Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 22, 2009

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THIS WEEK:

Constitutional Speedy Trial

Wofford v. State, A09A0731

Appellant contended that the trial court erred in denying his motion for discharge based on constitutional speedy trial grounds. Under the four part test of *Barker v. Wingo*, 407 U. S. 514 (1972), the record showed that the length of the delay was 32 months which is presumptively prejudicial. The reasons for the delay could be attributed to both the State and the defense, but mostly the State. However, there was no evidence that the delay was a deliberate effort on the part of the State. The appellant failed to make any assertion of his right to a speedy trial until his motion, which was filed 32 months after his arrest. Finally, as to the prejudice prong of the test, the Court found 1) appellant's generalized statement that the memories of witnesses have faded over the passage of time is not sufficient because for memory lapse to be prejudicial, appellant must have established that the lapses substantially related to a material issue; and 2) appellant's claim of an unavailable witness was without merit since he failed to show that the witness could supply material evidence for the defense. Therefore, in balancing the factors, the Court held that the trial court did not abuse its discretion in denying appellant's motion.

Right to Counsel; Right to Jury Trial

Cook v. State, A09A0209

Appellant was convicted of two misdemeanors. She argued that she did not make a knowing, voluntary, and intelligent waiver of her right to counsel or her right to a jury trial. The Court agreed and reversed. The Court found that the record of pretrial and trial proceedings was almost "nonexistent." The State argued that this paucity of evidence in the record prevented the appellant from establishing error on appeal. However, the Court found that while this might be the general rule, where, as here, appellant was facing a term of imprisonment, the right to counsel is constitutionally guaranteed and she must affirmatively waive that right. When the record is silent, waiver is never presumed, and the burden is on the State to demonstrate that the defendant received sufficient information and guidance from the trial court to make a knowing and intelligent waiver. Since there was no evidence, the State failed to make the proper showing. Since no evidence was presented that appellant was adequately informed of the nature of the charges against her, the possible punishments she faced, the dangers of proceeding pro se, and other circumstances that might affect her ability to adequately represent herself, the case was remanded for a new trial.

Jury Charges

Roberts v. State, A09A0383

Appellant was convicted of two counts of child molestation, two counts of aggravated child molestation, and aggravated sodomy. He argued that the trial court erred when it instructed the jury a second time on the offense of aggravated child molestation. The record showed that after the initial charge to the jury, the State informed the trial court that it neglected to charge the jury on the specific element of injury to a child in regard to aggravated child molestation. Appellant objected on the grounds that recharging the offense would place undue emphasis on the charge and argued that the trial judge should have recharged the jury on all points of law. The Court found no error. Here, the trial court's refusal to recharge on all of the offenses was proper because in its recharge, it specifically informed the jury that it had made an error and that it was not placing emphasis on the offense that was recharged, leaving no room for juror confusion or inference.

Confessions; Sentencing

Canty v. State, A09A0449

Appellant was convicted of attempted armed robbery and aggravated assault. He argued that his confession was inadmissible because it was induced by the promise of a lighter sentence. At trial, the officer who conducted the interview with appellant stated that he had offered to speak to the "[District Attorney's] office on [appellant's] behalf [if he] cooperat[ed]." The Court held that merely telling a defendant that his or her cooperation will be made known to the prosecution does not constitute the "hope of benefit" sufficient to render a statement inadmissible.

During sentencing, the prosecutor requested that appellant be sentenced as a recidivist under OCGA § 17-10-7 (c). In making this request, the prosecutor erroneously advised the trial judge that OCGA § 17-10-7 (c) required that it impose the maximum sentence allowable on both counts, that such time be served in prison, and that the trial court was not permitted to probate any portion of the sentence. However, the trial court reviewed copies of appellant's three prior felony convictions at the sentencing hearing and knew that appellant was then serving concurrent sentences of life plus 25 years and ten years, respectively. Thus, the Court held, inasmuch as appellant had already been sentenced to substantial time to serve in prison and given the seriousness of the offenses here, appellant failed to meet his burden to show prejudice inuring to his detriment.

Kidnapping

Grimes v. State, A09A1044

Appellant was convicted of armed robbery and kidnapping. He argued that under *Garza*, the evidence was insufficient to support his conviction for kidnapping. The evidence showed that appellant and his accomplice entered a restaurant with their faces covered and guns drawn. They told the manager to turn around and get down and told the waitresses to get into a booth. While the accomplice kept the waitresses in the booth, appellant forced the manager into the office and told him to unlock the money cabinet. Appellant took a bank bag full of money that was in the cabinet and then forced the manager to go to the register at the front counter and open it. After he took money from that register, he and his accomplice fled the restaurant. The Court held that the evidence was insufficient to find the element of asportation: The movement of the victim was brief, occurred during and incidental to the armed robbery, and did not enhance significantly the risk the victim already faced as a victim of armed robbery. It therefore reversed appellant's kidnapping conviction.

Search & Seizure

Floyd v. State, A09A0210

Appellant was convicted of felony possession of marijuana. He contended that the trial court erred in denying his motion to suppress. The evidence showed that the officer began following appellant after noticing that appellant may not have been wearing a seatbelt. According to the officer, the appellant crossed over into the emergency lane. This incident was not recorded and the officer did not stop him. The officer then stated that the appellant drifted over into the other lane on his right. This second incident was recorded. The officer then stopped appellant. Appellant was wearing his seatbelt. Appellant gave consent to search and the marijuana was found. The trial court found that appellant did not fail to maintain his lane on the second incident, but that because the officer testified as to the first incident, the traffic stop was valid.

Appellant argued that the trial court's finding that the second alleged lane violation did not occur was an implicit finding that the officer had testified falsely on a highly material issue. Accordingly, appellant argued, by then crediting the officer as to the first incident, the trial court violated OCGA § 24-9-85 (b), which provides: "If a witness shall willfully and knowingly swear falsely, his testimony shall be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence." The court disagreed. OCGA § 24-9-85 (b) only applies when a witness admits he swore falsely or when the evidence manifestly establishes purposeful falsification. Without evidence of a manifest purpose to testify falsely, the issue is merely one of witness credibility. Here, the evidence did not establish that the officer testified falsely, and the trial court did not so find. Rather, it found that the second incident, in its opinion, did not constitute a traffic violation. It disagreed with the officer's characterization of the incident, not with the facts of the incident itself, and found that in isolation it would not have been sufficient to justify a traffic stop. But, the trial court believed that the first incident occurred as the officer described it, which was that appellant's car moved a foot into the emergency lane, and the court held that the first incident constituted a violation sufficient to justify the traffic stop.

Right of Confrontation; Cruelty to Children

Bradberry v. State, A09A1084

Appellant was convicted of one count of rape, three counts of child molestation, and two counts of cruelty to children. He argued that the trial court erred in admitting the testimony of the DNA expert because two lab technicians, who participated in the process, did not testify at trial, and therefore, he was denied his right of confrontation under the Sixth Amendment. The evidence showed that the first technician microscopically viewed a sample from the vaginal swabs taken from the victim and informed the expert that sperm was present. Because of this information, the DNA expert knew to perform a

DNA "differential extraction" on the sample she obtained directly from the vaginal swab, which extraction is used when sperm cells are present (as opposed to a second type of extraction that is used for blood, tissue, or saliva samples). The second lab technician placed the blood sample taken from appellant, on a blood-stain card, which was then viewed by the expert. The Court held that the first technician's observations merely alerted the DNA expert as to the type of DNA extraction she needed to perform on the vaginal swab. This did nothing more than expedite matters for the expert who, without this knowledge would have either (a) microscopically viewed the vaginal swab sample herself to determine what type of extraction to perform, or (b) learned immediately upon performing the extraction that the sample contained sperm cells. The second technician did nothing more than place some blood from the sample taken from appellant onto a blood-stain card for the ease and convenience of the expert performing the DNA extraction of that blood. Technicians who prepare samples for testing by the testifying expert need not themselves testify so as to preserve a defendant's right to confrontation, as this is an issue affecting the reliability and weight of the evidence, not its admissibility. The DNA expert testified regarding the procedures used to establish that the substance tested was the substance that came from appellant, and no conclusions from the technicians were submitted to the jury, which sufficed to satisfy any constitutional concerns.

Appellant also argued that the trial court erred in admitting the victim's testimony that just prior to trial, she had attempted suicide due to the stress caused by the molestation. Appellant specifically argued that the evidence was too remote in time to qualify as evidence of "excessive physical or mental pain" needed for a cruelty to children conviction under OCGA § 16-5-70 (b). The Court held that this was a matter for the jury to resolve because other cases have noted children's suppressed or delayed reactions to abuse, where the children at issue exhibited no overt manifestations of stress for quite some time after the abuse. Thus, the trial court did not err in admitting evidence of the attempted suicide to show that the victim experienced excessive mental pain from the molestation events.

Judicial Comment

Anderson v. State, A09A0182

Appellant was convicted of armed robbery, kidnapping, possession of a firearm during the commission of a crime, and financial transaction card fraud. He argued that the trial court committed reversible error when it commented on whether venue had been proven, in violation of OCGA § 17-8-57. The Court agreed and reversed. The record showed that the trial judge asked: "Did we establish venue?" The prosecutor replied that he had asked the witness if the store where the crime occurred was in the county. The judge said that he knew there was some confusion as to which store was involved and then stated "I just wanted to make sure." The Court held that the trial court had improperly expressed its opinion as to what had been proved on a disputed issue of fact, notwithstanding the trial court's lack of intent to express an opinion on the evidentiary issue of venue. Moreover, the fact that defense counsel did not object was immaterial because a violation of OCGA § 17-8-57 is plain error.