

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 4, 2011

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THIS WEEK:

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- **Character Evidence**
- **DNA; Chain of Custody**
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Jury Charges

Mitchell v. State, A10A2227 (2/16/2011)

Appellant was convicted of multiple counts of aggravated sodomy, aggravated child molestation and child molestation. He contended that the trial court erred by failing to instruct the jury on the essential elements of the crime of aggravated child molestation. The record showed that the trial court charged the jury on the essential elements of sodomy and aggravated sodomy. The court also charged on the essential elements of child molestation but did not specifically define the offense of aggravated child molestation for the jury. The Court, citing *Floyd v. State*, 193 Ga. App. 17 (1989), found no error. The indictment specified the manner in which the alleged acts of sodomy and aggravated sodomy had been committed,

the testimony of the victims disclosed that appellant had perpetrated the acts as alleged in the indictment, and the charge as a whole sufficiently instructed the jury as to the basic principles of law and contained specific instructions on the offenses of child molestation, sodomy and aggravated sodomy. Moreover, the jury was specifically instructed on the State's burden to prove every material allegation of the indictment and the essential elements of the crimes charged. In light of these circumstances, the Court found no reversible error.

Fatal Variance; Closing Arguments

Davis v. State, A10A2072 (2/17/2011)

Appellant was convicted of burglary, aggravated assault and misdemeanor obstruction. He contended that a fatal variance existed between the allegata and probata with regard to his burglary conviction. The evidence showed that the burgled building had been used as a home, but because of fire damage, the victim lived elsewhere. Nevertheless, the victim still kept his property there and continued to pay the rent and keep his doors locked. Appellant argued that because the victim no longer lived there, it was not a "dwelling house" as alleged in the indictment and the trial court defined burglary in its final charge as committed "when a person enters or remains in any building or dwelling place of another."

The Court held that the true inquiry is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the accused. It is the underlying reasons for the rule which must be served: 1) the allegations must definitely inform the accused as to the charges against him as to enable him to present his defense and

not to be taken by surprise; and 2) the allegations must be adequate to protect the accused against another prosecution for the same offense. Only if the allegations fail to meet these tests is the variance fatal. Here, the burglary count of the indictment correctly specified the location of the building unlawfully entered and accurately identified the date of the crime. Therefore, there was no fatal variance.

Appellant argued that the trial court erred in refusing to grant a mistrial during the State's closing arguments. The record showed that the prosecutor stated, "Mr. Davis is incredibly lucky to be drawing breath today because there are a lot of officers given the numbers of officers who are killed each and every year by folks doing just what Mr. Davis does —." Appellant contended that this argument exceeded the wide latitude afforded counsel during closing argument because there was no evidence that he was attempting to kill any of the officers involved in this case and therefore the remark referencing unknown instances where officers had been killed in the line of duty was improper. However, the Court found, the prosecutor's remarks did not go so far as to insinuate that appellant had attempted to kill any of the officers that day. And, the remarks did relate, in part, to appellant's "obviously precarious situation given the investigator's response to his encounter with [appellant], namely, drawing his gun." Moreover, after being cautioned by the trial court, the prosecutor did not revisit the point concerning police officers.

Video Gambling Machines

State of Georgia v. Damani,
A07A1015; A07A1016; A07A1017; A07A1018
(2/21/2011)

In *Ultra Telecom v. State of Georgia*, 288 Ga. 65 (2010), the Supreme Court held that seven video game machines at issue were not illegal gambling devices. In so holding, the Court reversed the decision of the Court of Appeals in *State of Georgia v. Damani*, 299 Ga. App. 112 (2009). In the remand of the case back to the Court of Appeals, the Court held as follows: "The Supreme Court did not address our holding, however, with respect to the remaining four devices that were condemned by the trial court and which were the subject of cross appeals in Court of Appeals Cases A07A1016 through 1018. We conclude, therefore, that the superior court's decision

that the devices were subject to condemnation under OCGA § 16-12-20 (2) (A) was not clearly erroneous as the record evidence supports the court's detailed factual findings that each device was a 'contrivance which for a consideration affords the player an opportunity to obtain money or other thing of value, the award of which is determined by chance even though accompanied by some skill, whether or not the prize is automatically paid by contrivance,' and, hence, an illegal gambling device."

Closing Arguments; Prosecutorial Misconduct

Schenck v. State, A10A1788 (2/16/2011)

Appellant was convicted of DUI. He contended that his constitutional rights were violated by the State when the prosecutor, during closing arguments, commented on his right to remain silent. The record showed that the prosecutor stated, "Now, the Judge will instruct you, at the end of this trial, you are not to hold it against the defendant that he did not testify. That's a right in our country and you uphold that right. But did the defendant testify [the prosecutor made air quotation marks around the word testify]? No. He didn't take the witness stand —." At this, the defense objected and the prosecutor stated that that he was not commenting on appellant's failure to testify but on the video recording that was introduced at trial. The Court then overruled the objection. The prosecutor then continued to make numerous comments relating to appellant and the video of the stop.

The Court held that an allegedly impermissible comment must be evaluated in the context in which it was made at trial. Here, the Court agreed with the trial court that the prosecutor did not manifestly intend to comment on appellant's failure to testify, and the nature of the statement was not such that the jury would naturally and necessarily take it to be such a comment. Rather, the statement was meant to draw the jury's attention to appellant's conduct on the videotape, which the prosecutor believed constituted testimony of appellant's impairment. Moreover, the Court found, even if the statement was an improper comment on appellant's failure to testify, given the fact that it was not designed or likely to urge a negative inference, and the context in which it was made, any error was harmless in light of the overwhelming evidence of guilt.

Voir Dire; McCullum Challenge

Brown v. State, A10A1960 (2/11/2011)

Appellant was convicted of armed robbery and other offenses. He contended that the trial court erred in replacing two jurors on the panel after the State made a successful *McCullum* challenge to his peremptory jury strikes. The Court found that the State made out a prima facie case of race discrimination by showing that appellant used all his strikes against Caucasian jurors. The burden then shifted to appellant to give a race-neutral reason for his strikes. The trial court accepted defense counsel's explanations for seven of the nine strikes. However, the trial court found that the State had carried its burden of persuasion regarding racial motivation as to two jurors, and seated them on the jury.

Appellant argued that since he provided a race neutral reason for striking these two jurors, the trial court erred in granting the State's motion. The Court disagreed. Even assuming that the reasons proffered by the defense were facially race-neutral, that did not end the inquiry because the trial court must ultimately decide the credibility of such explanation. Here, the trial court noted that appellant failed to strike similarly situated jurors and thus, the trial court did not believe that the appellant had given a truthful reason for his strikes. Therefore, the Court found, the decision to place these two jurors on the jury was not clearly erroneous.

Nevertheless, appellant argued that even if the trial court found that the two jurors were struck for reasons of race, the remedy was not to place them on the jury. The Court again disagreed. The prohibition of the discriminatory exercise of peremptory challenges does not violate a defendant's Sixth Amendment right to a trial by an impartial jury. When a *McCullum* challenge results in a finding that jury selection was not racially neutral and when, as here, the jurors remained unaware of the party who struck them, reinstating the improperly challenged jurors did not abridge the defendant's right to a fair and impartial jury.

Guilty Pleas; Ineffective Assistance of Counsel

Watson v. State, A11A0263 (2/14/2011)

Appellant pleaded guilty to three counts of electronically furnishing obscene materials

to minors. Within the same term, he moved to withdraw his plea. At the hearing, at which the State was represented, the trial court granted appellant a continuance of the hearing, stating to defense counsel to put the hearing down for any time that he chose. Two years later, appellant, who was now represented by new counsel, filed an amended motion and alleged ineffective assistance of counsel concerning the collateral consequences of his plea. The trial court entered an order denying the motion to withdraw because it did not allege more than a legal conclusion, had been entered only for the purpose of “keep[ing] the record open,” did not relate back, and had been abandoned through inaction.

The Court reversed and remanded the case back to the trial court for a hearing. Appellant brought his initial motion to withdraw his plea before the end of the term in which the sentence was rendered, even though a hearing on the motion was not held until well after the expiration of that term. There was no dispute that the State had adequate notice of the motion, and the timely motion was not abandoned because the trial court authorized appellant to reschedule the hearing on the motion “at any time” appellant chose. Since the record did not show if appellant’s previous counsel advised him of the collateral consequences of his plea, the case was remanded to develop the record regarding this issue.

Criminal Contempt

In re Bowens, A10A2045 (2/15/2011)

Appellant, the Sheriff of Terrell County, appealed from an order of the superior court finding him in criminal contempt for violating a transport order. Appellant contended that the evidence was insufficient because he did not willfully violate the court’s order. The evidence showed that the judge sent over an order requiring the Sheriff to transport four prisoners to the courthouse at 9:00 a.m. the following morning. The next day, the Sheriff had a deputy transport two prisoners with instructions that when the judge was finished with them, he would then transport the other two. The Sheriff contended that because of staffing and safety reasons, he could not send all four with one deputy. Therefore, his refusal to abide by the order was not willful. The Court disagreed. First, the Court noted, the hearing judge determined that the Sheriff’s

testimony that he did not wilfully disobey the court order because he did not have the ability or personnel to safely comply with the order to transfer four prisoners from the jail to the courthouse for the 9:00 a.m. hearing was not credible. Second, the legislature may have vested the office of county sheriff with broad authority to determine the safe administration of the county jail and the prisoners confined therein, but the judge was empowered to determine that the orderly administration of justice required the presence of the four prisoners at the courthouse by 9:00 a.m., and to order the Sheriff to transfer the prisoners from the jail to the courthouse by that time. The order was clear and did not direct him to send one deputy with four prisoners. If the Sheriff believed in good faith that, because of a lack of funding and personnel for his office, the court order erroneously compelled him to transport the prisoners in an unsafe manner, his remedy was to appeal the order, not to disobey it. The evidence, especially evidence that the Sheriff had ample deputies and resources under his control to comply with the court order, was sufficient to prove beyond a reasonable doubt that he wilfully violated the order and was guilty of criminal contempt.

Speedy Trial; Barker v. Wingo

Howard v. State, A10A2208 (2/11/2011)

Appellant was charged as a co-defendant under RICO with conspiracy to pass forged checks. He was indicted in December of 2006. His counsel filed a plea in bar on constitutional grounds in February 2010. It was denied in June of 2010 and he appealed.

The Court found that the 42 month delay was long enough to trigger an analysis under *Barker v. Wingo*. The Court found that the delay was uncommonly long but, “a prosecution like this one —involving twelve defendants, a continuing criminal enterprise, and twenty predicate acts —might justifiably require more time than a prosecution involving a lone defendant or an isolated incident.” The Court found that appellant was partially to blame because his attorney announced not ready at two calendar calls and appellant failed to appear at one. However, the State bore a preponderance of the blame because at least one year went by without any activity on the case whatsoever and no explanation was given.

The Court found that defense counsel’s failure to assert the right for three years weighed heavily against him. Although the Court found that appellant filed some pro se documents much earlier apparently asserting the right, they had no effect since appellant was represented by counsel at the time.

Finally, appellant failed to show prejudice. His claims of anxiety and concern could have been alleviated by asserting a more timely right to speedy trial. His claim that the delay impaired his defense because he could not locate two witnesses was also found meritless because he presented no evidence that he ever could have located either of these witnesses or that either of them would have provided information material to his defense. Thus, considering all these factors, the Court concluded that the trial court did not err in denying appellant’s plea in bar.

Character Evidence

Baker v. State, A10A1737 (2/16/2011)

Appellant was convicted of armed robbery and theft by receiving. The crime occurred in 2005. He contended that the State elicited improper character evidence from him during cross-examination. The record showed that during cross-examination of appellant, the State sought to admit a photograph of appellant wearing braids in his hair based on the testimony from one of the victims who stated that the armed robbery perpetrator wore braids. After defense counsel objected because the State failed to elicit testimony as to when the photo accurately depicted appellant, the State asked the appellant when he wore braids in his hair. Appellant stated that it had to be in 2004 because he went into the Federal Penitentiary in 2004 where they cut off all his hair and he got out in 2005. Follow-up cross-examination by the prosecutor revealed that appellant had a drug conviction.

The Court found there was nothing to show that the question posed by the State — asking appellant to explain why he knew when the photograph was taken —was intended to elicit the response appellant gave concerning his prior incarceration. Where a defendant testifies and admits prior criminal conduct, he has not placed his character “in issue” within the meaning of O.C.G.A. § 24-9-20 (b). Rather, he has raised an issue which may be fully explored by the State on cross-examination.

Here, it was appellant who introduced the topic. He therefore could not now complain that the prosecutor followed up on cross-examination. Moreover, defense counsel made no objection during the testimony, objecting only when the State commented that appellant had a drug conviction, and did not move the court for a ruling on relevance. Therefore, the trial court did not err in permitting the State's cross-examination on this issue.

DNA; Chain of Custody

Hines v. State, A10A2059 (2/11/2011)

Appellant was convicted of child molestation. He contended that the trial court erred in overruling his chain of custody objection to the admission of the sexual assault kit into evidence. Specifically, that there was a break in the chain of custody because the kit was sent to Reliagene, a laboratory in New Orleans, for testing and no one from Reliagene testified.

The evidence showed that at the hospital, a nurse gave the sexual assault kit to an investigating officer. The kit was then taken to the State crime lab. There, the GBI sealed the bag containing the kit, labeled it, marked it with the analyst's initials and a bar code, and sent the kit to Reliagene to test for the presence of "seminal fluid or sperm." Reliagene returned the entire kit to the GBI eight months later. At trial, the kit was shown to have the same identification number and bar code, and it had the initials of the GBI analyst who worked on the case. Thus, the Court held, the kit itself, as marked, was not fungible and the witness testified to its identification.

Moreover, after it received the kit, the GBI also concluded the same sample contained sperm, and it then compared the DNA found in that sample with DNA taken from a buccal swab of the defendant's mouth. The DNA in the two samples matched. The Court held that "DNA, like a fingerprint, is unique to a single individual and, therefore, . . . may be admitted without demonstrating a chain of custody, since it can be readily identified by reference to the defendant's DNA." Thus, the Court determined, appellant's complaint about the swab samples sent to Reliagene did not raise a chain of custody issue, per se, but rather, the possibility of mishandling or contamination of the material in the sexual assault kit with another source of appellant's DNA. But, the Court found, no evidence was produced to

show 1) that there could be such a possibility prior to the time that the material was returned from Reliagene, the first point in time when the material taken from the victim, was in the same location as the buccal swab taken from appellant's mouth; 2) that the buccal swab was sent to New Orleans; 3) that Reliagene, or the doctor who took the swabs from the victim, had access to any of appellant's sperm from any other source; or 4) that the sample returned from Reliagene was mishandled or contaminated upon return to the GBI. Therefore, the trial court did not abuse its discretion in admitting the evidence.

Statements; Impeachment Evidence

Durrence v. State, A10A2125 (2/11/2011)

Appellant was convicted of child molestation. He contended that the trial court erred in admitting alleged custodial statements he made without benefit of *Miranda* warnings. The evidence showed that a DFCS worker invited appellant to come talk to the worker at the DFCS office to discuss the allegations of molestation. Unbeknownst to appellant, the worker also invited a GBI agent to be there as well. Appellant contended that because he was lured into DFCS by a social worker, his "surprise" interview by a GBI agent was custodial and therefore, he was entitled to have been Mirandized prior to making any statements.

The Court upheld the trial court's ruling that appellant was not in custody for *Miranda* purposes when he made the statement. Appellant was interviewed in a DFCS office, and he came there voluntarily. Although he was not expecting the GBI agent to be there, the agent introduced himself as a GBI agent and stated that he wanted to discuss the allegations against appellant. The agent told appellant that he was not under arrest, was free to leave, and did not have to make a statement. There was no evidence that he was physically restrained or otherwise prevented from leaving the DFCS office until after he admitted to criminal conduct. Accordingly, the evidence authorized a finding that a reasonable person in appellant's position would have believed that he was free to terminate the interview and leave.

Appellant also contended that the trial court erred in granting the state's motion in limine to preclude the defense from introducing evidence of a molestation report made by the

victim's half-sister. Specifically, he argued that the trial court denied him a thorough and sifting cross-examination and contended that the evidence was relevant to show that the victim's mother had caused the victim to fabricate the allegations because the mother was jealous, vindictive, and suspected that appellant was paying attention to another woman. After a pretrial hearing, the trial court granted the State's motion. At trial, the mother was called as a defense witness; she did not testify for the State. Appellant questioned her extensively concerning her volatile relationship with him, both before and after he molested the victim.

The Court found no error. First, appellant failed to perfect the record with the DFCS reports of the half-sister's allegations. But, even assuming that the record was perfected, the Court found the argument meritless. The Court noted that it was appellant, not the State, who called the mother as a witness. In any event, pursuant to OCGA § 24-9-81, "[a]ny party, including the party calling the witness, may attack the credibility of a witness." Thus, the statute gives the defendant the right to attempt to impeach his own witness. Here, however, appellant proffered no proper impeachment evidence, and therefore, cannot complain that the trial court abused its discretion in granting the State's motion in limine.

Prior Difficulties

Rayner v. State, A10A2356 (2/15/2011)

Appellant was convicted of child molestation, criminal attempt to commit rape, and false imprisonment. At trial, the court charged the jury on prior difficulties between appellant and the victim. Appellant contended that the charge intimated an opinion that there was indeed evidence of prior difficulties, when there was none, and that it telegraphed to the jury that the court agreed with the State's theory of the case.

The Court found that proof of prior difficulties between the defendant and victim, including prior acts of molestation, is admissible without notice or a hearing. Such evidence is admissible to show the defendant's motive, intent, and bent of mind in committing the act against the victim which resulted in the charges for which he was being prosecuted. Here, appellant was charged with child molestation for placing his penis on or about the victim's vagina, with criminal attempt to

commit rape for doing the same while holding he victim down, and with false imprisonment for illegally detaining her. But the victim also testified to various other instances of appellant touching her breasts and vagina, all of which constituted evidence of prior difficulties. Although not necessarily charged by the State, each instance of molestation reported by the victim constituted evidence of prior difficulties justifying the charge. Moreover, by giving the charge, the trial court neither commented on the evidence nor was the charge unsupported by the evidence.