the State's production of law enforcement officers' notes pursuant to O.C.G.A. § 17-16-4. The Court disagreed. By its plain language, O.C.G.A. § 17-16-4, which addresses Georgia's requirements for the disclosure of evidence in criminal trials and specifies the types of evidence the State must turn over to the defense, does not include the informal notes of law enforcement officials among the types of evidence the State is statutorily required to produce. Accordingly, the Court found no error in the trial court's determination that absent a showing by the defense that it was legally entitled to the discovery of such notes on some other basis, the State had no duty to provide them under O.C.G.A. § 17-16-4.

Moreover, although appellant disputed the trial court's finding that the type of notes he sought to compel did not exist, mere speculation is insufficient to substantiate appellant's claim that the State withheld exculpatory evidence which prejudiced his defense. To prevail on a *Brady* claim, a defendant must show (1) the State possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the trial would have been different. Because the record showed that appellant failed to make any of the required showings under *Brady*, the trial court properly rejected this claim.

Appellant also argued that the trial court erred by refusing to require the State to obtain and supply information to the defense about plea deals allegedly given to various State witnesses. The Court noted that the State has a duty to reveal to the defense any agreement with a witness concerning criminal charges pending against that witness, and the failure to disclose such an agreement constitutes a violation of the accused's due process rights under *Brady*. In order to establish reversible error, however, a defendant must show that

had evidence of the agreement been disclosed, there exists a reasonable probability that the result of the defendant's trial would have been different. And here, the trial court found the prosecution was not involved in any discussions with other law enforcement agencies outside of the Circuit regarding any plea offers made to any of the State's witnesses at appellant's trial. The trial court further determined that the only plea offer made by the State in this case was to his co-defendant, a deal the State revealed to appellant during discovery. Having failed to come forward with any evidence supporting his contention that plea deals were given to State witnesses by other jurisdictions, appellant failed to make the showings required under *Brady* to support his claim.

Finally, appellant argued that the trial court improperly allowed a police detective to testify as to the contents of a surveillance video over appellant's objection. He also contended the trial court erred in permitting the detective to testify about the date-time stamp appearing on the video, arguing that the detective's second-hand viewing of the surveillance video in this case did not meet the threshold requirements necessary for its admission pursuant to O.C.G.A. § 24-9-923.

The Court noted that O.C.G.A. § 24-9-923(c) governs the method for admitting video recordings created by unmanned cameras such as the surveillance video admitted by the trial court in this case. Pursuant to this statute, videotapes created by unmanned cameras "shall be admissible in evidence when the court determines, based on competent evidence presented to the court," that the video tends to reliably show the fact or facts for which it is offered. Although this provision also requires that the videotape show the date and time the recording was made, the fact that the date-time stamp does not reflect the actual time when the images were captured goes to the weight to be given the evidence, not its admissibility. The record showed that the detective testified that he had been trained in video surveillance and retrieved and captured video recordings as part of his work; that he downloaded videotape from surveillance cameras at the scene of the crime on the day the victim's body was discovered; that he retrieved the video using a system for which he was certified and also trained other officers to use; that at the time he downloaded the video the equipment appeared to be functioning properly except that the date-

time stamp was inaccurate; that he was able to determine that the date-time entry on the video was two days, 12 hours, and 45 minutes fast by comparing it with the actual date and time; that he viewed the video on the day he downloaded it; and that the video being offered as evidence was the one he retrieved from the surveillance cameras at the scene of the crime. Under these circumstances, the Court held the trial court did not abuse its discretion in admitting the videotape.

Ineffective Assistance of Counsel; Jury Charges

Bolden v. State, A15A1927 (2/10/16)

Appellant was convicted of two counts of burglary, kidnapping with bodily injury, aggravated assault (family violence), rape, and cruelty to children in the third degree. He contended that his trial counsel rendered ineffective assistance in failing to object to the court's jury charges on burglary. The Court agreed and reversed his burglary convictions.

The indictment stated that appellant committed burglary when he "did without authority enter into the residence" of the victim with the intent to commit rape and aggravated assault. But the trial court originally charged the jury that "[a] person commits the offense of burglary when, without authority, that person enters a dwelling house of another or any room or part of it with the intent to commit a felony." The trial court further charged that "it is not necessary that the alleged felony actually occur or be accomplished. It is only necessary that the evidence show beyond a reasonable doubt that the accused did, without authority, enter or remain in the building or dwelling place of another with the intent to commit an alleged felony." After commencing deliberations, the jury asked the court to explain the portion of the jury charge including the phrase "or remain in," and, relatedly, the timing by which the defendant must have developed the requisite intent. The trial court then clarified the jury's question, stating "as I understand it, the question from the jury - and if this is not correct you need to get me - is that let's assume for argument sake that we enter a place with one intent and while we're there we formulate another one." The foreman confirmed this was the issue submitted to the court for clarification. The trial court then

directed the jury to the indictment, but again stated that the jury must consider whether appellant "with or without authority" entered the victim's dwelling "or any room or part of it with the intent to commit a felony."

Appellant contended that the trial court erred by including "or remain" in the original jury instructions, and by including in its response to the jury's question the additional language "or any room or part of [the dwelling]," because the burglary indictment was limited to appellant's entering the victim's residence, and that his trial counsel was ineffective for not objecting. The Court agreed. The Court found that the trial court's instructions expanded the charge beyond the bounds of the indictment by instructing the jury that they could consider whether appellant entered "any room or part of [the dwelling] with the intent to commit a felony." The evidence presented at trial included testimony that appellant entered the victim's home, armed with a knife. Once inside the victim's home, the evidence showed that he may have obtained another knife from the victim's kitchen. The jury heard testimony that once appellant was in the victim's room, he first demanded money from her and promised to leave if she would provide it. After she responded that she did not have it, appellant proceeded to choke and later rape the victim. And though he disputed the victim's version of events, appellant himself testified that he entered the victim's home to talk with the victim and asked the victim to give him some money once he was in her room. The jury's question to the trial court suggested that the jury may have been considering whether it could convict appellant of burglary if he entered the victim's residence without the intent to commit an aggravated assault or rape, but then formulated the requisite intent before entering "any room or part of it[.]" When the jury expressed its confusion, the trial court should have instructed the jury to limit its consideration to determining whether appellant was guilty of committing burglary in the specific manner alleged *in the indictments only* - that is, whether appellant had the intent to commit aggravated assault and rape before entering the victim's home without authority. Instead, the trial court aggravated the confusion by simply referring the jury to the indictments, and repeating the portion of the original charge stating that appellant could

be found guilty of burglary if he entered the victim's house or "any room or part of it with the intent to commit a felony" with no additional limiting or remedial instruction. Therefore, the Court held, under the circumstances, the trial court's instructions created a reasonable possibility that the jury convicted appellant of the commission of a crime in a manner not charged in the indictment. Therefore, defense counsel rendered ineffective performance by not objecting to the jury charges and the failure to do so prejudiced appellant because a reasonable probability existed that, but for counsel's deficient performance, the outcome of the trial would have been different on the burglary counts.

DUI; Independent Testing

Farmer v. State, A15A1783 (2/11/16)

Appellant was convicted of DUI (per se) and failure to maintain lane. The evidence showed that after appellant was arrested for DUI, the officer read her the Georgia Implied Consent notice. The officer asked appellant if she was willing to submit to a chemical test of her breath. Appellant responded by saying that she would take a urine test. The officer then explained that he was asking her to submit to a breath test and appellant agreed to submit to the designated test. At that point, in order to make sure there was no confusion, the officer asked appellant if she was requesting an independent test. Appellant responded that the breath test was fine because she was "screwed either way." After making that comment, appellant gave no further response. Appellant did not request an independent test at any time during the encounter.

Appellant contended that the trial court erred in denying her motion to suppress the results of her breath test because she was not given her independent test. The Court disagreed. Here, the Court found, appellant never requested an independent test of her urine, blood, or breath. Moreover, when appellant told the officer that she would take a urine test, she was requesting that the officer designate a urine test, rather than a breath test, as the State administered chemical test.

