Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 11, 2010

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THIS WEEK:

Voir Dire

Rose v. State, S10A0248

Appellant was convicted of the murder of his estranged wife. He contended that the trial court erred in reseating a venireperson he struck with a peremptory challenge. The evidence showed that appellant used all of his peremptory challenges to strike Caucasian members of the jury pool. The State objected under *Georgia v. McCollum*, 505 U.S. 42, 112 SC 2348, 120 LE2d 33 (1992), which extended the principles established in *Batson v. Kentucky*, 476 U.S. 79, 106 SC 1712, 90 LE2d 69 (1986) to hold that a criminal defendant may not engage in "purposeful discrimination on the ground of race in the exercise of peremptory challenges." Since the record showed that of the 25 jurors who were reached during voir dire, twelve or 48 percent were white, and appellant used 100 percent of his peremptory strikes against white venirepersons, the State made out a prima facie case of purposeful discrimination.

As to one potential juror, defense counsel stated that she struck him because he was from Texas and she wanted more "geographical diversity" on the jury. In response to the State's question of why did you then strike the guy from Texas, defense counsel explained that she meant "cultural diversity." The Court stated that although a striking party's explanation for the exercise of a peremptory strike may be superstitious, silly, or implausible, the striking party's burden is satisfied as long as the articulated reason is race or gender-neutral. The Court then assumed, without deciding, that geographical and cultural diversity are facially race-neutral reasons for a jury strike. Nevertheless, that did not end the inquiry because "[i]n the situation in which a racially-neutral reason for the strike is given, the trial court must ultimately decide the *credibility* of such explanation." Here, the trial court did not clearly err by rejecting as pretextual defense counsel's rationale of striking a juror from Texas because she wanted a geographically or culturally diverse jury.

Illegally Obtained Documents; Impeachment

Hogsed v. State, S10A0599

Appellant was convicted of the malice murder of her husband. She contended that the trial court erred in allowing her journals to be placed into evidence. The evidence showed that prior to trial, the State conceded that the search of appellant's home was overly broad when, while executing a valid warrant, law enforcement removed the journals from appellant's home. Nevertheless, when appellant took the stand in her own defense, the State was allowed to cross-examine her with them.

The Court, citing *Walder v. U.S.*, 347 U.S. 62, 74 SC 354, 98 LE 503 (1954), held that illegally obtained evidence, or evidence not

admissible in the State's case-in-chief, may be used for the limited purpose of impeaching a defendant. Here the journals were relevant to impeach appellant's testimony that the victim abused her. Since the journals were proffered solely for the impeachment of appellant's direct testimony, there was no error in the trial court's admission of the evidence.

Similar Transactions; Waiver of Objection

Whitehead v. State, S10A0313

Appellant was convicted of malice murder and other crimes. He contended that the trial court erred in admitting similar transaction evidence. The record showed that appellant objected to the introduction of such evidence after the USCR 31.3 (B) hearing. At trial, appellant did not object after the introduction of the evidence. Instead he waited until the jury was deliberating before renewing his objection.

The Court held that under Georgia law, a defendant must repeat at trial any objection that he made to similar transaction evidence at the Rule 31.3 (B) hearing or be deemed on appeal to have waived the objection. *Dixon v. State*, 285 Ga. 312, 317 (2009); *Robinson v. State*, 283 Ga. 546, 547 (2008); *Young v. State*, 269 Ga. 478, 479 (1998). Appellant's reiteration of the objection while the jury was deliberating would be insufficient to preserve the issue under the standard rule that evidentiary objections made after the close of evidence are untimely. However, the Court determined that this "repetitive objection" rule regarding similar transactions was unique in Georgia law. Calling it a "trap for the unwary and an invitation to ineffective assistance of counsel claims," the Court held that "our unique repetitive objection rule for similar transaction evidence should be abandoned, and the rules for objecting to that type of evidence should conform to our ordinary rules for objecting to evidence." It therefore overruled *Dixon*, *Robinson*, *Young*, and other cases to the extent that they require a defendant to repeat an objection at trial to similar transaction evidence that was raised and overruled at a Rule 31.3 (B) hearing. The Court then held that the similar transaction evidence was properly admitted into evidence at trial and affirmed appellant's conviction.

Search & Seizure

State v. Mohammed, A10A1188

Mohammed was charged with DUI. The State appealed from the grant of his motion to suppress. The evidence showed that Mohammed and another vehicle were traveling on the same 4 lane highway in the same lane. A police officer followed the vehicles for approximately two miles. During that time, Mohammed made no improper lane changes, maintained his lane, and traveled at approximately 45 miles per hour, which was the posted speed limit. The police officer noticed that Mohammed was repeatedly tapping his breaks, but he was unable to definitively state that this was not the result of the lead car varying its speed. The officer believed Mohammed was following too closely, in violation of OCGA § 40-6-49 (a), and he conducted a traffic stop of Mohammed's car. Based on evidence collected during the traffic stop, Mohammed was charged with DUI.

Mohammed disputed the testimony of the officer and the trial court credited his testimony over that of the officer. The trial court apparently agreed that the lead car was not maintaining a constant speed and found that Mohammed's repeated tapping of his breaks resulted from his attempt to maintain the speed limit. The State contended that the video from the officer's patrol car substantiated the officer's testimony and that the Court should review the evidence de novo. The Court declined to do so. It held that de novo review is only appropriate where the facts are not in dispute. Here, neither the speed of the vehicles nor the distance between them was plainly discernable on the video. While the video was consistent with the police officer's claim that Mohammed was following the lead car more closely than was reasonable and prudent under the conditions, it was also consistent with the theory accepted by the trial court that Mohammed was merely trying to maintain a safe speed while following a car that failed to maintain a constant rate of travel.

Day v. State, A10A0799

Appellant was convicted of VGCSA. He contended that the trial court erred in denying his motion to suppress. The evidence showed that the police obtained a search warrant describing the property to be searched as follows: "Property located at 691 Highway 96 Jeffersonville Ga. Twiggs County, any persons on said property, any outbuildings, and curtilage of said property. Occupant of said property is known to us as 'Douglass Day'. The residence is described as an off white in color with brown trim pull behind camper." The record showed that 691 Highway 96 was appellant's mother's address and that the camper had its own address as 103 Califf Lane. The "103" was displayed on the camper, but no evidence was shown that it was Califf Lane.

The Court held that the test for the sufficiency of a premises description in a search warrant is whether on its face it enables a prudent officer executing the warrant to locate the person and place definitely and with reasonable certainty, and without depending upon his discretion. Here, the warrant provided appellant's name as the occupant of the property to be searched. Moreover, the warrant's description of the residence as "off white in color with brown trim pull behind camper" would permit a prudent officer to locate appellant's camper definitely and with reasonable certainty, and without depending upon his discretion. This was particularly true here because the affiant officer testified that the camper was off-white with brown trim, was "pulled behind" appellant's mother's house, and was connected to it with electrical extension cords. Accordingly, the motion to suppress was properly denied.

Sentencing; Recidivists

Slaughter v. State, A10A0076

Appellant appealed from the trial court's order sentencing him as a recidivist without parole. He contended the trial court erred by sentencing him as a recidivist based upon at least one of three convictions used by the State to convict him of possession of a firearm by a convicted felon. The Court held that where the State proves a defendant's prior felony convictions for the purpose of convicting him of being a convicted felon in possession of a firearm, it may not also use those prior convictions in aggravation of punishment. In so holding, the Court rejected the State's argument that the rule only applies when the defendant is sentenced as a recidivist under OCGA § 17-10-7 (a). The Court therefore vacated the trial court's order sentencing appellant as a recidivist and remanded the case to the trial court for resentencing.

Sentencing, Recidivism

Moore v. State, A10A1163

Appellant entered a non-negotiated guilty plea to two counts of burglary. His GCIC report was introduced into evidence, and the trial court sentenced him as a recidivist to serve twenty years, seven of which would be served in confinement, with the balance on probation, pursuant to OCGA § § 17-10-7 (a) and (c). Appellant contended that he did not receive notice of the State's intent to seek recidivist punishment. In fact, he contended, he was told he would not be sentenced as a recidivist. The record showed that the State filed in the trial court a "Disclosure Certificate Pursuant to OCGA § 17-16-1" which provided that "all convictions, arrests, and bad conduct will be used in aggravation of punishment pursuant to OCGA § § 17-10-2 [and] 17-10-7 [and] for impeachment purposes pursuant to OCGA § 24-9-84" and attached appellant's GCIC report. Nevertheless, the State conceded that it did not intend that appellant be sentenced as a recidivist.

The Court held that despite the State's intent, OCGA § 17-10-7 required the trial court to sentence appellant as a recidivist. However, the record was incomplete on the issue of whether appellant consented to the admissibility of the GCIC report, upon which the trial court relied to impose its sentence, with knowledge that he would be sentenced as a recidivist. Although the Court noted that it has held that "[c]onvictions listed on an attached GCIC as aggravation evidence in sentencing have sufficed as proper notice," it decline to do so under the unique factual circumstances presented here. Instead, because 1) it was unclear whether the State's notice was sufficient to apprise appellant with unmistakable advance warning that his prior convictions would be used to enhance his sentencing (thereby giving him enough time to rebut or explain his conviction record); and 2) appellant was in fact led to believe by the State that he would not be sentenced as a recidivist, the case was remanded for "a resentencing hearing where all issues germane to [appellant]'s prior convictions can be resolved."

Family Violence Battery; Jury Charges

Powell v. State, A10A0708

Appellant was convicted of false imprisonment and misdemeanor family violence battery. Appellant contended that the trial court incorrectly charged the jury, allowing the jurors to find him guilty of family violence battery in a manner that was not charged in the indictment. The Court agreed, and reversed his family violence battery conviction. The evidence showed that appellant and his girlfriend got into a fight during which he smothered her with a pillow, choked her neck, and caused bruising on her neck and arms. The indictment charged that appellant "intentionally caused substantial physical harm, to wit[,] suffocation, to [the victim], his former live-in girlfriend, by attempting to smother her with a pillow in violation of [OCGA] § 16-5-23.1." The trial court, however, charged the jury with the entire definition of battery contained in OCGA § 16-5-23.1 (a), which included both visible bodily harm and substantial physical harm as alternative methods for committing a battery. The Court held that it is not usually cause for a new trial that an entire Code section is given even though a part of the charge may be inapplicable under the facts in evidence. But, the giving of a jury instruction which deviates from the indictment violates due process where there is evidence to support a conviction on the unalleged manner of committing the crime and the jury is not instructed to limit its consideration to the manner specified in the indictment. Therefore, under the facts of this case, the trial court erred by charging the jury using the statutory language of OCGA §16-5-23.1 (a) without also issuing an instruction to the jury limiting its deliberation of the offense to the manner alleged in the indictment. The Court further held that even though appellant did not object after the jury instructions were read, he would not be deemed to have waived his right to appeal on this issue because there was a substantial error in the charge that was harmful as a matter of law.

Juvenile Court; Sequestration

In the Interest of F. F., A10A1270, A10A1271

Appellants, a juvenile and his mother, appealed from an adjudication of the juvenile as a delinquent for committing aggravated sexual battery. The record showed that the juvenile's parents were sequestered at the request of the State because they were to be witnesses in the case. They contended that the juvenile court erred by sequestering them. The Court agreed. A parent is a party to a juvenile proceeding and may not be sequestered, even if the parent is also a witness in the case. This is true whether the juvenile proceeding is a deprivation hearing or a delinquency proceeding. Because there must be scrupulous adherence to due process requirements in juvenile court proceedings, it was a manifest abuse of discretion to exclude a juvenile's parents from a delinquency trial. Accordingly, the juvenile was entitled to a new trial where his parents may be present in the courtroom.