

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 25, 2018

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THIS WEEK:

- **Rape Shield Statute; Prior False Claims**
- **Voir Dire; Biased Jurors**
- **Brady; Merger**
- **Search & Seizure**

Rape Shield Statute; Prior False Claims

Burns v. State, A18A0227 (4/19/2018)

Appellant was indicted for committing aggravated sexual battery, aggravated sodomy, and incest upon his stepdaughter. He was granted an interlocutory appeal from an order granting the State's motion in limine to exclude evidence that the alleged victim had previously made a false accusation of sexual abuse against another individual. The record showed that the victim sent a Twitter message about a sexual incident that she had with appellant. Toward the end of the paragraph, the victim stated, "And my brother's best friend tried to rape me." Appellant's wife contacted law enforcement, and an investigation ensued. When asked about the time her brother's best friend tried to rape her during a forensic interview, the stepdaughter replied, "Oh, I just made that up." She explained that she did not know why she said it and suspected that she was high on marijuana at the time. When the police interviewed appellant's wife, she also stated that her daughter told her she just made up the story.

The Court noted that both parties correctly concluded that the evidence of the admittedly false accusation is not barred by the rape shield statute. Specifically, rape shield does not bar evidence of the victim's

alleged false allegations of sexual misconduct by persons other than the defendant, because such evidence does not involve the victim's past sexual conduct but rather the victim's propensity to make false statements regarding sexual misconduct. And here, the trial court made a threshold determination that a reasonable probability of falsity existed.

Nevertheless, the trial court erred in concluding that the probative value of the statement in question was substantially outweighed by the danger of unfair prejudice and confusion of the issues and is inadmissible under OCGA § 24-4-403. Here, the trial court excluded evidence of the stepdaughter's false accusation because it concluded that the evidence "lacked specificity" and created "unfair prejudice and confusion of the issues." But, the Court questioned, how could a false accusation contain adequate specificity about an incident that never occurred? Furthermore, it did not seem that evidence of an allegation against a totally unrelated third party presented a "danger of unfair prejudice [or] confusion of the issues" in this prosecution against one defendant, for sexual acts committed on one day, against one individual. Thus, given these circumstances, the exclusion of the evidence at this preliminary stage was erroneous. Accordingly, the grant of the State's motion in limine was reversed.

Voir Dire; Biased Jurors

DeSantos v. State, A18A0209 (4/24/18)

Appellant was convicted of two counts of aggravated child molestation and one count of child molestation. He contended that the trial court erred by not excusing Juror No. 22 for cause. The Court stated that whether to

strike a juror for cause is within the discretion of the trial court and the trial court's rulings are proper absent some manifest abuse of discretion. Further, for a juror to be stricken for cause, it must be established that the juror holds an opinion on guilt or innocence that is so fixed that the juror will be unable to set that opinion aside and decide the case based on the evidence or the trial court's charge at trial.

The record showed that during voir dire, prospective jurors were told that the case involved allegations that the defendant had molested an 11-year-old boy three times between November 1, 2013, and January 31, 2014. Juror No. 22 revealed that he had 8- and 12-year-old brothers, who were similar in age to the victim. The Court, quoting from the exchange between the juror and the State, highlighted the responses in which Juror 22 stated that he would still be a little biased after listening to the evidence and applying the law; that he would try to be fair, but he would still feel like he'd be biased; and that he would be unfair because his brothers were the same age as the victim.

The Court found that the Juror 22 expressed persistent doubts in his ability to be impartial and fairly evaluate the evidence based on the law given. Also, no questioning by either the trial court or the State was able to elicit the necessary response that Juror No. 22 would be able to lay aside his prejudices and personal experiences and fairly and impartially decide the case on the evidence presented at trial. Thus, the Court concluded, the trial court erred in declining to excuse Juror No. 22 for cause.

The Court stated the selection of an impartial jury is the cornerstone of the fairness of trial by jury, and, in this process, peremptory strikes are invaluable. Thus, requiring appellant to use a peremptory strike to remove Juror No. 22 meant that he was denied a full panel of qualified jurors. Accordingly, his conviction was reversed and his case remanded for a new trial.

Brady; Merger

Colbert v. State, A18A0361 (4/24/18)

Appellant was convicted of two counts of armed robbery, two counts of aggravated assault, two counts of possession of a firearm during the commission of a felony, one count of aggravated battery, and one count of hijack-

ing a motor vehicle. Appellant contended that the State failed to reveal agreements that it had with two witnesses who had pending criminal charges, Jasmine Arrington and Demarco Jones, in exchange for their testimony. The Court noted that under *Brady v. Maryland*, and *Giglio v. United States*, the State is under a duty to reveal any agreement, even an informal one, with a witness concerning criminal charges pending against that witness, and a failure to disclose such an agreement constitutes a violation of due process. In order to show that the State violated *Brady* and *Giglio*, a defendant must show that the State possessed evidence of the deal; that the defendant did not possess the evidence nor could he obtain it himself with any reasonable diligence; that the State suppressed evidence of the deal; and that, had the evidence of the deal been disclosed to the defendant, there existed a reasonable probability that the result at trial would have been different. The burden is on the defendant to prove each of these elements.

Appellant argued that there was at least an informal agreement between Arrington and the State for the district attorney to "let it be known that she cooperated." But, the Court noted, the trial transcript showed that this informal agreement was revealed at the start of the trial when the district attorney informed the court that he had offered "for [Arrington's] cooperation to be taken into account" regarding her pending charges, but had not made any specific promises concerning a reduced sentence. Thus, appellant knew of the informal deal prior to the witness' testimony and even assuming, arguendo, that he was not aware of all circumstances surrounding the deal before trial, he failed to show that earlier disclosure would have benefitted him. And, while appellant contended that the charges against Arrington were ultimately transferred to juvenile court where she was given probation, there was no evidence that any agreement for such a disposition of her charges was in place prior to Arrington testifying. On the contrary, Arrington, her attorney, and the district attorney all testified that no such deal was in place. Mere speculation that such a deal existed is insufficient to substantiate appellant's claim that the State withheld exculpatory evidence which prejudiced his defense.

As to Jones, appellant argued that the outcome of the trial would have been different if the State had "disclosed that it was

going to reward Jones in some way after his testimony[.]" However, the Court noted, appellant failed to point to evidence of any deal, and Jones himself testified that no deals had been made with him for his testimony. Once again, mere speculation was insufficient to substantiate appellant's claim that a deal existed. Accordingly, there was not error.

Appellant also contended that his convictions on counts 16 and 17 for aggravated assaults of the same victim should have merged with his conviction on count 14 for the armed robbery of that victim. The Court held that appellant was correct that the aggravated assault in count 16 should have merged with the armed robbery count, but was incorrect as to the aggravated assault in count 17.

The State conceded that that the conviction on count 16, for aggravated assault with intent to rob the victim, should have merged with the conviction on count 14, for armed robbery of the same victim, because the offenses were predicated on the same acts of violence and each did not require proof of a fact which the other did not. However, appellant's conviction for aggravated assault of the same victim in count 17 was not predicated on the same facts as the armed robbery. Rather, the evidence showed that the aggravated assault in count 17 was based on a gunshot fired at the victim after the armed robbery had been completed and the victim was fleeing from the scene. If one crime is complete before the other takes place, the two crimes do not merge. Thus, because the testimony showed that the armed robbery and aggravated assault were separate events, the armed robbery being complete before the commission of the aggravated assault, the trial court did not err when it refused to merge these convictions.

Search & Seizure

Jenkins v. State, A18A0123 (4/25/18)

Appellant was convicted of trafficking in cocaine, attempting to elude, obstruction, and other traffic offenses. He contended that the trial court erred in denying his motion to suppress. The Court disagreed.

The evidence, briefly stated, showed that an officer notice appellant's vehicle driving without lights while it was raining and driving with a partially obstructed license plate. He activated his blue lights and appellant pulled over on the ramp leading to the interstate.

But when the officer got out of his vehicle and approached the passenger side of appellant's vehicle, appellant sped away. The officer gave chase and stopped the vehicle. Appellant ran from the vehicle with the cocaine. He was tackled and arrested.

Appellant argued that the officer lacked probable cause to make the initial stop of his vehicle because there was no evidence that he violated any traffic laws. The trial court, without making findings of fact or credibility choices, summarily denied the motion. Nevertheless, the Court found that it was unnecessary to resolve any dispute over whether the officer had a sufficient basis to stop appellant on the ramp for a traffic violation, nor was it necessary to remand the case to the trial court to make factual findings or credibility determinations relevant to that dispute. Here, the Court found, the undisputed facts showed that the initial stop of the vehicle on the ramp did not result in a seizure within the meaning of the Fourth Amendment, which prohibits unreasonable searches and seizures. When a police officer makes a routine stop of a vehicle based on alleged probable cause or reasonable suspicion for the existence of a traffic code violation, the driver of the vehicle (and any passenger) detained during the stop is considered seized within the meaning of the Fourth Amendment and has standing to challenge the seizure as unreasonable. Absent physical force, for an encounter with a police officer to be considered a seizure under the Fourth Amendment, there must be submission to the assertion of authority.

And here, the Court found, the present record showed at most an attempted seizure by the officer. By a show of authority — the flashing blue lights on the marked patrol vehicle — the officer directed appellant to stop the vehicle, and appellant initially complied by stopping the vehicle on the ramp. But when the officer approached the vehicle on foot and knocked on the passenger side window, appellant immediately took off in the vehicle and fled from the stop. There was no physical contact between appellant (or appellant's passenger) and the officer before appellant fled the stop in the vehicle. On these facts, appellant's temporary stop of the vehicle in response to the officer's blue lights was a ruse to aid his evasion of the stop and not a submission to the officer's show of authority. Therefore, the Court concluded, there was no seizure. After

appellant fled from the initial stop, the officer pursued him and observed him commit traffic violations — speeding, running a red light, and improper lane usage — which provided a valid basis for the second stop.