Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 29, 2009

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THIS WEEK:

Closing Arguments; Evidence

Hardnett v. State, S09A0566

Appellant was convicted of murder and other related crimes. He contended that the trial court erred by not granting a mistrial after the trial court allowed the prosecution to comment on his "throat-slashing" gestures to the jury. The Court held that although appellant contended there was no evidence in the record that he made such a gesture, the trial court found otherwise. Therefore, because a prosecutor may comment on a defendant's courtroom demeanor in his closing argument, the trial court did not err in denying his motion for mistrial.

Appellant also contended that the trial court erred in admitting evidence that he led police on a high speed chase because the officer did not have any reason to stop him at that time. The Court held that appellant was correct that at the time the officer activated his blue lights in an attempt to stop appellant's vehicle, he lacked even reasonable suspicion for the stop. Nevertheless, once the officer signaled appellant to stop his vehicle, and appellant sped away, appellant was committing the crime of fleeing or attempting to elude a police officer, and that crime provided a legitimate basis for the police pursuit of him.

Severance; Statements

Daniel v. State, S09A0557, S09A0558

Appellants, Marcus and Warren Daniel, were convicted of murder and multiple other offenses. They alleged that the trial court erred in denying their motions to sever. It is incumbent upon the defendant who seeks a severance to show clearly that he will be prejudiced by a joint trial, and in the absence of such a showing, the trial court's denial of a severance motion will not be disturbed. Factors to be considered by the trial court are: 1) whether a joint trial will create confusion of evidence and law; 2) whether there is a danger that evidence implicating one defendant will be considered against a co-defendant despite limiting instructions; and 3) whether the defendants are asserting antagonistic defenses. Marcus alleged that the trial court should have severed his trial from his brother's because the state's use of Warren's statement violated *Bruton* and *Crawford*. The Court held that Warren's statement that the victim and he had gotten into a fight a long time ago and the victim was "still bringing it up" was properly

admitted because *Bruton* excludes only the statement of a non-testifying co-defendant that standing alone directly inculpates the defendant. While Warren's statement about the prior altercation could have provided a motive for the shooting, it did not, standing alone, inculpate Marcus in the charged crimes. Moreover, even assuming the admission of Warren's statement was error under *Crawford*, and the State may have offered Warren's statement in an attempt to show motive for the crimes, there was no error because it was not necessary for the State to prove motive to establish either malice murder or felony murder and the evidence of Marcus' guilt of the murder, including eyewitness testimony, was overwhelming.

Marcus also argued that his statements to police were involuntary because they were induced by hope of benefit. He specifically argued that his statements should have been excluded because investigators lied when they told him he was not a suspect. The Court held that for an incriminating statement to be admissible under Georgia law, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury. The use of trickery and deceit to obtain a confession does not render the confession inadmissible, as long as the means employed are not calculated to procure an untrue statement. Here the investigators' alleged deception regarding whether they had articulated a belief as to Marcus' participation in the crimes, or indeed had probable cause to obtain an arrest warrant, had no bearing on the voluntariness of his statement in the absence of any evidence that the investigative technique was designed to procure a false statement. Also, the statement to Marcus that he was "not a suspect" offered no hope of benefit because it offered no potential future outcome.

Hearsay; Res Gestae

Daniel v. State, S09A0557, S09A0558

Appellants, Marcus and Warren Daniel, were convicted of murder and multiple other offenses. Marcus contended that the trial court improperly admitted into evidence the hearsay statements of a 12-year-old witness to the crimes. The Court stated that included in the res gestae exception is an exception for excited utterances. To be admissible as an excited utterance, the proponent of the hearsay must show that the event precipitating the statement was sufficiently startling to render inoperative the declarant's normal reflective thought processes, and the declarant's statement must have been the result of a spontaneous reaction, and not the result of reflective thought. Testimony that the declarant appeared nervous and upset, combined with a reasonable basis for emotional upset, will usually suffice for admission under the excited utterance exception.

The evidence showed that when police arrived at the crime scene they saw the witness standing over the victim, sufficiently upset that he could not speak, and was visibly "distraught, upset, cursing, crying, almost like he was in shock." The witness told an investigator he was in his kitchen when he saw appellants outside with the victim, who had his hands up in the air. He heard gunshots and fell to the ground. When he stood up, he saw appellants running around the building. His aunt testified that when she arrived at the crime scene shortly after the shootings she saw him standing near the victim crying profusely. When she asked him what happened, he identified appellants as the shooters. The Court held that the record supported the trial court's admission of the statement because they were spontaneous and not the result of reasoned deliberation.

Jury Charges

Barnes v. State, A09A0599

Appellant was convicted of voluntary manslaughter, aggravated assault, and possession of a firearm during the commission of a felony. She argued that the trial court erred in instructing the jury on two questions posed by them during deliberations. The record showed that the Jurors had two questions: 1) "Is there a difference between aggravated assault and self-defense?" and 2) whether it was legal to find appellant guilty of aggravated assault, but not of murder. The trial court answered a simple "yes" to each question. Appellant contended that this terse response was inappropriate, insufficient and harmful to her. However, the Court held that the trial court did not abuse its discretion by confining its response to the jury's questions only to the matters raised in the jury's inquiry. Moreover, since trial counsel stated at the time that he was "okay" with the trial court's response to the jury's questions, there was not error.

Milner v. State, A09A0556

Appellant was acquitted or rape and convicted of terroristic threats. He contended that the trial court erred in its instructions to the jury. The indictment alleged that appellant "did threaten to commit the crime of murder, a crime of violence, with the purpose of terrorizing [the victim], the person threatened." But the court instructed the jury on the relevant language of OCGA § 16-11-37 (a): "a person commits the offense of terroristic threats when he or she threatens to commit any violence with the purpose of terrorizing another." During deliberations, the jury asked for a recharge on the definition of terroristic threats and the court gave an instruction nearly identical to its initial charge. Due process requires that, in criminal cases, jury instructions must be tailored to fit the allegations in the indictment and the evidence admitted at trial. If a jury charge recites the entire definition of a crime and the indictment does not, there is a reasonable probability that the deviation violated the defendant's due process rights by resulting in a conviction of a crime committed in a manner not charged in the indictment. The evidence presented at trial showed that appellant threatened both to hurt the victim and to "bury" or kill her. The trial court twice instructed the jury that terroristic threats involves "any violence" or "any crime of violence." Thus, the Court held, the conviction must be reversed because it was probable that the jury convicted appellant of threatening the victim with bodily harm. A trial court commits reversible error when the indictment specifies that the offense was committed one way and the trial court charges the jury that it could be committed in two ways without giving a limiting instruction.

Right of Self-Representation

Sheppard v. State, A09A0475

Appellant was convicted of kidnapping, aggravated assault and three firearms offenses. He argued that because he suffers from mental illness, the trial court should not have allowed him to represent himself at trial. Specifically, appellant relied on the recent U.S.S.C. decision of *Indiana v. Edwards*, __ U.S. __, 128 S. Ct. 2379, 171 LE2d 345, (2008) in which the Court held that the U. S. Constitution permits judges to take realistic account of

a particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. In other words, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under the standard set forth in *Dusky v. United States*, 362 U.S. 402, 80 SC 788, 4 LE2d 824 (1960), but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. Here, the appellant argued that the trial court should have insisted that he be represented at trial despite his knowing and voluntary waiver of counsel. The Court disagreed. It found that the trial court took "realistic account" of appellant's mental capacity to represent himself at trial before allowing him to do so and the trial court's findings were not an abuse of discretion.

Accusation

Knapp v. State, A09A0256

Appellant was convicted of DUI in probate court. She contended that a defect in the accusation rendered her conviction null and void. The record showed that a traffic citation was issued charging "Jane Marie Knapp" with driving under the influence of alcohol. A one-count DUI accusation referencing the number of the traffic citation was subsequently filed in probate court. The accusation was styled "State of Georgia v. Jane Marie Knapp," but the body of the accusation identified as the defendant an individual named "Billy Thomas Jones." The Court held that this was not merely a misnomer because an entirely different person was named as the person in the body of the accusation. Therefore, the accusation was fatally defective because of its allegation that someone other than the defendant committed the crime charged.

Search & Seizure

Johnson v. State, A09A0184

Appellant was convicted of possession of methamphetamine and giving a false name to a police officer. He argued that the trial court erred in denying his motion to suppress. The evidence showed that appellant was a passenger in a vehicle that was stopped for a traffic violation. The officer asked appellant for his name and appellant said "Kenny Burns." The officer asked appellant if he could pat him down for the officer's safety and appellant consented. During the pat-down, the officer felt what he believed to be an identification card. He told the appellant to take it out of his pocket and hand it to him. The officer read the card which had the appellant's true name and DOB on it. Appellant was arrested and the methamphetamine was found during the search incident to arrest.

The Court held that a *Terry* pat-down is conducted for the purpose of ensuring the safety of the officer and of others nearby, not to obtain evidence for use at trial. It is a minimal intrusion reasonably designed to discover guns, knives, clubs, or other weapons that could prove dangerous to a police officer. Under *Terry*, an officer is authorized to pat down a suspect's outer clothing. He may intrude beneath the surface in only two instances: (1) if he comes upon something that feels like a weapon, or (2) if he feels an object whose contour or mass makes its identity as contraband immediately apparent, i.e., the "plain feel" doctrine. Therefore, when the officer felt the identification card, he could not have lawfully intruded into appellant's pocket to retrieve it. Furthermore, the consent was not voluntary because the record shows only acquiescence to a claim of lawful authority. Because the State failed to prove that appellant voluntarily consented to a search of his pocket, the trial court erred by denying appellant's motion to suppress.

Guilty Plea; Alford

Skinner v. State, A09A0773

Appellant pled guilty under *North Carolina v. Alford* to one count each of statutory rape, incest and distribution of cocaine. He contended that the trial court erred in denying his motion to withdraw his plea because he did not fully understand the nature of an *Alford* plea, and the court did not attempt to resolve the conflict between his guilty plea and his claim of innocence. Under *Alford*, the trial court may accept a guilty plea from a defendant who claims innocence if the defendant has intelligently concluded that it is in his best interest to plead guilty and the court has inquired into the factual basis for the plea and sought to resolve the conflict between the plea and the claim of innocence. The record showed that after the prosecutor established a factual basis for the plea, the trial court inquired of defense counsel whether appellant disagreed with the statement or wished to add anything to it. Appellant's counsel stated that for the purpose of this plea they would stipulate that there is a factual basis as stated by the State. Appellant also admitted at the hearing on his motion to withdraw that his counsel advised him of the meaning of an *Alford* plea, and his counsel testified that appellant wanted to enter the plea because he did not want to admit his guilt in front of any family members. Thus, the Court held the trial court did not abuse its discretion in denying appellant's motion to withdraw his *Alford* plea of guilty.

Venue

Mock v. State, A09A1068

Appellant was convicted of attempted armed robbery of a restaurant and other related crimes. He contended that the State failed to prove venue. The evidence showed that the State elicited testimony that the restaurant was located in a particular city, but failed to present any evidence that the restaurant was located in the county or that the city was located entirely within the boundaries of the county. The Court held that proving that a crime took place within a city without also proving that the city is entirely within a county does not establish venue. The convictions were therefore reversed.

Harbin v. State, A09A1037

Appellant was convicted of possession of methamphetamine based on a positive urine test given during a visit to his probation officer. Appellant contended the State failed to prove venue beyond a reasonable doubt. OCGA § 17-2-2 (h) provides: "If in any case it cannot be determined in what county a crime was committed, it shall be considered to have been committed in any county in which the evidence shows beyond a reasonable doubt that it might have been committed." The Court held that this statute applies when a drug possession charge results from the detection of drugs that can remain in a defendant's urine for days after the drug was ingested. Venue is therefore appropriate in the county where the defendant was present immediately before being asked to provide the urine sample. Here, the evidence was uncontroverted that appellant was admin-

istered a drug test at the county probation office and that the sample tested positive for methamphetamine. This evidence was sufficient to show beyond a reasonable doubt that the crime of methamphetamine possession "might have been committed" in the county. Moreover, the State did not have to prove where appellant actually ingested the methamphetamine.

Speedy Trial

Trimm v. State, A09A0694

The trial court denied appellant's plea in bar based on a violation of OCGA § 17-7-170, finding that she waived her rights by moving for a continuance. She argued that she was forced to move for a continuance after the state re-indicted her on the eve of trial, which changed her trial strategy. The record showed that she was first indicted in September, 2007, on one count of aggravated assault with a deadly weapon for allegedly "discharging the firearm and striking" her stepson. In October, the State filed a superseding indictment, charging her with possession of a firearm during the commission of a felony in addition to aggravated assault. She pled not guilty and filed a demand for speedy trial pursuant to OCGA § 17-7-170. The terms of court commence in that county on the second and third Mondays in January, April, July, and October. Thus, under § 17-7-170, she was required to be tried in the October 2007 or January 2008 term of court, and the final date set for jury trials to commence in the January term was March 31.

She was not tried during the October 2007 term of court. On March 3, appellant was notified to appear for trial on March 31. In the interim, on March 14, the State served notice on her that it intended to present a new indictment to the grand jury on March 28, which it did. The new indictment retained the weapon offense but charged two counts of aggravated assault with a deadly weapon under OCGA § 16-5-21 (a) (2): one by "shooting at" the victim, and the second by "pointing and brandishing a firearm." On March 31, appellant filed a motion for a continuance. In her motion, she acknowledged that her request "will be construed as a waiver of her right to a speedy trial."

The Court held that a defendant may waive her right to automatic discharge under § 17-7-170 by any affirmative action on her part or on the part of her counsel which results in a continuance of the case to a time outside the period of the demand. A request for a continuance of the case is such an affirmative action. Here, there was no evidence in the record that the State intended to manipulate the trial calendar by re-indicting appellant. The superseding indictment added in the second count, "pointing and brandishing a firearm," proof of a new element, that of placing the victim in reasonable apprehension of receiving a violent injury. But, appellant was given two weeks' notice of the state's intent to present the new indictment to the grand jury. Moreover, it was appellant who requested a continuance on the last date in which it was possible to try her case in accordance with her speedy trial demand. Under the circumstances presented in this case, the Court held, the trial court did not err in denying appellant's plea in bar.

Identification

Savage v. State, A09A0110

Appellant was convicted of armed robbery and other related offenses. He argued that the trial court erred in admitting the in-court identification of him by the store cashier because it was tainted by 1) an impermissibly suggestive show-up at the police station; and 2) placement of the witness in the same holding cell as appellant when the witness failed to appear for the hearing on the motion to suppress the identification. The Court held that to determine if there was a substantial likelihood of misidentification, a trial court should look at the following factors: 1) the witness's opportunity to view the accused at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the accused; (4) the witness's level of certainty at the confrontation with the accused; and (5) the length of time between the crime and the confrontation. The Court held that there was evidence to support the ruling that under the totality of the circumstances, there was not a substantial likelihood of misidentification. The witness had the opportunity to view, and speak to, appellant on two occasions in the store; appellant was standing approximately two arm lengths away from the witness each time they encountered each other; and each encounter lasted 10 to 15 seconds. Moreover, the witness described the lighting in the store as brighter than in the courtroom. The witness was certain of his identification and accurately described appellant's clothing and hair. Finally, no more than two hours elapsed between the crime and the police station confrontation.

Recusal; Sentencing

Schlanger v. State, A09A1257

Appellant was convicted of two counts of DUI and one count each of reckless driving and failure to maintain lane. He appealed and the Court remanded for resentencing with explicit instructions. The record showed that less than two weeks after the remand, before the issuance of a remittitur, and without a hearing, the trial court merged the two DUI counts, reimposed its original sentence, and ordered appellant to report to jail within 48 hours. Appellant then brought an emergency motion in the Court of Appeals to vacate this second sentence, which the Court granted on the ground that the trial court lacked jurisdiction over the matter before the remittitur had been returned. Appellant then brought a motion to recuse the trial court judge on the ground that the trial court's resentencing before the return of the remittitur showed prejudice. A different judge assigned to the matter denied the motion. On remand again, and after a hearing, the trial court reimposed its original sentence of 24 months, increased the time to be served from 10 to 30 days, and imposed separate fines for each offense. The trial court then commented as follows: "[I]f he continues to appeal, it continues to represent to me his denial of the jury verdict and I will continue to escalate my sentence in view of that, probably, the time he needs to serve, because he's in denial of his violation of the law." The Court first held that bias requiring recusal must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case, and must be of such a nature and intensity to prevent the defendant from obtaining a trial uninfluenced by the court's prejudgment. Because a merely erroneous order cannot by itself justify the grant of a motion to recuse, the trial court did not abuse its discretion when it denied appellant's motion. However, "[h]aving committed reversible error at [appellant's] first sentencing hearing, and having reimposed the original sentence before it had jurisdiction to do so, this trial court presided over a third sentencing proceeding at which it increased

the amount of time [appellant] was to serve and threatened to increase it once again if he took another appeal. This was rank error." The case was remanded again for re-sentencing.

Preservation of Evidence; Due Process

State v. Brawner, A09A0578

The State indicted appellee for armed robbery, kidnapping and carjacking in relation to an incident in a grocery store parking lot. The trial court dismissed the indictment, finding that the State's failure to preserve a surveillance tape of the incident violated the appellee's right to due process. The Court reversed. It held that in dealing with the failure of the State to preserve evidence which might have exonerated the defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence. To be material, the evidence must have had an apparent exculpatory value before it was lost, and be of such a nature that the defendant could not obtain comparable evidence by other reasonable means. A finding of bad faith is reserved for those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. Here, there was no evidence that anything on the videotape was readily seen, understood, evident, or obvious or that it had any exculpatory value. In fact, the evidence was that the images were distorted, small, and distant. The officer who viewed the tape testified that he could discern nothing pertinent to the case on the tape, and only with the victim's help could one observe that a robbery had in fact occurred. The officer was unable to identify either the victim or the defendant from the tape. Moreover, there was no evidence of bad faith. The record showed that one officer viewed the tape and saw nothing on it. A second officer, who viewed the tape with the victim at the scene, took the tape back to the station and left it on a desk of another officer. The tape was then lost. The Court held that careless, shoddy and unprofessional investigatory procedures do not necessarily equate with bad faith. Thus, the acts of obtaining and then losing the tape, alone, were insufficient to support a finding of bad faith. There was no evidence of intentional destruction of the videotape or that the officers intended to deprive appellee of exculpatory evidence. Therefore, there was no evidence to support the trial court's finding of bad faith.

Discovery; Evidence

Herieia v. State, A09A0945

Appellant was convicted of armed robbery and aggravated assault. He contended that the trial court erred in admitting into evidence a knife allegedly used by him against the victim because the knife was not timely produced to the defense prior to trial. The Court disagreed. OCGA § 17-16-4 (c) provides that "[i]f prior to or during trial a party discovers additional evidence or material previously requested or ordered which is subject to discovery or inspection under this article, such party shall promptly notify the other party of the existence of the additional evidence or material and make this additional evidence or material available as provided in this article." It is only where a defendant shows that the State failed to comply with the discovery statute, that the State acted in bad faith, and that the defendant would be prejudiced thereby that the trial court may exclude evidence improperly withheld from the defense. Here, the record showed that during the last interview with the victim, through an interpreter, the State learned that although appellant used a gun to commit the offenses, he also held a knife. This interview occurred on the Thursday before trial. The State subsequently informed defense counsel about this finding, at the latest, the following Monday. This disclosure complied with the newly discovered evidence statute. There was also no showing of bad faith because it was undisputed that the State did not know of the knife's relevance until the final interview with the victim in the presence of an interpreter. Moreover, there was no prejudice because appellant was not charged with any crime involving the knife.

Appellant also asserted error in the admission of the victim's hearsay testimony about a second unidentified victim. At trial, the victim testified that he personally observed appellant confront another individual and take money and a cell phone from this individual. The Court held that this testimony was not hearsay because the victim did not testify about any statements made by this second victim; he merely recounted what he observed. Moreover, the testimony was admissible as part of the res gestae of the armed robbery and aggravated assault against the victim at issue in the trial. This other act occurred in the same place and during the same time that appellant was committing the crimes against the victim at issue in the trial.

Giglio; Continuing Witness Rule

Varner v. State, A09A0359

Appellant was convicted of armed robbery. He argued that the State violated his due process rights by failing to disclose a deal it made with his accomplice, a female prostitute. The following colloquy occurred at trial between the accomplice and the prosecutor: "Q. What did you do with your case? A. I ended up taking a ten-year plea bargain. … Q. Why are you here today? A. I feel like I need to tell the truth. Q. Have you been offered any type of deal in exchange for your testimony? A. No." Subsequently, after appellant's trial, the State did not oppose a motion to vacate her sentence and her sentence was reduced. Appellant argued that this testimony, coupled with the fact that the accomplice's sentence was ultimately reduced, shows that the State failed to disclose that it had an agreement with her, or, at a minimum, had held out hope to her that her sentence would be reduced.

The Court held that the State has a duty, under *Brady* and *Giglio* to disclose favorable evidence to the defendant in criminal matters which includes disclosure of deals with witnesses relating to the disposition of criminal charges against them. However, the evidence showed that while the attorney for the accomplice offered her testimony in exchange for a deal, no deal was ever made with the prosecution. To the extent that the accomplice or her counsel hoped that her testimony would later benefit her, their subjective hopes were not evidence that a deal existed. In addition, there was no evidence that the prosecutor encouraged her or her lawyer to believe that she would, in fact, benefit from testifying against the appellant. Nor does the fact that the State ultimately cooperated with her counsel's efforts to reduce her sentence prove that the State and she had a deal prior to trial. Therefore, the Court held, under all the circumstances, the trial court's finding

that there was no deal between the accomplice and the State was authorized.

Appellant also argued that the trial court violated the continuing witness rule when, after the jury had begun deliberations, it allowed the jury to come back into the courtroom to review the letter appellant wrote to the accomplice urging her not to testify, and another letter she wrote while in jail to her boyfriend, appellant's cousin, urging him to tell appellant to leave town because the police were looking for him. The Court noted that appellant had not cited any authority for the proposition that the continuing witness rule not only prevents written testimony from going with the jury but also prevents the jury from reviewing such writings for a limited period of time back in the courtroom. But, even assuming the rule applied in this situation, the letters were not written testimony, but instead constituted original documentary evidence, circumstantial in nature, of appellant's involvement in the crime at issue. As such, they were not subject to a continuing witness objection.