

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 14, 2015

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THIS WEEK:

- **Double Jeopardy; Constitutional Right to a Speedy Trial**
- **Bond Forfeitures; Pretrial Diversion Programs**
- **Right of Self Representation; *Faretta***
- **Power to Arrest; Campus Police Officers**
- **Statements; *Miranda***
- **Sentencing; Banishment**
- **Victims; Prejudicial Evidence**

Double Jeopardy; Constitutional Right to a Speedy Trial

State v. Grayson, A15A0408 (7/8/15)

The State appealed from an order granting Grayson's plea in bar, which the court granted on double jeopardy and constitutional speedy trial grounds. The record showed that in August of 2012, Grayson was accused of six counts of battery and seven counts of simple battery. His trial began on November 19, 2013. The victim, who was under subpoena, was an unexpected no-show at trial. The State attempted to use an officer to authenticate recordings of 911 calls made by the victim. During the hearing on whether the 911 calls would be admissible under the hearsay exception in O.C.G.A. § 24-8-804(b) for unavailable witnesses, it became clear that the 911 caller made reference to Grayson's alleged cocaine use, but his counsel apparently had been unaware of this content in the recording. The trial court then announced it would grant a mistrial. Thereafter, appellant filed its plea in bar alleging the two grounds upon which the trial court granted the motion on July 14, 2014.

The Court noted that when informed of the trial court's ruling that it was going to declare a mistrial, Grayson's counsel did not question the ruling or pose any objection, merely stating, "Thank you, Your Honor." Based on this record, the Court concluded that the mistrial was not granted over Grayson's objection or without his consent. No matter how erroneous a ruling of a trial court might be, a litigant cannot submit to a ruling or acquiesce in the holding, and then complain of the same on appeal. He must stand his ground. Acquiescence deprives him of the right to complain further. Consent to the grant of a mistrial can be express or implied, and although Grayson did not expressly consent to a mistrial, he impliedly consented by failing to object timely to the mistrial declaration. Therefore, the trial court erred in barring further prosecution of Grayson.

The State also argued that the trial court erred in granting Grayson's plea in bar on constitutional speedy trial grounds. The Court agreed. The trial court concluded that the delay in trial was more than one year, apparently relying on the date of the August 2012 accusation. But, the Court stated, while typically the time for speedy trial attaches at the date of arrest (or date of indictment/accusation if earlier), in this case Grayson was actually tried, and he had not moved for dismissal on speedy trial grounds prior to that trial. Therefore, the relevant time frame for purposes of the instant motion to dismiss on constitutional speedy trial grounds was from the date of the mistrial, November 20, 2013, through the date the motion was ruled upon on July 14, 2014. Accordingly, the delay was only approximately eight months and therefore, not presumptively prejudicial.

Nevertheless, Grayson argued, there was prosecutorial misconduct because the mistrial was caused by the State's lack of diligence in securing its witness's presence in court. But, the Court noted, the trial court found that the State was not at fault and was not to blame for the witness's failure to appear. Thus, in light of this finding, which the Court found was supported by the record, the trial court erred by calculating the delay from the date of the accusation. Properly calculated, the delay was less than one year and not presumptively prejudicial. Accordingly, Grayson's "rights to a speedy trial had not been violated, and there was no basis to engage in the four-factor *Barker-Doggett* balancing test.

Bond Forfeitures; Pretrial Diversion Programs

AA Professional Bail Bonding v. Deal, A15A0340 (7/8/15)

AA-Professional Bail Bonding ("AAPB") appealed from a trial court's order denying its motion to set aside the forfeiture of a bond it issued on behalf of Anne Kisudila following her arrest for shoplifting. The record showed that on February 11, 2011, Kisudila was arrested for shoplifting. That same day, she was released on bond after entering into a bond agreement with AAPB as the surety. Then, on February 23, 2011, the Solicitor charged Kisudila, via accusation, with a single count of shoplifting. However, on April 13, 2011, Kisudila entered into a pretrial diversion program, the terms of which were specifically provided for in a "Notice of Diversion/Abeyance" signed by the solicitor, Kisudila, and her probation officer, and which was then filed with the clerk of court. On May 25, 2011, it was determined that Kisudila failed to comply with the terms required by the pretrial diversion program, and therefore, her shoplifting case was placed back on the court's July 2011 arraignment calendar. When Kisudila failed to appear for arraignment, the State filed a motion for a bench warrant for her arrest and a forfeiture of her bond, both of which the trial court immediately granted. Subsequently, on December 1, 2011, the trial court held an execution hearing, after which it entered judgment on the bond forfeiture for \$1,357.

AAPB contended that the trial court erred in finding that Kisudila's entry into a

pretrial diversion program did not release it from liability on the bond under O.C.G.A. § 17-6-31(d)(1)(C) which provides that a "surety shall be released from liability if, prior to entry of judgment, there is ... [a] court ordered pretrial intervention program . . ." (Emphasis supplied). But, the Court found, Kisudila's entry into the pretrial diversion program was based upon an agreement with the solicitor rather than as the result of an explicit court order. In fact, the trial court was not involved in any part of the State's decision to enter Kisudila into the program; its signature appeared nowhere on the "Notice of Diversion/Abeyance" form, which both Kisudila and the solicitor signed; and the court did not monitor Kisudila's compliance—or lack thereof—with the terms of the program.

Nevertheless, AAPB argued, the General Assembly implicitly excised the requirement that a pretrial diversion program be court ordered before a surety can be relieved of liability under O.C.G.A. § 17-6-31(d) when it subsequently enacted O.C.G.A. § 15-18-80, which authorizes the State's prosecutors to create such programs. In other words, AAPB contended, the court-ordered pretrial diversion requirement for relieving a surety of liability in O.C.G.A. § 17-6-31(d)(1)(C) conflicts with the authority in O.C.G.A. § 15-18-80 that allows prosecutors to bypass such orders, and the Court should resolve this conflict by reading "court ordered" out of O.C.G.A. § 17-6-31(d). But, the Court stated, it is not at liberty to casually construe statutory language as "mere surplusage." Thus, even if it were inclined to agree that the statutes conflicted, the resolution of any tension between the two statutes is a matter for the General Assembly to address. And while AAPB may have sound policy arguments in favor of allowing a surety to be relieved of liability when a defendant enters into any type of pretrial diversion program, it is emphatically the province and duty of the judiciary to say what the law is, not what judges or parties believe it should be.

Right of Self Representation; Faretta

Smith v. State, A15A0329 (7/8/15)

Appellant was convicted of forgery in the first degree, tampering with evidence, misdemeanor obstruction of a law enforcement officer, and possession of cocaine.

He contended that the trial court erred in refusing to allow him to represent himself at trial. The Court agreed and reversed.

The record showed that after being appointed a public defender, appellant requested that he be allowed to represent himself. Concerned of appellant's mental health status, the court ordered a mental health evaluation and eventually entered an order confining him in an inpatient mental health facility. However, the forensic psychologist concluded that appellant was in fact competent and that his request to represent himself was not the result of mental incompetence. Thereafter, the court allowed appellant to represent himself. The day before trial, however, appellant requested counsel be appointed to him. The court granted his request and continued the trial. The next time the case was called for trial, appellant sought again to represent himself. The court summarily denied the request, finding it to be a dilatory tactic.

The Court stated that if a defendant makes an unequivocal assertion of his right to represent himself prior to trial, the request should be followed by a *Faretta* hearing to ensure that the defendant knowingly and intelligently waives the right to counsel and understands the disadvantages of self-representation. Once given pro se status, the defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial. Deprivation of the right to self-representation is structural error, i.e., errors that require automatic reversal.

Here, the Court found, although appellant made several unequivocal assertions of his right to represent himself before the trial commenced, the trial court did not conduct a *Faretta* hearing and apprise appellant of the dangers and disadvantages of self-representation. Instead, the court summarily denied appellant's request to represent himself after concluding that the request was a dilatory tactic. But the motives of a defendant are irrelevant in determining whether to honor a defendant's pretrial, unequivocal request to represent himself; rather, the proper test is whether the defendant knowingly and intelligently waives his or her right to counsel.

And while a defendant may be denied his right to self-representation if he suffers from severe mental illness to the point where he is not competent to conduct trial proceedings by himself, the inpatient mental health evaluation ordered by the trial court and performed on appellant reflected that he was mentally competent. In fact, the Court noted, after reviewing the mental health evaluation and conducting a hearing on the issue, the trial court allowed appellant to represent himself in pretrial matters and had been “fully prepared to allow [appellant] to represent himself” at trial; it was only when the court later concluded that appellant’s second request to represent himself was done with a dilatory motive that the court reversed course and refused to allow appellant to represent himself solely on that basis. Accordingly, because the record shows that appellant both wished to make and was mentally competent to make a knowing and intelligent waiver of his right to counsel, and the trial court employed the wrong standard for making this determination, the trial court erred. In so holding, the Court distinguished *Williams v. State*, 183 Ga.App. 373 (1987), finding that there, the request for self-representation came after the trial began and therefore, the trial court properly concluded it to be a dilatory tactic.

Power to Arrest; Campus Police Officers

State v. Zilke, A15A0279 (7/8/15)

Zilke was arrested for two counts of driving under the influence, failing to maintain lane, and operating a vehicle without headlights. The arresting officer was a POST-certified police officer at a state university. The evidence showed that the arrest occurred nowhere near the campus or university property. The trial court granted Zilke’s motion to suppress, finding that the officer lacked jurisdiction to arrest him.

The Court stated that generally, a police officer has the power to arrest only in the territory of the governmental unit by which the officer was appointed. An exception arises, however, when the officer witnesses a moving traffic violation. Under O.C.G.A. § 17-4-23(a), “[a] law enforcement officer may arrest a person accused of violating any law or ordinance governing the operation ... of motor vehicles by the issuance of a citation,

provided the offense is committed in his presence.” This exception authorizes an arrest regardless of territorial limitations. POST-certified campus police officers fall within the ambit of O.C.G.A. § 17-4-23.

Here, the Court noted, it “must determine for the first time whether O.C.G.A. § 17-4-23 also authorizes a POST-certified campus police officer to arrest for a traffic offense committed in his presence, but beyond the territorial limits prescribed for campus police officers.” The trial court concluded that O.C.G.A. § 20-3-72 precludes a POST-certified campus police officer from making an arrest for offenses committed more than 500 yards from campus. That Code section provides: “The campus policemen and other security personnel of the university system who are regular employees of the system shall have the power to make arrests for offenses committed upon any property under the jurisdiction of the board of regents and for offenses committed upon any public or private property within 500 yards of any property under the jurisdiction of the board.” Relying upon the basic rule of statutory construction that requires statutes relating to the same subject matters be construed together and harmonized wherever possible, the Court concluded that POST-certified campus police officers fall within the scope of O.C.G.A. § 17-4-23 and may arrest for moving traffic offenses committed in their presence more than 500 yards from campus. Accordingly, the order granting the motion to suppress was reversed.

Statements; Miranda

Ellis v. State, A15A0696 (7/8/15)

Appellant was convicted of possession of a firearm during the commission of a crime, theft by receiving stolen property, obstructing an officer, and driving on a suspended license. He contended that the trial court erred in admitting his custodial statements into evidence because the statements were obtained after he clearly invoked his right to counsel. The Court agreed and reversed.

Initially, the Court noted that since appellant’s statements to the detective were recorded and there are no relevant additional facts, the trial court’s application of the law to the undisputed facts is subject to de novo appellate review. The recording showed

that after the detective advised appellant that he had the right to talk to an attorney and have the attorney present during the police interview, appellant asked whether he could call his attorney. First, appellant asked, “So I can call him now?” While appellant’s request was somewhat muffled, causing the detective to ask for clarification, appellant then clarified “Are you saying I can call him now?” (Emphasis supplied). At this point, the detective asked whether appellant had an attorney, and appellant responded in the affirmative. The Court noted that in asking whether he could call his attorney, appellant “did not use equivocal words such as “might” or “maybe” when referring to his desire for a lawyer. He was also not referring to a need for counsel sometime in the future.

Furthermore, appellant’s statements were not ambiguous because the detective sought clarification by asking whether he had an attorney. Out of context, appellant’s questions about whether he could “call him now?” might seem ambiguous. However, appellant asked these questions when the detective advised appellant of his right to have an attorney present during his custodial interview. Consequently, the Court found, it was readily apparent that appellant was referring to his attorney when asking whether he could call him. Thus, the Court held, appellant’s request to call his attorney was a clear invocation of his right to counsel, and the fact that appellant agreed to talk to the detective after the detective finished reading the form did not vitiate his earlier request. Therefore, appellant’s custodial statement was taken in violation of his constitutional right to counsel, and the trial court erred in failing to exclude the statement.

Finally, the Court held, the jury’s verdict may have been influenced by the improper admission of appellant’s custodial statement. Therefore, the admission was not harmless error.

Sentencing; Banishment

Regent v. State, A14A1770 (7/9/2015)

Appellant entered into a non-negotiated guilty plea to one count of aggravated assault and one count of aggravated battery. The trial court sentenced him to 20 years with 12 years to serve on the aggravated assault charge and a consecutive sentence of 10 years on the

aggravated battery charge. The trial court also banished him from all of Georgia, except for Toombs County, as a special condition of probation.

Appellant contended that the trial court violated O.C.G.A. § 42-8-35(a)(6)(A) by banishing him from the entire state, except for Toombs County. The Court agreed. The legislature has expressly provided that banishment is a valid term and condition of probation. The trial court, however, cannot banish a probationer to any area within the state that does not consist of at least one entire judicial circuit. Since Toombs County is part of the five-county Middle Judicial Circuit, which also includes Emanuel, Jefferson, Washington, and Candler Counties, the trial court was not statutorily authorized to banish appellant from the entire state, except for Toombs County. Banishment from the entire state, except for the five-county Middle Judicial Circuit was presumably an appropriate special probation condition. Nevertheless, because appellant's sentencing order did not provide for banishment to the entire Middle Judicial Circuit, the Court stated that it was constrained to vacate the banishment provision in appellant's sentencing order and remand the case to the trial court solely for the purpose of resentencing appellant on that provision. In doing so, the Court emphasized that appellant's sentence of 20 years with 12 years to serve on the aggravated assault charge and a consecutive sentence of 10 years on the aggravated battery charge stands affirmed.

Victims; Prejudicial Evidence

Freeman v. State, A15A0545 (7/9/15)

Appellant was convicted of two counts of cruelty to children in the second degree and two counts of cruelty to children in the first degree. The victims were his two children. Appellant's youngest child, E. F., was less than 6 months old when doctors discovered the injuries during a scheduled routine check-up.

Appellant argued that the trial court erred regarding E. F.'s appearance in the courtroom. The record showed that at trial, E. F.'s foster mother testified regarding his condition, including the fact that he was not able to talk, walk, feed, or toilet himself at four years old. The State asked her to step down and bring E. F. into the courtroom. Over appellant's objections, the trial court allowed her to do

so. After she wheeled E. F. into the courtroom in a stroller, the State asked her one final question regarding her care of E. F. The record revealed that during this brief questioning, E. F. "groaned several times out loud." Appellant contended that the State presented E. F. to the jury not as evidence but to inflame the jury and prejudice it against him. He further argued that because E. F. could not be called as a witness due to his age and medical condition, and the State had already presented evidence regarding his condition, "it was not necessary to parade him in front of the jury like some freak at a side show."

The Court noted that because the trial occurred after Jan. 1, 2013, the new Evidence Code applied and thus, the evidence must be evaluated under O.C.G.A. § 24-4-401 defining relevant evidence and O.C.G.A. § 24-4-403, prohibiting prejudicial evidence. The Court found that evidence of E. F.'s condition was clearly relevant to the State's charges, including that appellant caused E. F. "bodily harm ... by rendering his brain, a member of his body, useless by violently shaking him, causing permanent brain damage." Although viewing E. F. in person may have been prejudicial to appellant, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. In a criminal trial, relevant evidence is inherently prejudicial; it is only when unfair prejudice substantially outweighs probative value that the rule permits exclusion. Thus, the major function of Rule 403 is to exclude evidence of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. And, the Court found, it did not find that direct evidence of the permanent nature of E. F.'s injury was of scant probative force.

Furthermore, the Court also agreed with the State that pursuant to O.C.G.A. § 17-17-9, referred to as the "Crime Victims' Bill of Rights," E. F. had the right to be present at the trial. The Crime Victims' Bill of Rights provides in part that "[a] victim has the right to be present at all criminal proceedings in which the accused has the right to be present." O.C.G.A. § 17-17-9(a). Accordingly, appellant was not entitled to a new trial on this basis.