Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 5, 2017

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THIS WEEK:

Miranda; "Off the Record" Statements

State v. Clark, S17A0350 (4/17/17)

The State appealed from the trial court's order suppressing statements made by Clark during a police station interview. The facts, briefly stated, show that the detective read Clark his *Miranda* rights at the scene. Clark was then taken to the hospital for treatment of a hand injury. Four hours later, after Clark was released from the hospital, he was taken to the police station where the same detective interviewed him. The detective began videotaping the interview after Clark had already been talking for seven minutes. Less than 30 seconds into the recording, Clark says, "This is off the record," and the detective responds, "Yeah." About 22 minutes into the recording, the detective reminds Clark that he was read his rights; Clark just keeps talking. Clark eventually describes the point at which he hit and stabbed the victim. The detective then reminds Clark again that his rights were read to him. The trial court found, among other things, that Clark could have reasonably believed that the custodial interview, being "off the record," could not be used against him.

The Court noted that it has previously held in *Spence v. State*, 281 Ga. 697 (2) (2007) that when an accused has received *Miranda* warnings, but subsequently the police officer affirmatively states that an accused's custodial statements will be kept confidential, the resulting statements are inadmissible at trial. And, the Court found, the fact that Clark used the words "off the record" rather than "confidential" was of no moment because the phrase "off the record" is an adjective defined as "given or made in confidence and not for publication." Thus, the Court found, the detective's affirmative agreement to keep the discussion "off the record" had the effect of nullifying the *Miranda* warning previously given to Clark and rendering his custodial statement inadmissible as to the State's case-in-chief.

In fact, the Court stated, the moment Clark said he wanted to talk "off the record," the detective should have taken some action to disabuse Clark of the notion that any of his statements could be treated as "off the record." At a bare minimum, the detective should have advised Clark that anything he said to police was "on the record." Since the detective took no such steps to rectify Clark's lack of understanding of his right against self-incrimination, his simple affirmation to Clark's unqualified assertion that he wanted to speak off the record created a false promise which had the effect of inducing Clark to incriminate himself during the interview at the police station. Thus, the Court held, the facts failed to establish by a preponderance of the evidence that Clark's police station statements were voluntary, and, therefore, they were held not admissible at trial for any purpose. Accordingly, the trial court did not err in granting Clark's motion to suppress.

Indictments; RICO

Kimbrough v. State, S16G1313 (4/17/17)

In July 2013, a grand jury returned a 50-count indictment against Kimbrough, Mayfield (hereinafter "appellants'), and two others. Count 1 charged all of the defendants with a violation of the RICO Act, alleging that they, "being associated with an enterprise[,] to wit: Executive Wellness and Rehabilitation, did participate in, directly and indirectly, such enterprise through a pattern of racketeering activity." Count 1 further alleged that the pattern of racketeering activity consisted of multiple violations of the Georgia Controlled Substances Act. More specifically, Count 1 alleged that the racketeering activity involved the defendants unlawfully obtaining Oxycodone (a Schedule II controlled substance) by "withholding information from various [medical] practitioners . . . that [the defendants] had obtained a controlled substance of a similar therapeutic use in a concurrent time period from another practitioner." Count 1 further stated that the pattern of racketeering activity was "more particularly described" in subsequent counts of the indictment, and indeed, nineteen other counts charged various defendants with unlawfully obtaining Oxycodone by withholding information from a medical practitioner. The remaining 30 counts charged various other violations of the Controlled Substances Act. Altogether, the indictment identified Executive Wellness and Rehabilitation as the enterprise at the bottom of the RICO charge, alleged that the defendants were associated with the enterprise and participated in it "through" a pattern of racketeering activity, and specified 19 predicate acts of racketeering that form the alleged pattern of racketeering activity. The indictment said nothing more, however, about the nature of the alleged connection between the enterprise and the pattern of racketeering activity.

By their special demurrers, appellants insisted upon greater detail about that connection. The trial court denied the special demurrers, and in *Kimbrough v. State*, 336 Ga. App. 381, 384-386 (2) (b) (i) (2016), the Court of Appeals held that the indictment contained enough detail about the connection between the enterprise and the racketeering activity to survive a special demurrer, and it affirmed the denial of appellants' special demurrers. The Supreme Court thereafter issued a writ of certiorari to review that decision.

The Court noted that Count 1 charged appellants with a violation of OCGA § 16-14-4 (b), which provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity." An essential element of this offense is a connection or nexus between the enterprise and the racketeering activity. Although Count 1 identified the enterprise with which the defendants allegedly were associated (Executive Wellness and Rehabilitation) and specified the alleged racketeering activity through which they participated in the enterprise (unlawfully obtaining Oxycodone by withholding information from medical practitioners), the indictment failed to set forth any facts that show a connection between the enterprise and the racketeering activity, and the nature of that connection was not apparent from the identification of the enterprise, the general description of the racketeering activity in Count 1, or the subsequent counts charging more particularly the predicate acts of racketeering.

Specifically, the Court found, by not knowing whether the enterprise is alleged to be a licit or illicit one, how the defendants allegedly were "associated with" it, or how the alleged racketeering activity relates in any way to the business or affairs of the enterprise, appellants could not possibly ascertain from the indictment what they must be prepared to meet with respect to proof of the requisite connection between the enterprise and the alleged pattern of racketeering activity. In so holding, however, the Court stated "we do not mean to suggest that a RICO indictment must contain pages and pages of extensive detail about the connection between the enterprise and the pattern of racketeering activity. We hold only that the sparse allegations of this indictment — which says *nothing at all* about the nature of the connection — are insufficient to enable the defendants to prepare for trial." (Emphasis in original). Accordingly, the Court held that appellants' special demurrers should have been sustained and the Court of Appeals erred in affirming the trial court's denial of them.

Jury Instructions; Sudden Emergency

Austin v. State, S17A0284 (4/17/17)

Appellant was convicted of malice murder, felony murder, possession of a firearm by a convicted felon and other offenses in connection with the death of his girlfriend. The evidence showed that appellant was called over to his girlfriend's house to take care of the couple's infant son while the girlfriend was at work. When the girlfriend got to work, she was told that her shift had been rescheduled, so she returned home. When she got home, she and appellant got into an argument and appellant shot her.

Appellant contended that the trial court erred by not giving his requested charge on "sudden emergency," contending that at least some evidence showed that he only came into possession of a handgun in order to defend himself from a sudden attack. But, the Court found, based on appellant's own testimony, he did not suddenly acquire actual possession of the gun that he used to shoot his girlfriend while trying to defend himself. Instead, appellant claimed that he already had the gun that he pointed at the bedroom door of the apartment when he heard footsteps coming towards the door. He then claimed that he fired his gun as soon as he saw the doorknob turning on the bedroom door. The Court found that this provided no evidence of any sudden emergency that caused him to suddenly possess a firearm to defend himself; rather, the evidence he presented showed, at most, that he already possessed a firearm that he chose to use before being placed in any situation that required him to actually defend himself. Therefore, the Court held, the trial court did not err by refusing to give appellant's requested charge on sudden emergency.

In so holding, the Court noted that the State and appellant's post-trial counsel erroneously argued that the "sudden emergency" charge requested at trial relates to "sudden emergency" charges that are given in civil tort cases and that are not appropriate for criminal cases. However, the Court stated, the criminal jury charge on sudden emergency that was approved by the Court in *Cauley v. State*, 260 Ga. 324 (2) (c) (1990) and that was actually requested at trial had nothing do to with the sudden emergency charges given in civil tort cases.

Venue; Infliction of Death

State v. Jones, S17A0348 (4/17/17)

Appellant was convicted of two counts of malice murder and other crimes. Appellant argued the State failed to establish venue in Fulton County. The Court disagreed.

The Court stated that murder is "considered as having been committed in the county in which the cause of death was inflicted [and i]f it cannot be determined in which county the cause of death was inflicted, it shall be considered that it was inflicted in the county in which the death occurred." OCGA § 17-2-2 (c). Appellant contended that the language "cause of death was inflicted" requires the State to prove that guns were fired in Fulton County. And, appellant argued, there was no evidence to establish this point.

But, the Court stated, "that is not what the language means." Here, the Court found, although the evidence showed that appellant and his codefendant fired guns 30 to 291 feet away from where the two victims were found, the two did not die simply because shots were fired. The victims died because bullets struck their bodies and "inflicted" fatal injuries. Accordingly, because the evidence showed that the victims' causes of death were inflicted in Fulton County, venue was established beyond a reasonable doubt.

"Victims"; Closing Arguments

McCray v. State, S17A0315 (4/17/17)

Appellant was convicted of murder and other offenses arising from the shooting death of Grover. Appellant argued that the trial court erred in denying his motion in limine in which he sought to preclude the State from referring to Grover as a victim at trial. Specifically, appellant contended, because he asserted he shot Grover in self-defense, the determination of whether Grover was a victim of a crime was an issue to be determined by the jury, and he argued, the State's repeated use of the term "victim" to describe Grover amounted to an improper commentary on the evidence.

The Court noted that it had not previously addressed this issue, but the Court of Appeals rejected a similar argument. See *Gober v. State*, 203 Ga. App. 5, 6 (2) (1992), overruled on other grounds by *Dudley v. State*, 273 Ga. 466 (742 SE2d 99) (2001). Here, the Court found, it was obvious from the evidence and argument presented to the jury that appellant admitted he shot Grover but nevertheless asserted it was not a crime because he did so in self-defense, thereby creating an issue for jury determination as to whether Grover was the victim of a crime. The trial court gave proper jury instructions regarding justification by reason of self-defense. Thus, appellant failed to demonstrate reversible error in this regard.

Appellant also argued that the prosecutor's closing arguments entitled him to a new trial. The transcript showed that during the State's closing argument, the prosecutor pretended to call the decedent to the stand, after which the prosecutor took the stand, pretended to swear herself in, and commenced offering "testimony" as if the victim himself was testifying. Assuming the persona of the victim, the prosecutor stated she was telling the jury things the victim wanted to say but could not. The prosecutor spoke in the first person of experiences the victim would now miss in life, such as watching his daughter walk down the aisle, wishing his mother a happy Mother's Day, talking to his brothers, and attending family barbeques. Speaking as the victim, the prosecutor also stated that when the victim got out a shotgun, he was simply doing what he felt he had to do to protect himself and others. Appellant's trial counsel raised no objection.

Appellant argued that the prosecutor's statements amounted to an improper victim's impact statement which may be made to a jury only during the sentencing phase of a capital murder prosecution, pursuant to OCGA § 17-10-1.2, and only after the trial court has made a prior determination that the statement is not unduly prejudicial. He also contended that his trial counsel's failure to object should not waive this error on appeal because the prosecutor's comments were prejudicial and substantially prevented him from receiving a fair trial. The Court disagreed. In a non-capital case, the defendant's failure to object to the State's closing argument waives his right to rely on the alleged impropriety of that argument as a basis for reversal. Further, plain error review is not available for errors not preserved in the trial court that relate to allegedly improper remarks by a prosecutor during closing argument.

Accordingly, the Court held, "While we strongly disapprove of the prosecutor's attempt in her closing argument to 'speak' for the victim, and caution against such a practice, given the failure to properly object, we cannot say the closing argument made in this case entitles the defendant to a new trial."

Plea Negotiations; Judicial Intervention

Carr v. State, S17A0561 (4/17/17)

Appellant was convicted of murder. He argued that the trial court "derailed" a plea agreement that he was trying to negotiate with the State when the court refused to indicate whether it would be willing to accept a proposed plea agreement in which appellant would serve a 25-year sentence for voluntary manslaughter. As a result, appellant argued, the State was unwilling to finalize the plea agreement. The Court disagreed.

The Court stated that appellant had no right to enter a guilty plea and the trial court was not required to provide the parties with an indication of the likelihood that — after a plea hearing — it would look favorably upon a certain proposed sentence. When the State and an accused have reached a tentative plea agreement, the trial judge may permit the parties "to disclose the tentative agreement and the reasons therefor in advance of the time for the tendering of the plea." Uniform Superior Court Rule 33.5 (B). And after such a disclosure, the trial judge is permitted to "indicate to the prosecuting attorney and defense counsel whether the judge will likely concur in the proposed disposition if the information developed in the plea hearing or presented in the presentence report is consistent with the representations made by the parties." USCR 33.5 (B). But, the Court stated, nothing *requires* the trial court to provide the parties with any advance assurance about its willingness to impose a proposed sentence prior to a guilty plea hearing. Accordingly, the Court held, appellant's claim was meritless.