

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 6, 2009

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THIS WEEK:

- Search & Seizure
- Closing Arguments; Right to Remain Silent
- Right to Self-Representation
- Statement; *Miranda*
- Merger; Severance
- Prior Difficulties; Crawford
- Statute of Limitations
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Search & Seizure

State v. Palmer, S08G1419

The State appealed from the grant of the defendant's motion to suppress. The record showed that an officer used a "reliable" confidential informant to do a controlled buy and then used that controlled buy as the basis for obtaining a search warrant. The defendant contended that the affidavit in support of the warrant was deficient because it offered no information to the magistrate as to the reliability of the unnamed CI and it failed to disclose that the CI had a criminal background. The Court held that if a trial court determines that an affidavit contains material misrepresentations or omissions, the false statements must be deleted, the omitted truthful material must be included, and the affidavit must be reexamined to determine whether probable cause exists to issue a warrant. If any omissions on the part of the affiant are offset by independent corroboration of criminal activity, then the magistrate may still have sufficient information to find that probable cause exists. A magistrate's decision

to issue a search warrant based on a finding of probable cause is entitled to substantial deference by a reviewing court. Here, the CI's reliability was not independently dispositive, but one factor among many to be considered. Therefore, the magistrate may have had sufficient information to find that probable cause existed for the issuance of the warrant because the alleged omissions were offset by independent corroboration of criminal activity and "a controlled buy strongly corroborates the reliability of the informant." Accordingly, the case was reversed.

Closing Arguments; Right to Remain Silent

Reynolds v. State, S08G1123

The Court granted certiorari in this case to consider whether the rule of *Mallory v. State*, 261 Ga. 625, 630 (5) (1991), that a prosecutor may not comment on a defendant's pre-arrest silence, is limited to circumstances described in *Morrison v. State*, 251 Ga. App. 161, 164 (3) (2001). During closing argument, the prosecutor stated, "I want you to consider that Mr. Reynolds had the opportunity to stay . . . that night and call the police or wait for police to respond to give his version of the facts." The Court of Appeals found no error because under its ruling in *Morrison*, the rule prohibiting comments regarding pre-arrest silence is properly limited to a defendant's silence *in the face of questions by an agent of the State or his failure to come forward when he knew that he was the target of a criminal investigation*. The Supreme Court, however, found that in criminal cases, comments on a defendant's pre-arrest silence are not permitted and that this rule applies even in situations in which the defendant has not received *Miranda* warnings

or takes the stand in his own defense. This is a bright-line rule and *Morrison* was an attempt to limit the holding in *Mallory* to its facts. The Court rejected any erosion of this bright-line rule and therefore held that *Morrison* and its progeny are overruled.

Right to Self-Representation

State v. Evans, S08G0504

The Court granted certiorari in this case to determine whether the Court of Appeals correctly reversed the trial court's decision to allow appellant to represent himself at trial. Appellant was charged with burglary and giving a false name. Before trial, appellant requested that his appointed counsel be dismissed and that he be allowed to represent himself. After extensive questioning, the court agreed to allow him to represent himself. The jury convicted on both counts. The Court of Appeals utilized a "six-part test" and determined that the trial court erred because it failed to discuss with appellant any lesser included offenses and failed to explain to appellant the element of intent and the fact that he could be convicted as a party to that crime, even though both of these principles related directly to the defense theories articulated by appellant.

The Supreme Court reversed. It held that rote application of the six-part test used by the Court of Appeals is not mandated. Instead, a defendant's waiver of his right to counsel is valid if the record reflects that the defendant "was made aware of the dangers of self-representation and nevertheless made a knowing and intelligent waiver." It is also not required that the trial court probe a defendant's case and advise the defendant as to legal strategies to ensure that a waiver is intelligently made. A defendant's "technical legal knowledge" is irrelevant to the question of whether he validly waives his right to be represented by counsel. "The test is not whether the accused is capable of good lawyering—but whether he knowingly and intelligently waives his right to counsel." Here, the record demonstrated that the trial court repeatedly cautioned appellant about the dangers of self-representation, and discussed the benefits of having qualified counsel representing him, and appellant clearly understood what he was undertaking. Therefore, appellant may not have demonstrated that he was capable of "good lawyering," but he did demonstrate that he was knowingly and

intelligently waiving his right to be represented by counsel.

Statement; Miranda

State v. Moon, S08A1798

The State appealed the suppression of appellant's statements to police investigators. The evidence showed that after receiving his *Miranda* warnings, appellant began to answer questions. When appellant was told that there were "still a whole lot of unanswered questions," Appellant stated, "I don't—I'll just get me a lawyer, man." Appellant was then questioned about whether he wanted a lawyer. Appellant stated that he was "getting confused," agreed that he had "mentioned a lawyer," but stated that he would continue the interview without a lawyer present. The questioning continued for some time, but then appellant stated, "I ain't got no more to say. I mean, that is it." However, the interview did not cease, and appellant was not asked if he wished to stop. The Court held that a person being subjected to custodial interrogation may at any time express his or her desire to remain silent and, thereby, end the interrogation. Any exercise of this right to silence must be scrupulously honored. But here, that was not the case. The record supported "the inescapable conclusion" that appellant asserted his right to silence when he stated, "I ain't got no more to say. I mean, that is it." This desire to remain silent was reinforced by appellant's subsequent and repeated pleas to end the interrogation in the face of the investigators' determination to do otherwise. Since the interrogation should have ended after appellant's first statement that he had nothing more to say, his responses thereafter were properly suppressed. However, the trial court suppressed everything said by appellant to the investigators. Therefore, the case was reversed in part because only that which appellant said after invoking his right to silence was properly suppressed.

Merger; Severance

Wilson v. State, S08A1696; S08A2035

Appellant was tried with his co-defendant for murder and other crimes. He contended that his conviction for aggravated assault and malice murder should have merged and the trial court erred in denying his motion to sever. First, the Court found no merger was required.

When the victim of both the aggravated assault and the malice murder is the same person, the aggravated assault generally is a crime included in the malice murder. However, here the malice murder count of the indictment charged appellant with causing the victim's death by shooting him with a firearm and specified the weapon as a .223-caliber rifle. The aggravated assault count charged appellant with assault and listed two aggravating factors stated in the conjunctive—with intent to rob and with a deadly weapon. In order to establish that appellant committed aggravated assault as pled in the indictment, the State was required to show not only that appellant shot the victim, but that he did so with the intent to rob him. Because this additional aggravating factor was a material element of the crime, the aggravated assault was not established by proof of the same or less than all the facts required to establish proof of malice murder. Since the two crimes did not merge as a matter of fact, the trial court did not err when it imposed sentences for both crimes.

Appellant also contended that the trial court erred when it denied his motion to sever his trial from that of his co-defendant, arguing that the co-defendant's presence at trial prevented him from presenting to the jury the entirety of his statement to police. At trial, appellant unsuccessfully sought to play the video recording of his post-arrest interview with police in its entirety, citing OCGA § 24-3-38. The Court held that "OCGA § 24-3-38 is not without limitation." The statute must yield to the constitutional underpinnings of *Bruton*: When the State introduces the inculpatory portions of a defendant's statement as the admission of a party-opponent, the trial court correctly defuses a non-testifying defendant's attempt to use OCGA § 24-3-38 to gain admission into evidence of the remainder of the defendant's statement which includes a portion that directly inculpatates his co-defendant in the crime. Where, however, the portion of the defendant's statement that directly inculpatates his co-defendant also contains evidence of the defendant's defense, that portion of the defendant's statement must be admitted, and the State's ability to try defendants jointly must yield. Here, the Court found, there was no evidence that the material excluded by the trial court's ruling contained evidence of appellant's defenses of withdrawal and lack of knowledge. Therefore, the trial court did not err in refusing

to permit appellant to use OCGA § 24-3-38 as the basis for introducing an unedited version of his post-arrest interview with police.

Prior Difficulties; Crawford

Wright v. State, S08A1825

Appellant was convicted of malice murder, felony murder, and cruelty to children arising from the death of his 5-year-old stepdaughter. Appellant contended that the trial court erred when it allowed, under the necessity exception, the admission of a hearsay statement made by the victim for the purpose of showing prior difficulties between him and the victim. The evidence showed that almost two years prior to the victim's murder, an officer responded to a domestic disturbance call made by the victim's mother. When the officer arrived, the victim had a bruise on her face and was holding an ice pack on it. The officer, who had been trained on interviewing children, testified that when she asked the victim what happened, the victim, who was three or four at the time, repeatedly said "Daddy did it." Citing *Crawford*, the Court held that the trial court erred in admitting this evidence because the victim's statements were testimonial and violated appellant's Sixth Amendment right to confrontation. As opposed to statements made in response to garnering police assistance during an ongoing emergency, here the child's words were statements in response to a question by law enforcement after the emergency had already ended and were reflective of past events and, as such, were testimonial in nature. Nevertheless, the Court found the admission harmless because there was no reasonable probability that the evidence contributed to the verdict.

Statute of Limitations

State v. Robins, A08A2419

The state appealed from the trial court's grant of a plea in bar against seven defendants. The indictment alleged that Mark Robins, the section supervisor for the Internal Administration of the Department of Revenue, conspired with the other defendants in a pattern of bid-rigging. Robins was responsible for soliciting bids and ordering supplies for the Department of Revenue. It was alleged that Robins awarded bids and contracts to companies in which he had an interest or which were owned by friends or relatives. Specifically, the indictment

charged that Robins "would get bids from other companies and then advise his 'companies' of the competing bids to allow them to bid lower. He would also fabricate competing bids from his 'companies' and thereby award the contract to one of his 'companies' to his own benefit. The applicable statute of limitations was four years. The last act alleged in the indictment to be in furtherance of any conspiracy was March 18, 2002. Accordingly, the statute of limitation would have run on these crimes by March 17, 2006. The defendants were indicted on April 5, 2006. The State alleged that the statute was tolled until April 16, 2002 when it began an investigation based upon receipt of an open records request concerning some of the companies involved in the bid-rigging.

Criminal statutes of limitations are to be liberally construed in favor of repose. The burden is on the state to prove that a crime occurred within the statute of limitation, or, if an exception to the statute is alleged, to prove that the case properly falls within the exception. The state must have actual knowledge, not constructive knowledge. However, lack of knowledge of the *illegality* of the act was not sufficient to toll the limitation period. Instead, there must be lack of knowledge of the act itself. Here, there was evidence that Robins' supervisor was aware of the acts and aware of the illegality of the acts. Thus, the Court noted that there was testimony from the supervisor's procurement coordinator that the supervisor (whose secretary was Robins' wife) knew who these vendors were, that the supervisor told her to change invoice order numbers so that they would not be sequential, instructed her to alter documents, and also told her to break orders down to insure that they were under \$2,500. Furthermore, although the State claimed it had no knowledge of the crimes until it received a request under the open records act, the State never submitted any evidence as to when it received the open records request, only when it began acting upon it. Thus, the trial court correctly granted the pleas in bar.

Evidence; Cross-Examination

Daniel v. State, A08A2351

Appellant was convicted of aggravated child molestation, child molestation, and cruelty to children in the first degree. Appel-

lant contended that the trial court erred by allowing a continuous witness violation and by unlawfully restricting his cross-examination of the 11-year-old victim, his step-granddaughter. Appellant argued that the continuing witness rule was violated by the trial court allowing the victim's drawing of appellant's home with the words "help me" written on the drawing to go into the jury room. The Court found that even if the rule was violated, any error was harmless. First, the Court noted that the victim's drawing and her cry for help likely drew sympathy from the jurors. But, the jury was properly charged regarding sympathy. Also the statement on the drawing was not a substantive statement regarding the facts of the case that the jury could have used to enhance the state's case or satisfy any element of the charged offenses. The victim's factual account and details of the crimes were not allowed to be re-read or heard again in the jury room, and the statement contained no factual details that could have caused the jury to place undue emphasis on the victim's testimony.

Appellant argued that the trial court erred by not allowing him to cross examine the victim regarding her MySpace profile page that listed her age as 17 years old and her occupation as an Atlanta Falcons' cheerleader. Appellant contended that the evidence was admissible because the age of the victim is an essential element of the crime of child molestation, and he should have been permitted to introduce evidence of the victim's prior inconsistent statements as to her age to impeach her credibility. A victim's character is rarely relevant for any purpose in a criminal trial. The Court found that the victim's age was not at issue in this case, noting that appellant did not dispute the victim's age or request a directed verdict regarding the failure of the state to prove the victim's age. Nor was the fact that the victim had previously stated she was an Atlanta Falcons' cheerleader relevant. Thus, the trial court properly ruled that appellant was merely attempting to end-run around the prohibition on the admission of prior bad acts and impeach the victim about an immaterial issue.

Voir Dire

Daniel v. State, A08A2351

Appellant was convicted of aggravated child molestation, child molestation, and cru-

elty to children in the first degree. Appellant contended he was required to exercise one of his peremptory strikes on a juror after the trial court improperly denied his motion to disqualify her for cause. The record showed that the juror was a teacher who had a prior experience with one of her students being abused. During a lengthy voir dire, this juror stated that she could have sympathy for a child victim and that this sympathy could conceivably color her verdict. However, she eventually answered in the affirmative to the question of whether she would be able to base her decision based solely on what she heard from the witness stand and follow the instruction of the Court.

The Court held that while the juror honestly expressed concerns about her possible bias toward children, her doubt as to her own impartiality did not demand as a matter of law that she be excused for cause. The juror stated that she would listen to all the evidence and follow the instructions from the court despite any sympathy she might feel for the child victim. There was no evidence that the juror had formed an opinion regarding guilt that was so fixed and definite that it would not be changed by the evidence or the trial court's instructions. But, the Court added, "in discharging its duty to assure that ... [a] juror can be fair and impartial to both parties, the better practice is [to] err on the side of caution by excusing, rather than going to great lengths to rehabilitate a juror who has consistently expressed concern that he or she may not be able to be fair because of sympathy for a victim or bias against a party."