

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 18, 2018

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THIS WEEK:

- **Jury Instructions; Mutual Combat**
- **Ineffective Assistance of Counsel; Preservation of Issues**
- **Removal of Juror; Batson**
- **Pro se Post-conviction Filings; White**
- **Sufficiency of the Evidence; Appellate Review**

Jury Instructions; Mutual Combat

Russell v. State, S18A0091 (4/16/18)

Appellant was convicted of malice murder and other related crimes. The evidence showed that appellant, who was sixteen years old, was shadowboxing and wrestling in a good natured way with the victim. Gibson was observing. However, after the victim put appellant in a chokehold, the playful nature disappeared. Appellant swung at the victim and missed. The victim punched appellant in the eye and he fell to the ground. Appellant then picked up his gun and then shot and killed the victim.

Appellant contended that the trial court erred when it did not give his requested charge on mutual combat. The Court noted that because appellant did not object, its review was limited to whether the failure to so charge amounted to plain error. The Court noted that mutual combat occurs when there is combat between two persons as a result of a sudden quarrel or such circumstances as indicate a purpose, willingness, and intent on the part of both to engage mutually in a fight. Evidence of an ordinary scuffle or fight typically does not warrant a charge on mutual combat. Also, when the defendant asserts he acted in

self-defense during a fight and had no intent to kill, an instruction on mutual combat is not warranted.

Here, the Court found, there was no evidence that the victim and appellant mutually agreed to do anything but playfully shadowbox and wrestle each other. Unquestionably, the playful mood of the encounter changed when the victim seemingly got the better of appellant by putting him in a "choke hold," which in turn made appellant angry, leading him to swing unsuccessfully at the victim. After the victim landed a punch to appellant's eye, there was no mutual agreement to continue fighting, playfully or otherwise. Instead, the evidence showed appellant pointed the gun at both the victim and Gibson as Gibson stepped in between the two boys, urging them to calm down. The evidence also showed that, rather than engage further with appellant, the victim, who was unarmed, turned away from appellant and ran as shots were fired. Moreover, appellant maintained he shot the victim in self-defense and had no intent to kill him. Thus, the Court concluded, in such factual circumstances, a charge on mutual combat was not warranted and there was no plain error.

Ineffective Assistance of Counsel; Preservation of Issues

Gibbs v. State, S17G1343 (4/16/18)

Appellant was convicted of aggravated assault on a police officer and other offenses arising out of the encounter. One of the State's witnesses at trial was a nurse at the hospital where appellant was admitted for treatment of his gunshot wound after being taken into custody. As part of the routine admitting pro-

cess, the nurse questioned appellant about his medical history and made a written record of certain information he offered in response. Appellant admitted to having smoked marijuana prior to the encounter.

At the hearing on his motion for new trial, appellant asserted ineffective assistance as a result of counsel's failure to object to the nurse's testimony on the ground that it violated appellant's medical records privacy rights. The Court of Appeals noted that appellate counsel did not question trial counsel about his failure to object to the nurse's testimony on this ground or any other ground beyond relevance or the inadmissibility of other bad acts. Thus, the Court of Appeals found any other ground for challenging the nurse's testimony was not preserved, citing *Patel v. State*, 279 Ga. 750, 754 (c) (2005). The Court granted a writ of certiorari to determine whether the Court of Appeals erred in determining that appellant waived his right to argue that trial counsel was ineffective for failing to object to the testimony regarding his marijuana use because he failed to question trial counsel about that issue at the motion for new trial hearing.

The Court stated that the failure to present evidence or legal argument sufficient to rebut the presumption of reasonably competent assistance of counsel in a motion for new trial or at the hearing on the motion does not mean an ineffective assistance of counsel claim that was raised below was not preserved for appellate review. Rather, it means the appellant failed to establish ineffective assistance on the merits and the trial court's denial of the appellant's ineffectiveness claim was not erroneous. "To the extent the *Patel* opinion can be read (and apparently was read by the Court of Appeals in this case) as holding that an appellant's failure to present evidence in a motion for new trial to refute the presumption that trial counsel's conduct was strategic waives the issue for purposes of appeal, that portion of the opinion is disapproved." The Court of Appeals' conclusion that appellant waived this argument was erroneous.

Nevertheless, the Court affirmed the Court of Appeals' decision to uphold the trial court's denial of the motion for new trial on the ground of ineffective assistance of counsel under the "right for any reason" rule. The *Strickland* test requires a showing of both deficient performance and prejudice in order to establish ineffective assistance of counsel.

And here, the Court concluded, ineffective assistance of counsel was not established by counsel's failure to object to the nurse's testimony on the ground that it violated appellant's medical records privacy rights due to the overwhelming evidence of guilt.

Removal of Juror; Batson

Rhoden v. State, S18A011 (4/16/18)

Appellant was convicted of malice murder and other related offenses. The record showed that after the close of evidence, a juror was removed based on his violation of the judge's instruction not to do any independent investigation. Before the juror was individually questioned, the trial court recognized that he was "the only black man on our jury." After the juror was questioned, the trial court discussed the matter with the parties, and the prosecutor said the following: "I would also submit for the record that the court expressed concern regarding the fact that he is the only African-American male in this case. The defendants are entitled, as the court is aware, to a cross-section of the community. I mean, even if there's not a black juror on the jury panel that sits and considers the evidence, under the law that would not give rise to an issue with respect to going forward. *So I certainly appreciate the fact that he is a black male on the case. One of the reasons why I selected him initially.* I didn't — you know, when he indicated that he could be fair, I accepted that as true. *And you know, I want black males on the jury.* But at the end of the day, if he was struck from this jury as a result of the violation of the court's orders, it would not be a violation of the defendant's constitutional rights to a fair and impartial trial." (Emphasis supplied.) Appellant argued that his trial counsel should have moved for a mistrial because the language emphasized above amounted to an admission by the prosecutor that he had discriminated based on race and gender during jury selection in violation of *Batson v. Kentucky*, 476 U. S. 79 (106 SCt 1712, 90 LE2d 69) (1986), and *J.E.B. v. Alabama*, 511 U. S. 127 (114 SCt 1419, 128 LE2d 89) (1994).

The Court disagreed. The Court noted that appellant did not claim that the prosecutor exercised any peremptory challenge in a discriminatory manner. Instead, he argued that counsel's discrimination consisted in his acceptance of a juror and purposely not strik-

ing that juror.

The Court stated that appellant cannot establish deficient performance by trial counsel for failing to make a motion for mistrial premised on *Batson* and *J.E.B.* when he failed to present, and neither the State nor the Court was able to find, any authority that extends *Batson* and its progeny to a prosecutor's decision not to strike a prospective juror who is then seated on the jury. There is precedent that addresses a variety of *Batson* issues, such as the remedy for a trial court's mistaken application of *Batson* to deny a peremptory challenge. Other precedent addresses whether it is a violation of *Batson* for a prosecutor to strike one prospective juror in an effort either to achieve race and gender balance on the jury or to secure the service of another prospective juror of a particular race and gender. But, the Court stated, "we have not located or been informed of any precedent or rationale that extends *Batson* or *J.E.B.* or their remedies to a prosecutor's mere non-exercise of a peremptory strike." And there is no requirement for an attorney to prognosticate future law in order to render effective representation. Counsel is not obligated to argue beyond existing precedent.

Accordingly, the Court held, in light of the absence of supporting precedent, appellant's trial counsel might well have concluded that there was not a good-faith basis for a *Batson* motion. Moreover, when removal of the juror at issue was discussed, counsel specifically requested that he be allowed to continue on the jury. Thus, the Court concluded, appellant failed to show that his trial counsel did not have a strategy that was a reasonable one for a competent attorney to pursue.

Pro se Post-conviction Filings; White

Hernandez-Ramirez v. State, A18A0037 (3/23/18)

Appellant pled guilty to multiple crimes, including three counts of homicide by vehicle in the first degree, driving under the influence of alcohol, driving on the wrong side of the roadway, and driving without a valid license. Two months after the entry of the judgment of conviction and sentence and within the same term of court, appellant filed a pro se "motion to appeal guilty plea," which the trial court treated as a timely motion to withdraw the plea. The trial court denied the motion.

The Court, relying on *White v. State*, 302 Ga. 315, 318-320 (2) (2017), stated that at a minimum, legal representation continues — unless interrupted by entry of an order allowing counsel to withdraw or compliance with the requirements for substitution of counsel — through the end of the term at which a trial court enters a judgment of conviction and sentence on a guilty plea. During this time, the court retains authority to change its prior orders and judgments on motion or sua sponte for the purpose of promoting justice. Here, the record did not include an order allowing counsel to withdraw or anything indicating compliance with the requirements for substitution of counsel before appellant filed his pro se motion. Therefore, appellant remained represented by counsel at the time he filed his pro se motion and the motion was a nullity. Accordingly, the Court vacated the trial court's order on the pro se motion and remanded for entry of an appropriate order.

Sufficiency of the Evidence; Appellate Review

Canelas v. State, A18A0764 (3/29/18)

Appellant was convicted of two counts of DUI and driving without a valid driver's license. The evidence showed that appellant crashed his motorcycle on a residential road. Appellant contended that the evidence was insufficient to support his convictions. The State argued that the appellate court was precluded from addressing this issue. Specifically, the State argued, appellant "retracted" the issue of the sufficiency of the evidence by challenging the sufficiency of the evidence in his motion for new trial, even though he had the right to directly appeal on that basis without first submitting the issue to the trial court, and then opting to omit the transcript of the hearing on his motion for a new trial from the appellate record.

The Court disagreed. Whether the evidence presented at trial was legally sufficient is plainly a question of law which on appeal is assessed independently of the trial court's adjudication, through entry of judgment, that the evidence was sufficient. Whatever transpired at the evidentiary hearing on appellant's motion for a new trial was simply irrelevant to the Court's consideration of whether the evidence presented at trial was sufficient under the ap-

plicable standard.

Having found that the issue of sufficiency of the evidence was not waived, the Court found that the evidence was sufficient to support appellant's two DUI convictions. However, as to the conviction for driving without a valid driver's license, the State conceded that the evidence at trial, which consisted of the arresting officer's testimony that he ran appellant's driver's license through a verification program on a computer in his squad car and he "believe[d]" it came back as a valid license but he did not notice the "M" designation for a motorcycle qualification, was insufficient to support a conviction for violating OCGA § 40-5-20 (a). Accordingly, the Court reversed appellant's conviction for this offense.