

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 19, 2009

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THIS WEEK:

- **Due Process; Vagueness**
- **Extrinsic Evidence; Jury Deliberations**
- **Brady, Voice Recordings**
- **Jury Charges**
- **Failure to Yield**
- **Double Jeopardy**
- **Speedy Trial**
- **Sentencing**
- **Evidence; Right of Confrontation**
- **Obstruction of an Officer**
- **Character; Victim's Prior Violent Acts**

Due Process; Vagueness

McNair v. State, S09A0487

Appellant was convicted of making an illegal left turn in violation of OCGA § 40-6-120 (a) (2). He argued that the statute violated due process because it is unconstitutionally vague. The evidence showed that appellant was driving his vehicle south on a two-lane road when he entered an intersection with a four-lane road, i.e., with two lanes each for east-bound and west-bound traffic, with the intent to make a left turn. Appellant properly activated his left-turn signal and then turned his vehicle into the outer, right-hand lane of the two lanes heading east. An officer stopped him and charged him with making an improper turn on the basis that he was required by OCGA § 40-6-120 (a) (2) to turn his vehicle into the left-hand lane of the two lanes moving east.

OCGA § 40-6-120 (a) (2) provides as follows: "The driver of a vehicle intending

to turn left shall approach the turn in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle. Whenever practicable, the left turn shall be made to the left of the center of the intersection and so as to leave the intersection or other location in the extreme left-hand lane lawfully available to traffic moving in the same direction as such vehicle on the roadway being entered." A law may be unconstitutionally vague if it fails to provide the kind of notice that will enable ordinary people to conform their conduct to the law or if it fails to provide sufficient guidelines to govern the conduct of law enforcement authorities, thus making the law susceptible to arbitrary and discriminatory enforcement. The Court held that the statute is unconstitutionally vague. Specifically, it held that the vagueness arises in the second half of the second sentence of OCGA § 40-6-120 (a) (2). The use of the verb "leave" and its interplay with "lawfully available to traffic moving in the same direction" in OCGA § 40-6-120 (a) (2) creates an ambiguity in the statute because of the two diametrically-opposite interpretations that can be given the word "leave". The first interpretation is that a driver who wants to make a left turn onto a roadway with multiple lanes must make the turn in a manner that leaves the intersection or other extreme left-hand lane location lawfully available, i.e., open or clear, to traffic moving in the same direction on the roadway the driver has just entered. This interpretation applies "leave" in the context of its definition as "to permit to remain undisturbed . . . to permit to remain unoccupied . . . to let be without interference." The second interpretation of OCGA § 40-6-120 (a) (2) is that a driver who wants to make a left turn onto a roadway with multiple lanes

must make the turn so that, when the driver departs from or “leaves” the intersection or other location, the turning vehicle is itself located in the lane farthest to the left that is lawfully available to traffic moving in that same direction. This interpretation applies “leave” in the context of its tertiary definition as “to go away or depart from.” The Court held that because of the language in the statute, both methods are equally plausible. Therefore, OCGA § 40-6-120 (a) (2) is too vague to be enforced against appellant, i.e., a driver of a vehicle making a left turn into a multi-lane roadway that lacks official traffic-control devices directing the driver into which lane to turn, and accordingly unconstitutional.

Extrinsic Evidence; Jury Deliberations

Henley v. State, S09A0299

Appellant was convicted of malice murder, felony murder, and aggravated assault. He argued that the trial court erred in denying his motion for a new trial. The record showed that the Friday before the motion was to be heard, appellant filed an amended motion claiming that the jury verdict was the result of extrajudicial evidence. He attached an affidavit from one of the jurors alleging that the jury was originally split 6-6 and then 8-4 to acquit. But then “one or more unnamed jurors, whose gender and number were not specified, relayed to the rest of the jurors that they had seen the defendant driving a Honda Accord near the courthouse that morning and responding to the name “Blood” in the hallway.” The affidavit alleged that the eight jurors who had previously voted to acquit then changed their votes to “guilty” as a result. A continuance was granted and at the next hearing on the motion the affiant was not there to testify.

Under OCGA § 17-9-41, the affidavits of jurors may be taken to sustain but not to impeach their verdict. However, an exception to the rule exists where jurors independently gather evidence related to the case and share it with other jurors. The trial court recognized its authority to consider the juror affidavit under the exception to the rule of OCGA § 17-9-41 but declined to do so because it did not find the spare two-page affidavit credible. The Court agreed for the following reasons: 1) the defense made a conscious decision not to have the affiant testify in open court

where the State could cross-examine him and his credibility could be evaluated by the trial court; 2) the defendant elected not to include contact information in the affidavit so that the State could speak to the juror and decide for itself whether he was telling the truth; 3) according to appellant, the juror approached defense counsel out of the blue, almost a year after the trial but just four days prior to the first hearing on the motion for new trial, to execute the affidavit, a coincidence of timing that even the most credulous judge would have trouble accepting at face value; 4) the affidavit deliberately omitted information necessary to verify its allegations, including the names of the jurors who supposedly brought in the extrinsic information, the number of jurors who did so, and even their gender; 5) the time line in the affidavit does not sync with the comings and goings of the jurors and appellant at trial as reflected in the transcript; and 6) the information about the vehicle and the nickname “blood” could not have had a material impact on the jury deliberations.

Brady, Voice Recordings

Henley v. State, S09A0299

Appellant was convicted of malice murder, felony murder, and aggravated assault. He argued that under OCGA § 17-16-7 and *Brady*, the trial erred in failing to strike, in its entirety, the testimony of the victim’s brother’s friend. This witness testified at trial that when he spoke to the police after the incident, he did not tell them the truth about what had happened. He then testified to the surprise of both the prosecution and the defense that he told the truth later to officers who accompanied him to a bond hearing. Prior to that moment, neither the prosecution nor the defense was aware that another statement had been made by this witness. The Court first held that appellant’s claim under OCGA § 17-16-7 was meritless because the statute does not apply to oral witness statements not recorded or memorialized in any way because they are not, in the words of the statute, “in the possession, custody, or control of the state or prosecution.” The Court held there was no *Brady* violation either because the evidence was not material. *Brady* is violated only where undisclosed evidence is “material,” i.e., if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different. Here, the Court held, since the witness admitted on the stand that he initially lied to the police about what happened, “[i]t is hard to see how even the most skilled criminal defense attorney could use the fact that the witness changed his story . . . on the witness stand at the defendant’s trial to make a significantly stronger attack on the witness’s credibility during cross-examination than was already available.”

The appellant also argued that the trial court erred in admitting the tape of the voicemail message the appellant left on the victim’s brother’s voicemail service shortly before the shooting because the voicemail itself, as opposed to the tape of the voicemail, was not properly authenticated under *Steve M. Solomon, Jr., Inc. v. Edgar*, 92 Ga. App. 207, 211-212 (1955). *Solomon* established a seven-part test for authentication of a recording: (1) the mechanical transcription device must be capable of taking testimony; (2) the operator of the device must be competent to operate it; (3) the authenticity and correctness of the recording must be established; (4) it must be shown that no changes, additions, or deletions have been made; (5) the manner of preservation of the recording must be shown; (6) the speakers must be identified; and (7) it must be shown that the statements recorded were freely and voluntarily made without duress. However, the Court held that OCGA § 24-4-48 creates an additional method for authenticating a recording. This statute applies where a witness necessary to authenticate the recording is “unavailable” due to a “privilege from testifying concerning the subject matter of the authentication.” Here, the defendant could authenticate the recording, but he was “unavailable” to the State because of his assertion of his constitutional right not to testify. OCGA § 24-4-48 (b) provides that “recordings shall be admissible in evidence . . . when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered.” The victim’s brother testified that he pressed “*” to access his voicemail service, punched in his code, and listened to his voicemail messages as he had done “too many times to count.” He testified that he had known appellant for approximately two years and recognized his voice on the message left just before the shooting. He further stated that he knew from long experience

with this voicemail service that it accurately records messages. The State also entered into evidence phone records showing that a call placed from the appellant's cell phone number to the victim's brother's cell phone number went to voicemail at the relevant time. This was competent evidence sufficient to establish the reliability of the voicemail message for purposes of authentication.

Jury Charges

Torres v. State, A09A0145

Appellant was convicted of trafficking in methamphetamine, possession of methamphetamine with intent to distribute, escape, hindering a law enforcement officer, possession of Alprazolam and possession of marijuana. He contended that the trial court erred in its defining of the elements of his drug offenses. The Court agreed. It found that all the jury was told was that it is a violation of Georgia's Controlled Substances Act to traffic or possess with intent to distribute methamphetamine. The instructions given completely failed to inform the jury about the manner in which the offense of trafficking in methamphetamine or the offense of possessing methamphetamine with intent to distribute may be committed. Thus, the jury did not receive sufficient instructions to guide them in determining appellant's guilt or innocence on these charges. However, the trial court properly instructed on the possession charges. Therefore, appellant was only entitled to a new trial on the methamphetamine trafficking and distribution offenses.

Failure to Yield

Ervin v. State, A09A0301

Appellant was convicted of failing to yield the right of way in violation of OCGA § 40-6-72 (b). This statute provides that "the driver shall yield the right of way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when such driver is moving across or within the intersection or junction of roadways." Appellant contended that because the accusation charged him with "Failure to Yield Turning Left" and cited a violation of OCGA § 40-6-71, his conviction had to be reversed. However, the Court held that the language in the accusation charging him with a failure to yield turning left could

also describe a violation of OCGA § 40-6-72 (b). His objection to the improper code citation in the charging instrument was subject to a special demurrer, but because he failed to challenge it before entering his plea, it constituted a waiver of his right to be tried on a perfect charging instrument.

Double Jeopardy

Etienne v. State, A09A0476

Appellant argued that the trial court erred in denying his plea in bar based on double jeopardy. The record showed that appellant was involved in an automobile accident on November 4, 2004, which resulted in serious injury to four individuals. He was cited for failure to maintain lane on the date of the accident and for serious injury by vehicle approximately one month later. The police report indicates that the officer issued the additional charge after learning in court on December 1, 2004, that the victims had sustained serious injuries. On January 26, 2005, the Magistrate Court gave appellant a \$5,000 signature bond on the serious injury by vehicle charge and sent the charge to the grand jury. The district attorney's office received the charge on April 18, 2005. Appellant pled guilty to failure to maintain lane in magistrate court on October 24, 2005. On November 3, 2006, indictment no. 06SC50398 was issued, charging appellant with additional offenses stemming from the accident, which included four counts of serious injury by vehicle, failure to use a turn signal, and driving too fast for conditions.

OCGA § 16-1-7 (b) requires the State to prosecute crimes in a single prosecution if the crimes (1) arise from the same conduct, (2) are known to the proper prosecuting officer at the time of commencing the prosecution, and (3) are within the jurisdiction of a single court. A second prosecution is barred under OCGA § 16-1-8 (b) (1) if it is for crimes which should have been brought in the first prosecution under OCGA § 16-1-7 (b). The Court found that the indictment should have been barred by double jeopardy because the appellant pled in magistrate court to a charge of failure to maintain lane. The Court found that it was undisputed that both charges arose out of the same conduct and that they could be tried in the superior court. It was also apparent from the record, including the hearing transcript on the plea in bar, the police report, and the bond

document signed in magistrate court, that the prosecuting officer knew that appellant had been charged with both offenses. In this case, the proper prosecuting officer was the solicitor who handled appellant's guilty plea. When appellant appeared in court in January 2005, both charges were pending, and the magistrate court judge bound over the serious injury by vehicle charge.

Speedy Trial

Robinson v. State, A09A0542; A09A0579; A09A0640

Appellant contends that the trial court erred in denying his plea in bar to three indictments for rape and related crimes because his right under the constitution to a speedy trial was violated. The test for determining whether a defendant's right to a speedy trial has been violated is set forth in *Barker v. Wingo* and *Doggett v. United States*. The four factors to be considered are 1) the length of the delay, 2) the reason for the delay, 3) the defendant's assertion of the right to a speedy trial, and 4) whether the defendant was prejudiced by the delay. Here, the three and a half year delay was presumptively prejudicial and must be weighted against the State. The reasons for the delay were primarily attributable to the appellant. Likewise, because appellant initially filed a statutory speedy trial demand but then withdrew it and did not again assert a right to a speedy trial until he filed the plea in bar, this factor also was weighted against him. Finally, appellant showed no prejudice because his general assertions of witness memory loss and inability to locate witnesses were not sufficient to prove prejudice. Therefore, the trial court did not abuse its discretion in denying the plea in bar.

Sentencing

Townes v. State, A09A0065

Appellant was convicted of four counts of aggravated assault, burglary, theft by taking, and carrying a concealed weapon. The trial court sentenced him to serve 111 years in confinement, the maximum time possible. Appellant contended the trial court abused its discretion, because it said on the record before trial that it thought the State's recommendation of 20 years to serve 10 in confinement was reasonable. Specifically, he argued that

the sentence was vindictive under *N.C. v. Pearce*, 395 U.S. 711, 89 SC 2072, 23 LE2d 656 (1969). The Court found that *Pearce* was distinguishable because that case involved a re-sentencing following re-trial. Under the facts of *Pearce*, the increased sentence was more likely than not attributable to a presumption of vindictiveness, absent evidence attempting to justify the increase. However, the presumption of vindictiveness is absent when a trial court imposes a greater penalty after trial than it would have after a guilty plea because in the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged; the defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation; and a guilty plea may justify leniency, a justification absent if the case proceeds to trial. Here, the trial court's statements at the sentencing hearing indicated that the sentence was based on evidence that appellant's actions were life-threatening to the targeted victim and anyone else who happened to be nearby, that the jury convicted him of entering the dwelling with intent to commit murder, that his actions against this victim had escalated from his previous misdemeanor crimes against the same victim, and that he displayed no remorse. Because no presumption of vindictiveness applied and the trial court explained its reasons for the lengthy sentence imposed, which was within the statutory limits, the convictions were affirmed.

Evidence; Right of Confrontation

Reddick v. State, A09A0795

Appellant was convicted of possession of cocaine. He argued that the testimony of the forensic chemist violated his right to confrontation under the Sixth Amendment.

At trial, a forensic chemist with the crime lab was qualified at trial, without objection, to testify as an expert in forensic chemistry. She testified that two tests were performed on a sample of the substance: a gas chromatography-mass spectrometry (GCMS) test and a thin layer chromatography (TLC) test. Both tests were positive for cocaine. On cross-examination, she testified that the TLC test was performed by another employee of the lab, at her direction; and that she and this other employee

performed the GCMS test, working in tandem in accordance with the policies and procedures of the crime lab. The forensic chemist further testified that she reviewed both the TLC and the GCMS tests to make certain they were performed in accordance with the policies of the crime lab.

Appellant contended that his Sixth Amendment right to confrontation was infringed because he did not have the opportunity to cross-examine this other employee.

The Court disagreed. It found that the employee was acting under the direction of the forensic chemist witness and that she personally reviewed the test results. Thus, her testimony was proper because she arrived at her own independent conclusion that the substance at issue was cocaine, based on the GCMS and TLC test results. An expert need not testify to the validity of every step that went into the formulation of her results as a foundation for their admissibility and may base her opinion on data collected by others. The fact that the chemist may have relied on lab work performed by others does not render her expert opinion inadmissible; instead, it presents a question for the factfinder as to the weight to be given to her testimony.

Obstruction of an Officer

Connelly v. State, A09A0994

Appellant was charged with armed robbery, giving a false name and misdemeanor obstruction of an officer. He was convicted of giving a false name and misdemeanor obstruction of an officer. He challenged the sufficiency of the evidence of the obstruction charge. The testimony showed that officers received a report of an armed robbery and an eye witness stated that the perpetrator ran into the woods adjacent to a mobile home park. An investigating officer stopped appellant who was driving a vehicle with a front seat passenger as the vehicle was leaving the park. The officer asked appellant his name and appellant gave a false name. The officer then focused his attention on the passenger because he was breathing heavily and fit the description of the robber. Consequently, the officer asked the passenger to exit the car. After doing so, the passenger fled. The deputy chased him a short distance from the scene of the traffic stop and apprehended him. When he returned to the scene of the stop, appellant had driven away. The

officer admitted that he did not tell appellant to remain on the scene.

The Court held that the conviction for obstruction must be reversed. The Court found that appellant complied with the officer's order to stop his vehicle. Although he did not have a right to flee that encounter, he did not drive away until after the encounter apparently had ended. His conviction of obstruction could not be upheld on the ground that he fled the scene to avoid being arrested for the armed robbery, because he was never made aware that he was going to be arrested for the armed robbery and in fact, he was acquitted of that offense.

Character; Victim's Prior Violent Acts

Williams v. State, A09A0602

Appellant was convicted of voluntary manslaughter. He contended that the trial court erred in refusing to admit evidence of the victim's prior violence toward third parties, unless he testified. The evidence showed that the State put into evidence a statement of the appellant that the victim, his girlfriend, came at him with a butcher knife. He retreated into the bedroom. She followed him there and cornered him. He then grabbed a shotgun from the closet and fired it at her, because she persisted in trying to stab him despite his attempts to fend her off. The State also put into evidence a tape of appellant's 911 call. The trial court would not allow testimony that the victim had killed her prior boyfriend with a knife unless the appellant testified. Appellant took the stand and the State elicited testimony from him on cross-examination showing, among other things, that his proficiency in self-defense as a result of his military training had enabled him to disarm the victim when she had attempted to attack him with weapons on prior occasions.

The Court held that a necessary prerequisite to the admission of evidence of a victim's violence is the defendant's establishment of a prima facie showing of justification. A prima facie case of justification requires a showing that the victim was the aggressor, that the victim assaulted the defendant, and that the defendant was honestly trying to defend himself. It is possible to establish a prima facie case through the testimony of witnesses other than the defendant. However, if a trial court correctly determines that the testimony of

witnesses other than the defendant does not establish a prima facie case of justification, the trial court's insistence that a defendant establish a prima facie case before presenting evidence of the victim's prior acts of violence is not the equivalent to a judicial mandate that the defendant must testify. Here, the trial court, incorrectly determined that the evidence presented by the State did not establish the prima facie case. In his statement, which was admitted in evidence as part of the State's case-in-chief, appellant claimed, just as he did in his trial testimony, that he had shot the victim because of her relentless attempts to stab him with the knife despite his retreat into the bedroom and other efforts to fend off her attack. Therefore, appellant "was thus presented with the constitutionally impermissible Hobson's choice of foregoing either (a) his right not to take the stand and become subject to cross-examination or (b) his entitlement to present evidence in support of his defense of justification." Moreover, the error was not harmless because the State, through its cross of appellant, undermined appellant's defense of self-defense in a way that would not have been possible if he had not testified.