

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 25, 2014

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Resource Prosecutor

Sharla Jackson
Domestic Violence, Sexual Assault,
and Crimes Against Children
Resource Prosecutor

Todd Hayes
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Lalaine Briones
State Prosecutor

Jenna Fowler
State Prosecutor

THIS WEEK:

- **Search & Seizure; Probation Revocation**
- **Sentencing; Recidivism**
- **Zigan; State's Right to a Jury Trial**
- **Diminished Capacity; Statements**
- **Voir Dire; Right to Fair Trial**
- **Jury Charges**
- **Brady; Jury Communications**
- **Hearsay; Prosecutorial Misconduct**
- **Motions in Arrest of Judgment; Timeliness**
- **Computer or Electronic Pornographic and Child Exploitation Prevention Act**
- **Child Hearsay; Prior Consistent Statements**

Search & Seizure; Probation Revocation

Smith v. State, A14A0244 (4/21/14)

Appellant's probation was revoked on the basis that he had committed two new offenses: possession of illegal drugs and drug-related objects, and obstruction of an officer. The evidence showed that an officer noticed that an occupant in the car traveling through a high-crime area looked at him in a nervous manner. The officer followed the car, the car stopped, and appellant and another man got out and started walking. The officer pulled up near them, and the two then began to run. The officer pursued appellant's companion, commanding him to stop, and eventually caught him. The officer later determined that appellant was the other runner.

Appellant contended that the evidence was insufficient to sustain the findings that he committed new offenses and therefore, insufficient to sustain the revocation. The Court noted that there are three tiers of encounters between police and citizens: (1) communication between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment; (2) brief seizures that must be supported by reasonable suspicion; and (3) full-scale arrests that must be supported by probable cause. The Court stated that the encounter between the police officer and appellant was a first-tier encounter and nervousness is insufficient to justify an investigative second-tier detention. Likewise, appellant's mere presence in an area of suspected crime was not enough to support a reasonable, particularized suspicion that he was committing a crime. The officer's feeling that appellant was acting in a suspicious way did not amount to a particularized and objective basis for suspecting him of criminal activity. None of appellant's described activities were crimes in and of themselves, nor were they enough to make an objective determination that he was about to be engaged in criminal activity. Accordingly, the Court reversed the revocation of appellant's probation.

Sentencing; Recidivism

Bellamy v State, S14A0542 (04/22/14)

In 1998, appellant was convicted on one count of murder and two counts relating to possession of a firearm. With respect to the murder count, he was sentenced as a recidivist to life without the possibility of parole. The Court affirmed his convictions. *Bellamy v. State*, 272 Ga. 157 (2000). In 2013, appellant

filed a motion to vacate his murder sentence, arguing that the sentence was void. The trial court denied his motion.

The Court stated that although a sentencing court generally has jurisdiction to modify or vacate a sentence of imprisonment only for one year following the imposition of the sentence, a sentencing court has jurisdiction to vacate a void sentence *at any time*. Here, the Court noted, the State properly conceded that while it did file a notice of its intent to seek recidivist sentencing pursuant to the version of O.C.G.A. § 17-10-7(c) that was in effect at the time of appellant's sentencing, that version of the statute specifically excluded its provisions from applying to a capital felony such as malice murder. See O.C.G.A. § 17-10-7(c) (2009). Thus, the Court found, the trial court was not legally authorized to impose a sentence of life without the possibility of parole, making appellant's sentence for malice murder void. Accordingly, the Court vacated appellant's sentence for malice murder and remanded for resentencing.

Zigan; State's Right to a Jury Trial

Smith v. State, S14A0586 (4/22/14)

Appellant was tried by a jury and convicted of murder and possession of a firearm during the commission of a felony. Appellant would have preferred to be tried by a judge, but the State insisted that she be tried by a jury, and the trial court yielded to the insistence of the State.

Appellant contended that the trial court erred when it refused her demand for a bench trial. In *Zigan v. State*, 281 Ga. 415 (2006), the Georgia Supreme Court held that the State may insist that an accused be tried by a jury, even when the accused would prefer to be tried by a judge. Appellant argued that *Zigan* was decided incorrectly and ought to be overruled. The Court disagreed.

The Supreme Court noted that although *Zigan* was decided not long ago, it was based on principles that have been a settled part of our law for many decades. The rule in *Zigan* is simple and straightforward in its application. It is also a fair rule that permits the accused and the government to meet upon a level playing field. The Court further noted that the reasoning of *Zigan* is not obviously unsound, and so there was no good reason in this case

to reexamine it. Accordingly, the Court ruled, it will continue to adhere to the decision in *Zigan* and therefore, the trial court did not err when it yielded to the insistence of the State upon a trial by jury.

Diminished Capacity; Statements

Thompson v State, S14A0235 (4/22/14)

Appellant was convicted of felony murder. The evidence showed that while his mother was asleep, appellant went into her bedroom and shot her with a crossbow. Appellant contended that the trial court erred in not permitting him to introduce expert testimony that he has an IQ of 67. Appellant argued the evidence was relevant to his defense that the shooting was accidental because his mental disability prevented him from understanding how to use the crossbow properly. The Court disagreed.

The Court stated that evidence of a criminal defendant's mental disability may be presented in support of a defense of insanity or delusional compulsion, a claim of incompetency to stand trial, or, since such pleas were authorized, a plea of guilty but mentally ill or guilty but mentally retarded — none of which appellant raised in this case. However, for more than 150 years, it has consistently upheld the exclusion of evidence of a defendant's diminished mental condition when offered to support other defenses or to negate the intent element of a crime. The Court noted that this State takes a more restrictive position on this issue than many other jurisdictions, where the admission of evidence relating to a defendant's deficient mental condition to support defenses other than those based on diminished mental capacity or to negate a required element of a crime has been authorized by statute or judicial decision in at least some circumstances. Nevertheless, "if the law established by our longstanding precedent is to change, it would be better done as a matter of public policy legislated by the General Assembly."

Appellant also argued that certain statements he made were admitted in violation of his *Miranda* rights. The evidence showed that about 40 minutes into his interview at the sheriff's office, appellant said, "I'm not going to say anything ... I told you everything already." The investigators, however, continued

to question him. After the interview ended, appellant was moved to a conference room, where without any questioning, he began talking. He stated that he "got into this thing with my mom this morning"; "gun"; "shot her in the back"; "good thing it wasn't steel"; and "not bad." These statements were overheard by an investigator guarding him. Appellant argued that the trial court erred in admitting these statements, asserting that the violation of *Miranda* during the interview tainted the statements later heard by the investigator and that the statements were induced by the investigator's presence in the conference room.

The Court first noted that appellant never obtained a ruling on whether *Miranda* was violated by the continuation of the interview after appellant stated he was done talking. But, even assuming a *Miranda* violation, no error occurred. When a defendant makes a voluntary statement without being questioned or pressured by an interrogator, the statement is admissible even in the absence of *Miranda* warnings; a defendant's voluntary and spontaneous outburst not made in response to custodial questioning or interrogation is admissible at trial. Indeed, law enforcement officers do not have a duty to prevent a defendant from talking about the criminal incident if the defendant wishes to do so; they must not interrogate, but they need not refuse to listen.

Voir Dire; Right to Fair Trial

Green v. State, S14A0312 (4/22/14)

Appellant was convicted of malice murder, burglary, aggravated assault, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. He contended that the trial court erred in overruling his post-trial claim that he was denied a fair trial due to a juror's untruthful responses during voir dire. He maintained that the juror in question who served on his case, answered untruthfully when the juror failed to respond affirmatively that he knew appellant, that he had previously been prosecuted in the county or elsewhere, and that he had previously been arrested. Appellant also characterized the juror as untruthful because during general voir dire the juror indicated that he had had a bad experience with law enforcement, but subsequently denied this during individual voir dire.

The Court stated that a defendant has the right to trial by a fair and impartial jury, and in pursuit of that end is entitled to exercise knowledgeable challenges; however, an incorrect response given by a potential juror on voir dire does not necessarily call for a new trial. The determinative question is whether there exists bias on the part of the juror which results in prejudice to the defendant. If the prospective juror's response was given in good faith without the deliberate intent to mislead, the trial court may well find that no prejudice resulted, even in the situation in which the lack of disclosure might have impaired the defendant's right to knowledgeably exercise a peremptory challenge. In other words, in order for a defendant to obtain a new trial because of a juror's inaccurate responses during voir dire, the defendant must show more than the inaccuracies; the defendant must demonstrate that correct responses by the juror would have provided a valid basis for a challenge for cause for favor. A juror's knowledge of, or non-familial relationship with, a witness, attorney, or party provides a basis for disqualification only if it is shown that it has resulted in the juror having a fixed opinion of the accused's guilt or innocence or a bias for or against the accused. Here, the Court found, the evidence did not demonstrate either the juror's preconception of appellant's innocence or guilt or of any bias toward him. Consequently, appellant was not entitled to a new trial based upon his juror challenge.

Jury Charges

Castro v. State, S14A0300, S14A0301 (4/22/14)

Castro was convicted of malice murder, felony murder and related offenses and his co-defendant, Parker, was convicted of two counts of felony murder. Parker argued that the trial court erred by reading the definitions for the separate felony counts against her at the same time that it read the jury instructions on the felony murder counts. Specifically, she argued, by reading the definitions for the separate felonies in this manner, the jury could have been led to believe that they were obligated to find her guilty of felony murder even if they only found guilty on one of the predicate felonies.

The Court found that while giving its jury instructions for felony murder and the predicate felonies, the trial court repeatedly

emphasized that the definitions for each crime were to be used separately in determining whether Parker was guilty or not guilty of each of the counts. The court reiterated later in the charge that the conviction of one offense doesn't necessarily require conviction of another. Furthermore, when the court asked the jurors whether they understood that they could consider each charge separately, the jurors replied in the affirmative. Therefore, the Court found, considering the charge as a whole, no error occurred.

Brady; Jury Communications

Grant v. State, S14A0634 (4/22/14)

Appellant was convicted of malice murder and possession of a firearm during the commission of a crime. The evidence showed that appellant walked up to the victim, who was playing dice, and shot him in the back of the neck. Appellant contended that under *Brady v. Maryland*, he was denied a fair trial because the State failed to produce during discovery a videotaped interview of Brittany Gardner in which Gardner stated that a third person, Ellis, told Gardner he shot the victim. The State conceded that the videotaped interview, made during the investigation of a separate murder investigation, and a detective's related report, were inadvertently not turned over to appellant before trial.

The Court stated that to prevail on a *Brady* claim, appellant must show that the State possessed evidence favorable to him, that he did not possess the evidence and could not obtain it himself with reasonable diligence, that the State suppressed the favorable evidence, and that, if the evidence had been disclosed to him, a reasonable probability exists that the outcome of the proceeding would have been different. Premitting the issue of whether appellant met his burden with regard to the first three prongs of his *Brady* claim, the Court found no reversible error because appellant failed to show a reasonable probability that earlier disclosure of the evidence would have produced a different outcome at trial. The defense theory at trial was to challenge the sufficiency of the State's evidence by focusing on the weaknesses in the State's case and appellant's statement to police that he was not in the city when the shooting occurred. Although Gardner's interview and related police report from the other shooting

were not provided to defense counsel, counsel was given a copy of the entire police file in the case, including a copy of Ellis' interview with police in which he denied shooting Middlebrooks, witness interviews identifying Ellis as a possible suspect, and documents reflecting the State's conclusion that Ellis was not involved in the victim's shooting. Defense counsel used this information at trial to question the lead detective about other suspects, and more specifically, about Ellis, to which the detective responded that Ellis was eliminated as a suspect when it was confirmed that he was not at the scene of the shooting. Although appellant argued that his trial strategy would have changed had he known about the Gardner interview, the Court noted that he presented no evidence demonstrating how his strategy would have changed or that this information would have led to other evidence favorable to his defense. In light of defense counsel's and the jury's knowledge that Ellis had been questioned and eliminated as a possible suspect, the testimony of an eyewitness who identified appellant as the person who shot the victim, and appellant's own admission that he shot the victim over a dice game, the Court concluded that there would not have been a reasonable probability of a different outcome at trial if appellant had been given that information.

Appellant also argued that the trial court violated the requirements for jury communications laid out in *Lowery v. State*, 282 Ga. 68 (2007), by not marking the jury notes as exhibits and not providing him a full opportunity to respond to the jurors' requests to rehear testimony. The record showed that during deliberations, the jury sent several notes to the trial court. In one, jurors asked to review a transcript of the testimony of appellant's cousin. The trial court read the contents of this note to counsel and stated its intention not to give the transcript to the jury but instead to allow the jury to hear a replay of the testimony in the courtroom. After asking if this was agreeable to both parties and receiving input from both sides, the trial court responded, telling jurors they could rehear the witness' testimony in the courtroom. The jury then sent a note asking to also rehear the testimony of the investigator. The trial judge followed the same procedure of reading the note to counsel and discussed the amount of time it would take to replay the investigator's

testimony. The court informed the parties that it intended to deny the requests to rehear the testimony of both witnesses because it feared jurors were going to want to rehear all of the evidence and possibly cause a mistrial. To avoid this outcome, the court told the jury that it had decided not to go over again any of the testimony. The jury then sent a final note to the trial court, asking whether they could please rehear the testimony and let the court reporter replay just the appellant cousin's testimony only. After reading this note in open court, and without eliciting a response from either party, the court, consistent with its original ruling, informed counsel it would respond by stating no. None of the exchanged notes were marked as exhibits and did not appear in the record.

The Court held that the trial court did not abuse its discretion in denying the jury's requests to rehear certain testimony, as defense counsel had the opportunity to suggest an alternative response to the jury's notes but did not. Although the better practice would have been to mark the notes as exhibits to be included with the appellate record, appellant showed no harm from the trial court reading the contents of the notes into the record instead. Moreover, appellant failed to show what different or further action he would have taken had the trial court followed more closely the procedures set out in *Lowery*.

Hearsay; Prosecutorial Misconduct

Wilson v. State, S14A0100 (4/22/14)

Appellant was convicted of felony murder. The evidence showed appellant arrived at the victim's house, invited the victim outside to talk, and then he hit the victim in the back of the head with a brick. Appellant contended that the trial court erred when it allowed the victim's sister to testify over objection about her father's out-of-court statements under the necessity exception to the rule against hearsay. The evidence showed that only minutes after the incident, her father called her and said that she needed to come back home because the victim had just been beaten by appellant and some men. She testified that her father then explained that he had seen appellant grab a brick, pick it up, and hit the victim.

The Court stated that hearsay evidence is admitted only in specified cases from

necessity. To invoke the necessity exception, the proponent of the hearsay was required to show 1) a necessity for the evidence, 2) a circumstantial guaranty of the statement's trustworthiness, and 3) that the hearsay statement is more probative and revealing than other available evidence. The Court found that because the victim's father died before the trial, the first element of this test was satisfied. Regarding the second element, a statement is trustworthy when made to someone with whom the declarant enjoys a close personal relationship. Here, the declarant was the witness' father, and she testified that they spoke daily about family matters and confidential subjects, so the second element was also satisfied. As to the third element, however, the Court found that the sister's out-of-court statements identifying appellant as the man who beat his son did not appear to be the most probative evidence available to establish appellant's identity as the killer, because the victim's mother testified directly to that same fact.

Nevertheless, the Court found, even if the sister's statements should not have been admitted under the necessity exception, and premitting whether any error would have been harmless because the statements were cumulative of the testimony of the victim's mother, the record showed that the father's statements were admissible. When he spoke to his daughter just minutes after his son had been brutally attacked to recount what had happened, the father was "screaming," "upset," and "very emotional." Accordingly, the Court held, his statements were properly admissible as excited utterances.

Motions in Arrest of Judgment; Timeliness

Wheeler v. State, S14A0534 (4/22/14)

On September 19, 2007, appellant was convicted of malice murder and aggravated assault. In 2012, his convictions were affirmed by the Supreme Court. In August 2013, appellant filed a motion in arrest of judgment in which he challenged the sufficiency of the evidence, alleged prosecutorial and judicial misconduct, and violations of his constitutional rights during trial. The trial court denied his motion.

The Court noted that under O.C.G.A. § 17-9-61 (b), a motion in arrest of judgment

must be filed within the term of court in which the judgment was rendered. Here, appellant's motion in arrest of judgment was filed more than six years after his judgments were entered. Accordingly, appellant's motion was untimely, and as such, the Court did not address the merits of it.

Computer or Electronic Pornographic and Child Exploitation Prevention Act

State v. Cosmo, S13G1070 (4/22/14)

Cosmo was convicted of a violation of O.C.G.A. § 16-12-100.2(d)(1) (2012) (Computer or Electronic Pornographic and Child Exploitation Prevention Act). The evidence showed that Cosmo communicated via the internet, and later via telephone and telephone text messaging, with an undercover law enforcement agent posing as a woman named "Amber" regarding Amber's offer to engage in a sexual encounter with Cosmo involving her and at least one of three under-aged children that she claimed were her daughters. Cosmo engaged in a dialogue and negotiations with Amber regarding her proposal and he agreed to an encounter with her and the girl he was told was fourteen years old. Cosmo set forth in explicit detail the acts he was attempting to solicit with respect to this fictitious child. Cosmo never communicated directly with a person he believed to be a child, he communicated only with a person he believed to be Amber, the child's parent.

O.C.G.A. § 16-12-100.2(d)(1) in effect at the time Cosmo was indicted provided: "It shall be unlawful for any person intentionally or willfully to utilize a computer on-line service or Internet service, ... to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice a child or another person believed by such person to be a child to commit any illegal act described in Code Section 16-6-2, relating to the offense of sodomy or aggravated sodomy; Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation; Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes; or Code Section 16-6-8, relating to the offense of public indecency or to engage in any conduct that by its nature is an unlawful sexual offense against a child." The count of the indictment accusing Cosmo of violating the Act specifically accused him

of “attempt to solicit” a person he believed to be a child to commit child molestation and aggravated child molestation. The Court of Appeals reversed his conviction on the ground “that the plain meaning of the phrase ‘seduce, solicit, lure, or entice a child or another person believed by such person to be a child to commit any illegal act’ cannot be construed to encompass his communication with only an adult or person known to be an adult.” The Court granted the petition for writ of certiorari filed by the State to consider whether proof of a direct communication with a child is required to prove a violation of the statute.

The Court noted that O.C.G.A. § 16-12-100.2(d)(1) makes the attempt to do certain prohibited acts one of the ways in which the statute may be violated. In construing O.C.G.A. § 16-4-1 with the language of subsection (d)(1) the Court found that attempt within subsection (d)(1) involved two elements: intent to commit a crime (in this case, intent to solicit a child for an unlawful sexual offense), and the taking of a substantial step toward the commission of that crime (in this case, a substantial step toward soliciting a child for that unlawful offense). As to the first element, the Court found that communication with a person the defendant believes to be the parent of a child who is the object of the defendant’s attempt to solicit satisfies the intent element of the offense.

Nevertheless, Cosmos argued, attempting to solicit a minor to engage in illegal conduct, pursuant to O.C.G.A. § 16-12-100.2(d)(1) requires a direct communication with the minor. The Court disagreed. A solicitation of another may be made by communication with a third party. Just as solicitation of prostitution can be made through a third party pimp, solicitation of a child to commit the acts prohibited by O.C.G.A. § 16-12-100.2(d)(1) may be conducted through an adult intermediary who is believed to be in a position of trust or authority with respect to the child. Certainly, the intent to solicit a child for illegal sexual activity may be established by communication with such an adult intermediary. The intent element of attempt to solicit a child pursuant to O.C.G.A. § 16-12-100.2(d) was therefore established by the evidence in this case.

The Court also found that the second element of criminal attempt with respect to the crime charged — the taking of a substantial

step toward the commission of soliciting a child — was also established in this case. Cosmo engaged in several communications with the undercover officer whom he believed to be the minor child’s mother to discuss and negotiate the terms of an encounter with the child. He traveled a substantial distance from one part of the state to another to meet the child at the appointed place and time. When taken into custody, he had in his possession \$300 cash, condoms, and a just-purchased receipt for a male performance enhancement agent.

Accordingly, the Court reversed that part of the Court of Appeals opinion finding Cosmo may not be convicted of that count of the indictment charging him with violating O.C.G.A. § 16-12-100.2(d)(1) by attempting to solicit a child because the evidence showed he did not interact directly with a person he believed to be a child. Cosmo may therefore be retried on this count of the indictment.

Child Hearsay; Prior Consistent Statements

Cobb v. Hart, S14A0224 (04/22/14)

In 2005, appellant was convicted of child molestation and related crimes involving three of his children. During trial, the court admitted the videotapes of the forensic interviews of all three victims. The eldest of these victims, however, at the time of the forensic interview, was 14 years old. The record additionally showed that the eldest victim also testified against appellant at trial.

Under former O.C.G.A. § 24-3-16, to be admissible as child hearsay, the child had to be under 14 years of age. Appellant’s counsel on his direct appeal did not raise this as an issue. After the Court of Appeals affirmed his conviction, appellant filed a petition for habeas corpus arguing that he received ineffective assistance of appellate counsel relating to the admission of the 14 year old victim’s forensic interview. The habeas court denied the petition, and the Supreme Court granted appellant a certificate of probable cause on this issue.

Assuming that appellant’s trial counsel properly preserved the issue for appeal, the Court found, under the right for any reason rule, that appellate counsel did not render ineffective assistance by failing to raise the issue in appellant’s direct appeal. Regardless

of whether the victim’s forensic interview was admissible pursuant to the child hearsay statute, the interview was admissible as a prior consistent statement. A prior consistent statement is admissible where the veracity of the declarant was in issue, the declarant is available for trial under oath, and the declarant is subject to cross-examination. For a witness’s veracity to be in issue, the prior consistent statement must predate any allegation of recent fabrication by the witness. Here, the Court found, the victim’s veracity was challenged when, on cross-examination, defense counsel posed questions implying that the victim, just before trial, met and colluded with appellant’s adult niece, who had testified that appellant molested her as a child, to make their trial testimonies more consistent with each other. Because the victim’s veracity was in issue, she was available to testify under oath at trial, and because she was subject to cross-examination, her videotaped forensic interview was admissible as a prior consistent statement. Since the victim’s forensic interview was admissible as a prior consistent statement, it would have been fruitless for appellate counsel to raise, at the motion for new trial stage or on direct appeal, any error in admitting the forensic interview under the child hearsay statute based on the victim’s age. Therefore, appellate counsel did not render constitutionally ineffective assistance.