Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 8, 2016

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THIS WEEK:

Repugnant Verdicts; Voluntary Manslaughter

Carter v. State, S15G1047 (4/4/16)

Appellant was indicted on malice murder and three counts of felony murder predicated on aggravated assault. The jury found him guilty of voluntary manslaughter as a lesser included offense of the alleged felony murder of one victim, but found him not guilty of voluntary manslaughter as a lesser included offense of the alleged malice murder of the same victim. His conviction was affirmed by the Court of Appeals and the Supreme Court granted cert.

Citing *Wiley v. State*, 124 Ga.App. 654 (1971), appellant argued that the verdict was an impermissible "repugnant verdict" because he was found "both not guilty and guilty" of the same crime of voluntary manslaughter with respect to the same victim. The Court disagreed. First, the Court noted, it has neither adopted the reasoning of *Wiley* nor analyzed the concept of repugnant verdicts in relation to *Milam v. State*, 255 Ga. 560 (1986), which abolished the inconsistent verdict rule.

However, the Court found, under the facts of this case, voluntary manslaughter as a lesser included offense of malice murder is not the same offense as voluntary manslaughter as a lesser included offense of felony murder, and the two voluntary manslaughter verdicts can be logically reconciled. Thus, the Court found, they are merely two different offenses upon which the jury was free to find appellant guilty or not guilty based on the facts of the case as interpreted by the jury. Specifically, a defendant must have an intent to kill in order for voluntary manslaughter to serve as a potential lesser included offense of malice murder, but need not have any intent to kill for voluntary manslaughter to mitigate the circumstances that would otherwise constitute felony murder. Because of this fundamental difference between felony murder and malice murder, voluntary manslaughter as a lesser included offense of malice murder cannot be seen as the same crime as voluntary manslaughter as a lesser included offense of felony murder. Accordingly, the Court held, there was no repugnant verdict, and the Court stated, "we need not decide the question whether the rule that we announced in *Milam*, — which forbids a defendant from attacking as inconsistent a verdict of guilty on one count and not guilty on a different count — is just as applicable in repugnant verdict cases as it is in other inconsistent verdict cases."

In so holding, the Court further stated that it disapproved of the portion of the Court of Appeals opinion which implied that a defendant could be found guilty of voluntary manslaughter as a lesser included offense of malice murder where that defendant has not acted with an intent to kill.

Pretrial Immunity Hearings; Statements-in-Place

Anthony v. State, S16A0059 (4/4/16)

Appellant was convicted of murder. The evidence, very briefly stated, showed that appellant got into a confrontation with the victim, who was having an affair with appellant's estranged wife. When the victim allegedly hit appellant in the head, appellant pulled out a gun he was carrying and shot the victim. Before trial, appellant filed a motion under O.C.G.A. § 16-3-24.2 for immunity from prosecution. Following a hearing, the trial court denied the motion. Appellant argued that the trial court erred when it determined that his justification defense was not strong enough to afford him immunity from prosecution.

The Court noted that the burden in a pretrial immunity hearing is on the defendant to show that he or she is entitled to immunity by a preponderance of the evidence. Here, the Court noted, defense counsel presented the testimony of several witnesses regarding the victim's reputation for violence and a prior threat against appellant, and those witnesses were cross-examined. Defense counsel then stated in his place what he expected that the testimony of appellant and the victim's wife would show about the confrontation between appellant and the victim. The prosecutor then explained what she anticipated would be shown by the State's evidence. She also did not call any witnesses and objected to any ruling on immunity based on defense statements made without any evidence.

The Court noted that attorneys are officers of the court and a statement to the court in their place is prima facie true and needs no further verification unless the same is required by the court or the opposite party. Here, the statements-in-place by appellant's lawyer were not a proper substitute for evidence at the hearing on the motion for immunity because the State did not accept those proffers but rather insisted that appellant prove his immunity with traditional evidence. But, even assuming that the statements-in-place of appellant's lawyer could be considered, there would be no reason why the trial court could not also consider the prosecuting attorney's statements about the confrontation between appellant and the victim. And, the Court found, because the statements of appellant's lawyer and the prosecuting attorney were consistent with the evidence subsequently presented at trial, the trial court certainly was authorized to find that the appellant failed to show self-defense by a preponderance of the evidence. Accordingly, the Court held, appellant failed to meet his burden of showing that he was entitled to immunity under O.C.G.A. § 16-3-24.2.

Voir Dire; Right of Defendant to be Present

Smith v. State, S15A1705 (2/1/16)

Appellant was convicted of malice murder, armed robbery and other related crimes. He contended that his constitutional right to be present at trial was violated because a portion of the proceeding — the removal of a prospective juror — occurred when he was not in the courtroom. The evidence showed that Juror #33 raised her hand when asked if anyone had a problem being impartial. Later, those that raised their hands to this question were questioned individually. One juror was excused, one juror was not. Then, Juror #33 was questioned and she stated why she could not be impartial. At this point, appellant was excused for an emergency bathroom break. While he was gone, the judge removed the juror with the consent of the parties. Defense counsel was going to make a formal motion when appellant returned, but he did not and no motion to strike Juror #33 was repeated in appellant's presence.

The Court found that the right to be present belongs to the defendant and the defendant is free to relinquish that right if he or she so chooses. The right is waived if the defendant personally waives it in court; if counsel waives it at the defendant's express direction; if counsel waives it in open court while the defendant is present; or if counsel waives it and the defendant subsequently acquiesces in the waiver. Here, the Court found, appellant did not personally waive in court his right to be present for the discussion of Juror #33's removal, and his counsel did not waive appellant's right to be present at his express direction or in his presence. However, the Court found, the record showed that appellant acquiesced in the removal of Juror #33 in his absence. Acquiescence means a tacit consent to acts or conditions, and implies a knowledge of those things which are acquiesced in. And while appellant was not present during the brief period when the trial court and lawyers discussed removing Juror #33 and when the court actually struck the juror for cause, appellant was present in the courtroom on *four* later occasions when Juror #33's removal by the court was expressly noted — yet appellant raised no question or concern about her removal. Under these circumstances, the Court concluded, appellant acquiesced in the limited trial proceeding that occurred in his absence.

Search & Seizure

Jackson v. State, A15A1966 (2/9/16)

Appellant was convicted of trafficking in marijuana. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant's vehicle was stopped at 7:59 a.m. and that the officer made the decision to issue appellant a warning after appellant's license check came back valid at 8:06 a.m. However, the criminal history check was still pending at this time. During the traffic stop, appellant and the officer engaged in conversation. The statements appellant gave to the officer were inconsistent with the observations made by the officer. The criminal history check came back at 8:12 a.m. which showed a prior drug trafficking charge. When the officer asked appellant if he had been arrested previously, appellant lied. Thereafter, the officer asked for consent to search. Appellant declined to give it. A second officer, who had arrived on the scene by that time, walked his drug dog around the vehicle and the dog alerted. A subsequent search revealed the marijuana.

Appellant contended that the traffic stop was unconstitutionally prolonged and that the stop was completed when the officer stated that he was going to write appellant a warning. The Court disagreed. Instead, the Court stated that the traffic stop's mission did not conclude at the time the officer informed appellant that he was merely going to issue a warning. When an officer lawfully stops and detains an individual for a brief investigation, the officer is entitled to take reasonable steps to make the scene safe for his investigation. These steps generally include checking for outstanding warrants and the criminal history of the occupants of the stopped vehicle, as this enhances officer safety, and until these

checks are completed, there can be no undue prolongation of the traffic stop. Thus, at the minimum, the relevant time at issue was not when the officer informed appellant that he was going to issue a warning, but rather, when appellant's criminal history check returned. While the officer informed appellant that he was going to write a warning at 8:06 a. m., appellant's criminal history check was not completed until 8:12 a. m.

Moreover, the Court found, appellant's inconsistent answers as to why he was in Georgia, his inability to recall the location where he had been, his statement that he was exiting the interstate to get gas despite that he had plenty of gas and that gas was cheaper in his home state of Alabama, and the fact that he had passed the only gas station at the exit when he was stopped, considered in totality, provided reasonable articulable suspicion sufficient to allow the officer to broaden his investigation beyond a simple traffic offense. This was enhanced when the criminal background check revealed appellant's previous drug trafficking charge, and, even further, when appellant lied about his criminal record. Thus, the Court found, appellant's continued detention to allow the drug dog to do a "free air" sniff around his automobile passed constitutional muster. Accordingly, the trial court did not err in denying the motion to suppress.

Ineffective Assistance of Counsel; Plea Offers

Wiley v. State, A15A2148 (2/24/16)

Appellant was convicted of four counts of aggravated child molestation, four counts of child molestation, and four counts of sexual battery. She was sentenced to serve 25 years on each of the aggravated child molestation counts and concurrent sentences on all the other counts. She contended that her trial counsel was ineffective in failing to offer his informed opinion as to whether she should accept or reject the State's plea offer of 15 to 20 years, to serve 10 in prison.

The Court stated that whether to plead guilty is a decision belonging to the accused, not his or her attorney. Although the accused must make the decision whether to accept a proposed plea agreement, the accused should have the full and careful advice of counsel. Thus, before trial, the accused is entitled to rely upon defense counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer an informed opinion as to what plea should be entered.

Appellant contended that her trial counsel was deficient in failing to give his "professional input" as to whether she should accept or reject the State's plea offer. The Court noted that the evidence showed without dispute that trial counsel did not offer his opinion as to whether appellant should or should not accept the plea deal. However, the Court noted, counsel advised appellant of the State's plea offer, made her aware of the sentences she faced if she pleaded guilty or was convicted following a trial, and discussed the evidence against her, including his professional assessment of the strengths and weaknesses of the evidence. Moreover, the Court noted, appellant did not identify and it was not aware of any authority that in every instance defense counsel in the exercise of objectively reasonable assistance, must advise the accused either to accept or reject a plea offer.

Nevertheless, appellant argued, in her case, her counsel should have done more, particularly by offering his opinion as to which plea should be entered, because of the facts of the case, because she had been diagnosed as paranoid schizophrenic, and because she was facing a penalty of at least 25 years to serve in prison, without probation or parole, if she proceeded to trial and was convicted. However, the Court found, defense counsel could have reasonably concluded that the evidence against her was not overwhelming and there were circumstances, particularly the delay in the victim's outcry, which were favorable to the defense. Neither of the choices confronting appellant, to either accept the plea offer or to proceed to trial, were shown to be unreasonable in light of the facts of the case against her, and the Court stated that it could not conclude that trial counsel acted unprofessionally in failing to expressly advise her to choose one over the other. Moreover, defense counsel was also aware that appellant had been diagnosed with paranoid schizophrenia, he reviewed her medical records, and he knew that she had been receiving outpatient care and medication. Appellant failed to show that her trial counsel made any unprofessional decisions in light of her medical diagnosis. Accordingly, the Court found, the evidence supported the trial court's determination that appellant was fully informed of what she was facing, had full awareness of her alternatives, and therefore, under the circumstances, counsel's performance did not fall below an objective standard of reasonableness.

Indictments; Aggravated Assault

Goodrum v. State, A15A2007 (2/25/16)

Appellant was convicted of aggravated assault. The evidence showed that he choked the victim. He contended that he should not have been indicted for aggravated assault because the statutory language in effect at the time of his 2013 offense did not prohibit "choking." The Court disagreed. In 2014, the Legislature amended O.C.G.A. § 16-5-21 to specifically provide that aggravated assault occurs when a person assaults "[w]ith any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in strangulation." The former version of the statute contained no reference to strangulation. But, the Court stated, this does not mean that prior to 2014, choking or strangulation could not support an aggravated assault conviction and, it noted, it has consistently held that it could.

Appellant also contended that because his indictment mentioned "choking," the jury was unable to find him guilty of any lesser included offense. The Court again disagreed. The indictment charged that appellant committed aggravated assault "with [his] hands, an object which when used offensively against a person is likely to result in serious bodily injury by choking said person." The trial court read the indictment to the jury. It then defined aggravated assault, extensively discussing the necessary elements of the crime. It further instructed the jury on the lesser offenses of simple assault and battery. Thus, the Court noted, fully apprised of its options, the jury could have determined that appellant was guilty only of a lesser offense. It did not do so, however, and the evidence supported its conclusion. Accordingly, there was no error.

Medical Records; Prosecutorial Misconduct

Samuels v. State, A15A1804 (2/25/16)

Appellant was convicted of DUI (less safe) and other charges. She contended that the trial court erred in admitting her hospital records, which stated that she presented as "intoxicated." First, she contended that the admission violated her confrontation rights under *Crawford v. Washington*. The Court noted that the hospital records at issue consisted primarily of an "Emergency Department Assessment Sheet," which on the first page under "Triage/Initial Assessment" notes that "PT PRESENTS TO ER S/P MVC AND INTOXICATED. NEEDS TO BE CLEARED TO GO TO JAIL." Thus, the Court found, the records were not testimonial in nature because the circumstances surrounding their creation and the statements and actions of the parties objectively indicated that the records were prepared with a primary purpose of facilitating her medical care. In fact, the Court stated, despite describing appellant as intoxicated, the records at issue were not requested by the investigating police officers for the purpose of aiding the State's prosecution, but rather, were simply emergency room intake forms that are completed for *every* incoming patient. Therefore, the Court held, given these particular circumstances, the hospital records were not testimonial in nature, and thus, their admission did not violate appellant's rights under the Confrontation Clause.

Appellant also contended that the records were inadmissible hearsay. The Court disagreed. The Court noted that the State filed a notice of its intent to offer records into evidence under O.C.G.A. §§ 24-8-803 and 24-9-902. And following pretrial argument, the trial court ruled that the hospital records were admissible under O.C.G.A. § 24-8-803(6), the business-records exception to hearsay. The Court noted that federal courts have held that hospital records, including medical opinions, are admitted under Federal Rule of Evidence 803 (6), which expressly permits "opinions" and "diagnoses." Thus, the Court held, given this construction of Federal Rule of Evidence 803 (6), the fact that O.C.G.A. § 24-8-803(6) is nearly identically worded, and the fact that these records were made to facilitate appellant's treatment and not in anticipation of prosecution, the trial court did not err in admitting the hospital records under O.C.G.A. § 24-8-803(6) as business records.

Finally, appellant contended that the Court violated O.C.G.A. § 17-8-75 when the prosecutor made improper arguments during closing. The record showed that the prosecutor apparently showed a slide to the jury stating that the hospital records indicated that appellant had a history of alcohol abuse. Appellant's counsel objected, and, during a bench conference, the prosecutor reiterated that the written comment was based on information in the hospital records. Appellant's counsel argued that the records contained no such indication, and the trial court agreed. Consequently, the court instructed the jury as follows: "Ladies and gentlemen of the jury, there is no evidence in this case of past alcohol abuse. There's none. I think there was just a misreading of that hospital record, and you can look at it, but it was just a mistake about what it says. But there's no — there's no evidence in this case about any past alcohol abuse, by the defendant in this case. Okay?" Thereafter, the trial court allowed the prosecutor to resume her closing argument.

Appellant argued that the trial court erred in failing to rebuke the prosecutor for presenting the above-referenced slide and for providing an insufficient curative instruction. However, the Court found, appellant did not object after the court provided the instruction. In fact, a short time later, while discussing another objection, appellant's counsel stated that the court's instruction "was appropriate for the response about alcohol abuse." And it is well established that if the trial court's curative instructions are not sufficient, defendant should seek additional relief. This, appellant failed to do; and this failure waived appellate review of the matter, including complaints about improper comments in closing argument. Moreover, the Court stated, even setting aside appellant's waiver of the issue, given that the trial court sustained his objection and specifically instructed the jury that the prosecutor's argument in this regard was not supported by the evidence, appellant's argument lacked merit. While appellant claimed that the court erred by not also rebuking the prosecutor in addition to providing a curative instruction, when the instruction by the court to the jury to disregard the remarks was full, it in effect amounted to a rebuke of counsel. Accordingly, the Court held, appellant's argument in this regard presented no grounds for reversal.