

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 8, 2007

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THIS WEEK:

- **United States Supreme Court**
- **Eleventh Circuit Court of Appeals**
- **Georgia Supreme Court**
- **Georgia Court of Appeals - Evidence**

United States Supreme Court

Fry v. Plier, Warden, No. 06-5247, Argued March 20, 2007—Decided June 11, 2007

The trial judge presiding over petitioner's criminal trial excluded the testimony of defense-witness Pamela Maples. After his conviction, petitioner argued on appeal that the exclusion of Maples' testimony violated Chambers v. Mississippi, 410 U. S. 284, which held that a combination of erroneous evidentiary rulings rose to the level of a due-process violation. The California Court of Appeals did not explicitly address that argument in affirming, but stated, without specifying which harmless-error standard it was applying, that "no possible prejudice" could have resulted in light of the cumulative nature of Maples' testimony. The State Supreme Court denied discretionary review. Petitioner then filed a federal habeas petition raising the due-process violation and other claims. The Magistrate Judge found that the state appellate court's failure to recognize Chambers was error and an unreasonable application of clearly established law as set forth by the United States Supreme Court. Further, the Magistrate disagreed with the finding of "no possible prejudice," but concluded there was an insufficient showing that the

improper exclusion of Maples' testimony had a "substantial and injurious effect" on the jury's verdict under Brecht v. Abrahamson, 507 U. S. 619, 631. Subsequently, the District Court denied relief, and the Ninth Circuit affirmed.

The Supreme Court held that in 28 U. S. C. §2254 proceedings, a federal court must assess the prejudicial impact of constitutional error in a state-court criminal trial under Brecht's "substantial and injurious effect" standard, whether or not the state appellate court recognized the error and reviewed it for harmlessness under the "harmless beyond a reasonable doubt" standard set forth in Chapman v. California, 386 U. S. 18 (1967). Because the Ninth Circuit correctly applied the Brecht standard rather than the Chapman standard, the Court affirmed.

Eleventh Circuit Court of Appeals

Jordan v. Mosley, No. 06-11399

Defendant Mosley appealed the District Court's denial of his summary judgment motion on qualified immunity and official immunity issues. Plaintiff sued Mosley, the chief jailer for Screven County and a Sheriff's Deputy, alleging violations of the 4th Amendment and state laws prohibiting false arrest and malicious prosecution. Plaintiff visited Diane Mosley, his niece and defendant's wife at defendant's home. The defendant had hired a contractor to dig a well on their property. The defendant's wife asked plaintiff to use the backhoe owned by the contractor to dig a hole for a fish pond. Plaintiff, a heavy equipment operator, used the backhoe and caused a flat tire and a

broken hydraulic cylinder. Mosley received a bill for the damage and asked plaintiff to pay. Plaintiff refused and offered to pay half. Mosley pressed Deputy Crockett to take out a warrant for plaintiff's arrest on criminal damage to property. Plaintiff was arrested and transferred to Screven County jail. Plaintiff's wife arrived to post bond and Mosley told her if she paid restitution the charges would be dropped. The plaintiff's wife paid restitution, the charges were dropped, and plaintiff was released. Plaintiff sued under 42 U.S.C. §1983 for federal and state law claims.

Mosley appeals on two counts. First, did the district court err in denying his qualified immunity defense against the Fourth Amendment claim? Second, did the court err in denying his official immunity defense against state law claims? The court laid out the standard for finding qualified immunity as a two part inquiry. First, do the facts show a violation of federal law? Second, were the rights violated clearly established when the defendant acted? Here, the court found that the defendant did not need specific evidence of the suspect's intent because the charged crime was a crime of general intent. The defendant only needed to know that the suspect did the prohibited acts. Since Mosley knew that Jordan damaged the backhoe, he had probable cause and the arrest was lawful under the Fourth Amendment. Therefore, the district court erred in denying summary judgment on the Fourth Amendment claim.

Georgia allows state employees to be sued for performing discretionary functions only "if they act with actual malice or with actual intent to cause injury in the performance of their official functions." Gilbert v. Richardson, 452 S.E. 2d 476, 483 (Ga. 1994). Here, the court inquired into the subjective intent of Mosley. Plaintiff offered evidence that showed Mosley caused Plaintiff to be arrested for collection of a civil debt. Therefore, a reasonable fact finder could determine that Mosley acted with actual malice. Accordingly, the court upheld the district court's denial of summary judgment as to official immunity for the state law claims and remanded the case to the district court.

Georgia Supreme Court

State v. Pless, S06G1832

The Georgia Supreme Court granted certiorari in this case and reversed the judgment of the Court of Appeals. The Supreme Court determined that the General Assembly did not intend to eliminate the authority of trial courts to order restitution of court-appointed attorney fees when it passed the Georgia Indigent Defense Act of 2003.

Pless was convicted on three counts of violating the Henry County animal control ordinance, and was sentenced to one day in jail and a total of 179 days on probation. Additionally, Pless was ordered to pay \$1,226 in restitution to the county for the services of his court-appointed counsel. The trial court inquired into whether Pless was able to pay those costs and his attorney responded in the affirmative.

Pless's subsequent motion for a new trial was denied and trial counsel's failure to object to the restitution requirement was not raised within the context of Pless's ineffective assistance claim or within the motion for new trial. Pless appealed his convictions to the Court of Appeals. Pless did not challenge the trial court's restitution order, but the Court of Appeals addressed the issue sua sponte despite the lack of objection below and despite Pless's failure to enumerate the issue as error on appeal. The Court of Appeals reversed the restitution order of the sentence holding that the trial court did not have legal authority to impose the order because OCGA § 17-12-10 which allowed a court to order reimbursement was struck before trial and replaced with the Georgia Indigent Defense Act of 2003 (OCGA § 17-12-1 et seq.) which does not authorize a trial court to order reimbursement.

The Georgia Supreme Court first inquired into whether the trial court correctly ordered restitution. If so, then there was no basis to declare the sentence void without an objection below. The Court reasoned that OCGA § 42-8-35 gives the sentencing court the power to impose reasonable conditions of probation unless expressly prohibited. Even though the reimbursement provision of the former statute was not included in the Indigent Defense

Act, there is no express authority precluding a trial court from ordering reimbursement as a reasonable condition of probation. The trial court's sentence was proper and the issue was not preserved for appeal so it was not properly before the Court of Appeals and there was no authority for the court to address it sua sponte.

Chief Justice Sears dissented on the grounds that it is not a reasonable condition of probation to require a probationer to reimburse a local government for his court-appointed counsel as it is not "reasonably related to the nature and circumstances of the offense and the rehabilitative goals of probation."

State v. Aiken, S07G0126

The Georgia Supreme Court granted certiorari in this case to review the Court of Appeals's holding that a statement that the appellee, a probation officer, gave as part of a criminal investigation into his conduct could not be used against him at trial. The question before the Court concerns what should be the appropriate test when determining whether an incriminating statement made by a government employee during an investigation into his conduct is coerced and inadmissible based on allegations by the employee that he was impliedly threatened with the loss of his job if he did not answer questions during the investigation. Below, the Court of Appeals adopted the test for admissibility of statements by public employees set forth in United States v. Friedrich, 268 U. S. App. D.C. 386, 842 F2d 382 (D.C. Cir. 1988) rather than the test articulated in United States v. Indorato, 628 F2d 711 (1st Cir. 1980). The Georgia Supreme Court declined to adopt either test specifically, but concluded that trial courts should evaluate the totality of the circumstances surrounding the public employee's statement to determine whether it was voluntary.

Factors that a court may consider include whether the State actor made an overt threat to the defendant of the loss of his job, if he did not speak with investigators or whether a statute, rule, or ordinance of which the defendant was aware provided that the defendant would lose his job for failing to answer questions.

If no express threat is present, the court may examine whether the defendant subjectively believed that he could lose his job for failing to cooperate and whether, if so, that belief was reasonable given the State action involved. In determining whether the defendant's belief was objectively reasonable, the court may examine whether the defendant was aware of any statutes, ordinances, manuals, or policies that required cooperation and provided generally, without specifying a penalty, that an employee could be subject to discipline for failing to cooperate. The court may also consider whether the investigator implicitly communicated any threat of dismissal either in written or oral form; whether, before the interrogation began, the defendant was told he was free to leave at any time; and whether the defendant was told he had the right to have a lawyer present. The trial court can consider any other factor that it determines is relevant to the determination of voluntariness. The Court opined that the totality of the circumstances test was in keeping with the discretion Georgia courts have historically enjoyed in determining whether a defendant's statement is voluntary. The Georgia Supreme Court determined that appellee had read and signed the Department's "Standard Operating Procedures" and understood that he could be fired for failing to comply with those procedures. Even though there was no direct threat of job loss, nor was there any statute or ordinance requiring dismissal, appellee had the subjective belief he would be fired for not cooperating and that belief was reasonable based on the form an investigator had him sign stating that he could be fired for interfering with the investigation. Additionally, appellee was not read his Miranda rights and was not told he was free to go. The Court affirmed the judgment of the Court of Appeals excluding the statement from use by the State.

Wagner v. State, S07A0002

This death penalty case came before the court for interim review. The trial court denied appellant's demurrer with regard to count two of the indictment charging the offense of felony murder. The Supreme Court reversed the judgment of the trial court on this issue. Count two of appellant's indictment attempts

to charge felony murder, but it includes the phrase, "intentionally and with malice aforethought," which should appear in a malice murder charge, not a felony murder charge. The State could have charged malice and felony murder in the alternative in the same count. Leutner v. State, 235 Ga. 77, 79 (2) (218 SE2d 820) (1975). However, the charge at issue here mixed those elements rather than charging them in the alternative. The Court found that the mixing of the elements of malice murder and felony murder constituted a material defect. Therefore, the Court quashed count two of the indictment. The Court further held that "where a special demurrer points out an immaterial defect, the trial court should strike out or otherwise correct the immaterial defect. Where a special demurrer points out a material defect, the trial court must quash the defective count of the indictment. Bailey v. State, 280 Ga. 884 (635 SE2d 137) (2006). However, harmless error review is appropriate only in the post-conviction setting, not in pre-trial proceedings or on pre-trial appeal. Thus, Bailey is disapproved to the extent that it can be construed to hold that a material defect that is not prejudicial to the defendant does not require the quashing of a defective count of an indictment."

Gibson v. Head, S07A0194

Appellant was convicted and sentenced to death in 1990. Appellant filed his second habeas petition, which was denied. Appellant filed an application for a certificate of probable cause and claimed that his trial attorney labored under a conflict of interest because the attorney was a Special Assistant Attorney General at the time he represented appellant and did not disclose his status to the appellant. The Supreme Court of Georgia remanded his case to the habeas court and ordered it to determine if the claim was procedurally barred, and if not, whether it had any merit. The Supreme Court again remanded based on Roper v. Simmons, 543 U. S. 551 (2005), a recent decision by the Supreme Court of the United States barring the execution of persons who were under 18 years old at the time of their crimes. The habeas court vacated appellant's death sentence based on his youth at the time of the murder, but allowed his

convictions to stand by denying his other requests for relief. The Georgia Supreme Court granted appellant's application for certificate of probable cause to appeal and directed the parties to address whether the habeas court erred in concluding that appellant's conflict of interest claim was procedurally barred.

The Court found that the habeas court's reasoning in barring appellant's claim was erroneous and remanded the case for further proceedings. The habeas court found that appellant's claim was barred because of the rule against successive habeas petitions. OCGA §9-14-51. The Court found that the habeas court was correct in its statement of the law, but misapplied it because appellant could assume his trial counsel was not under a conflict because of trial counsel's duty to disclose the conflict. There was an imputed duty to disclose under OCGA §45-15-30 along with a clear ethical duty, and an order from the Attorney General that the Special Assistant Attorney Generals never serve as defense counsel in death cases.

The Court also found that the appeal did not suffer from procedural default because appellant's trial counsel argued his first appeal and that is an exception to the procedural default waiver that would be in effect otherwise. The habeas court also misstated the law when it characterized the conflict of interest claim as a non-constitutional claim. The Court held that it is a constitutional claim under the 6th Amendment. The Court reversed the habeas court's order insofar as it found appellant's conflict of interest claim to be procedurally barred and not cognizable on habeas corpus. On remand, the habeas court was instructed to again consider, in a manner consistent with the opinion, whether appellant's conflict of interest claim is procedurally barred and, if not, whether it has merit.

Georgia Court of Appeals- Evidence

Drammeh v. State, A07A0083 (05/25/07)

On appeal, appellant argued that the trial court erred in allowing the jury to consider information contained in a cell phone which had been admitted into evidence

without objection. During the trial, defense counsel cross-examined Toro, a narcotics officer, regarding the information contained in appellant's cell phone. Specifically, the defense questioned the officer whether he had attempted to access information stored on the phone other than the address book, whether he had accessed the list of most recently dialed numbers and whether he had accessed the numbers of calls recently received. Toro stated that he had reviewed the list of most recently dialed numbers. During deliberations, the jury sent the trial court a note asking whether they were permitted to consider evidence they had discovered on the phone. The trial court permitted the jury to consider the contents of the phone. Appellant contends that allowing the jury to consider the information they found on the phone was tantamount to allowing the jury to conduct an independent investigation violating his right to due process, right to a public trial and the right to confront witnesses. The Court of Appeals found that the phone was tendered without objection, without stipulations and that defense counsel questioned Toro regarding the contents of the phone thus making the contents an issue in the case. Therefore, the Court of Appeals held that there was no abuse of discretion.