

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 29, 2018

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Austin Waldo
State Prosecutor

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THIS WEEK:

- Sexual Offenders; Pardons
- Murder Conviction Records; Mandamus
- Photographic Lineups
- Miranda; Rule of Sequestration
- Competency; Severance
- Defendant's Right to Testify; Continuances
- Mutually Exclusive Verdicts

Sexual Offenders; Pardons

State v. Davis, S17G1333 (5/21/18)

In 1995, Davis pled guilty to aggravated sodomy against his six-year-old daughter and was sentenced to ten years with two to serve in confinement. After the enactment of OCGA § 42-1-12 in 1996, he was required to register for life as a sex offender upon his release on probation. After his release from prison, Davis' probation terminated on July 15, 2005. On February 13, 2013, Davis obtained a pardon from the Board of Pardons and Paroles ("the Board") which removed "all disabilities" and restored all civil and political rights other than firearm rights.

Shortly after receiving the pardon, Davis moved without providing notice within 72 hours as required of sex offenders by OCGA § 42-1-12 (f) (5). He was indicted for this violation. He filed a general demurrer, contending that the requirement to register as a sex offender was removed by the pardon. The trial court disagreed and denied the demurrer, but granted a certificate of immediate review.

The Court of Appeals held that it was "constrained [it] to conclude" that the requirement to register as a sex offender was a legal disability which was removed by the Board's pardon. *Davis v. State*, 340 Ga. App. 652, 660 (2017). It therefore reversed the trial court's denial of Davis' motion for a general demurrer. The Supreme Court granted certiorari.

The Supreme Court first determined that because it has exclusive appellate jurisdiction over cases involving the construction of the state constitution, the Court of Appeals was without jurisdiction to construe the meaning of the term "disability" with respect to the scope of the Board's powers and authority under Ga. Const. Art. IV, Sec. II, Par. II. Therefore, the Court vacated the judgment of the Court of Appeals.

Next, the Court addressed the issue of whether the sex offender registration requirements are a legal disability removed by the Board's order granting a pardon and removing all disabilities and restoring all rights other than firearms rights. The Court looked at all the requirements and limitations found in the provisions of OCGA § 42-1-12 that convicted sex offenders falling within its purview must abide by. The Court concluded that inclusion on the sex offender registry pursuant to OCGA § 42-1-12 is a legal consequence of the underlying criminal offense and a disability imposed by law; that Davis' pardon by its express terms removed all disabilities under Georgia law resulting from his conviction and relieved all the legal consequences thereof; and that it restored all of his civil and political rights, excepting only his firearm rights. Accordingly, the Court held that the judgment of the trial court must be reversed.

Murder Conviction Records; Mandamus

Brock v. Hardman, S18A0393 (5/21/18)

Appellant filed a civil petition for a writ of mandamus to force the Superior Court Clerk to release records in his criminal case which resulted in his murder conviction. The trial court denied the motion and appellant filed a direct appeal.

The Court noted that this case raised a question of whether the Court has jurisdiction to hear the appeal. Mandamus is an extraordinary remedy to compel a public officer to perform a required duty when there is no other adequate legal remedy. Our Constitution provides that the Supreme Court has appellate jurisdiction over “[a]ll cases involving extraordinary remedies” unless otherwise provided by law. Ga. Const. of 1983, Art. VI, Sec. VI, Par. III (5). Until the enactment of OCGA § 15-3-3.1, the Court had appellate jurisdiction over all cases involving extraordinary remedies. But when OCGA § 15-3-3.1 became effective on January 1, 2017, the Court’s jurisdiction in this area narrowed greatly. Now, the Court has appellate jurisdiction only in extraordinary remedy “cases concerning proceedings in which a sentence of death was imposed or could be imposed and those cases concerning the execution of [a sentence of] death”; the Court of Appeals now has appellate jurisdiction over all other extraordinary remedy cases.

Here, the mandamus petition clearly concerned proceedings in which a sentence of death was or could be imposed. Appellant was seeking records in a case in which he was indicted for murder, that case was renumbered to the case under which he was tried and convicted of murder, and he claimed that the State was required to pay for those records so that he could challenge that conviction. Appellant’s claim arose only from his conviction for murder and his desire to use those records to challenge that conviction. So, a mandamus petition brought by a prisoner convicted of murder claiming a right to free records of his murder case for the purpose of challenging that conviction is a case “concerning [the] proceedings” in which a sentence of death could have been imposed. Therefore, the Court found, this was an appeal arising from an extraordinary remedy case, and it retained jurisdiction under OCGA § 15-3-3.1 (a) (4).

Nevertheless, appellant filed this civil action as a prisoner, and appeals from such actions must proceed via the discretionary application process. Thus, because appellant filed a direct appeal, rather than an application for a discretionary appeal, the Court dismissed the appeal.

Photographic Lineups

Jordan v. State, S18A0114 (5/21/18)

Appellant was convicted of felony murder and related offenses. The evidence showed that appellant shot the victim from a blue Dodge Avenger. He contended that the trial court erred by denying his motion to suppress the photographic-lineup identifications made by two witnesses, Bryant and Miles. The Court disagreed.

The Court stated that it is error to allow testimony concerning a pre-trial identification of the defendant if the identification procedure was impermissibly suggestive and, under the totality of the circumstances, the suggestiveness gave rise to a substantial likelihood of misidentification. An identification procedure is impermissibly suggestive when it leads the witness to an “all but inevitable identification” of the defendant as the perpetrator. If the court does not find that the lineup was suggestive then it need not reach the issue of whether there was a substantial likelihood of misidentification.

Appellant argued that the lineup was improper because it occurred following a “stressful” and “traumatic” incident, and neither Bryant nor Miles had an adequate opportunity to observe appellant or the shooter from the blue Dodge. However, the Court noted, appellant’s concerns related to the second prong of the analysis — likelihood of misidentification — not whether there was an impermissibly suggestive lineup in the first instance. With respect to the first prong regarding suggestiveness, the trial court received testimony at the suppression hearing that: the photographs included in the lineup were automatically generated by the Department of Driver Services; the photographs depicted individuals with similar physical features; Bryant and Miles were kept in separate rooms during the photographic-lineup procedure; both men were given proper instructions regarding the photographic array; neither man was told whether appellant’s photograph was included

in the lineup; and each witness made his identification independently and without suggestion from investigators. Thus, the Court found, the trial court had ample testimony from which to conclude that the pre-trial photographic lineup was not impermissibly suggestive and, consequently, was not improper. Accordingly, the trial court did not abuse its discretion in denying appellant’s motion to suppress.

Miranda; Rule of Sequestration

Szorcik v. State, S18A0461 (5/21/18)

Appellant was convicted of malice murder and other crimes. The evidence showed that he and his mother killed Bentley, his stepfather. When first taken into custody on March 12, 2007, he was interviewed by GBI Agent Reed, but appellant invoked his right to counsel after being read his *Miranda* warnings. Thereafter, he made statements to the Sheriff on March 16 and 17, 2007 about the whereabouts of Bentley’s body and the fact that he had stabbed and killed Bentley in self-defense.

Appellant argued that, because these statements were made after he had already invoked his right to counsel on March 12, the trial court erred by allowing these statements to be admitted into evidence at his trial. The Court disagreed. While it is true that an accused, such as appellant, having expressed his desire to deal with the law enforcement only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, the accused can be further interviewed by investigators where, as here, the accused himself initiates further communication, exchanges, or conversations with the authorities. And here, the Court found, after appellant was read the *Miranda* warnings on March 12 and he invoked his right to counsel, law enforcement officials asked no further questions of him. It was appellant himself who reinitiated further communication with investigators four days later when he summoned the Sheriff to tell him, without any prompting, that he wanted to take the Sheriff to the place where Bentley’s body was buried. Before appellant was asked any additional questions relating to Bentley’s death, Agent Reed once again read appellant the *Miranda* warnings, and appellant agreed to speak with investigators. Agent Reed and the Sheriff both testified at the *Jackson-Denno*

hearing that appellant was lucid when they dealt with him and that he understood what he was doing. They further testified that they took no action to influence him in any way or to provide him with any hope of benefit if he spoke to them. Thus, the Court found, there was no error in the trial court's conclusion that, under the totality of the circumstances, appellant knowingly and voluntarily waived his previously invoked right to counsel after choosing to reinitiate communication with law enforcement officials.

Appellant also contended that the trial court committed plain error by failing, *sua sponte*, to give a jury charge on the rule of sequestration. Specifically, he argued that because the Sheriff was allowed to remain in the courtroom during the testimony of other witnesses, the trial court was required to give an instruction to the jury about the rule of sequestration, which generally would not allow for the other witnesses to remain in the courtroom to hear the testimony of others. The Court again disagreed.

The rule of sequestration pursuant to former OCGA § 24-9-61 provides that, “[e]xcept as otherwise provided in [former] Code Section 24-9-61.1 [relating to crime victims being present in court], in all cases either party shall have the right to have the witnesses of the other party examined out of the hearing of each other.” However, with respect to the Sheriff, the trial court committed no error by allowing him to remain in the courtroom during the testimony of other witnesses. It is within the discretion of the trial judge to permit a witness to remain in the courtroom to assist either the State or the accused. Noting that the Sheriff was listed as a witness for both the defense and the prosecution, and citing security issues in the courtroom on the day of trial, the trial court properly allowed the Sheriff to be exempted from the rule of sequestration. In other words, the rule of sequestration did not apply to exclude the Sheriff from the courtroom. Thus, a jury charge on the credibility of the Sheriff's testimony as it related to the rule of sequestration was unnecessary here, as such a charge may be requested when the rule has been invoked and *violated*, rather than in a situation where, as here, the rule did not apply.

Competency; Severance

Palmer v. State, S18A0426 (5/21/18)

Appellant and his codefendant, Wainwright, were convicted of murder and other crimes. He contended that the trial court erred in going forward with his trial because doubts existed regarding his competency to stand trial. The evidence showed that about 10 months before trial, appellant filed a plea of mental incompetency to stand trial and a motion for psychiatric evaluation. His motion noted that he had been assaulted in jail and had become increasingly withdrawn and unwilling to communicate with counsel, and that he had made statements to counsel regarding his belief that somebody was “switching his spirit.” The trial court ordered a mental evaluation, and appellant was evaluated by a psychologist with the Georgia Department of Behavioral Health and Developmental Disabilities. The evaluating psychologist ultimately advised that appellant was competent to stand trial because he “was able to demonstrate functional capacity with respect to the legal proceedings[,] ... understood the nature and object of the proceedings against him, [and] could discuss his charge and demonstrate an understanding of general courtroom procedure.”

Nevertheless, appellant contended that the court should have ordered a new competency evaluation, *sua sponte*, based on his subsequent behavior during trial. Appellant pointed to several instances when he tried to communicate directly with the trial court or appeared confused about the trial process. But in denying appellant's motion for new trial on this ground, the court found that in addition to the pre-trial evaluation determining that appellant was competent to stand trial, “during the trial neither Defendant's behavior nor his demeanor was such to raise a bona fide doubt regarding his competence. There was no evidence that Defendant did not understand the proceedings, appreciate their significance, or rationally aid his attorney in his defense.”

Citing *Traylor v. State*, 280 Ga. 400 (2006), the Court stated that neither appellant's (arguably confused) statements to the trial court, nor the fact that the court had to instruct him to communicate through his attorney, constituted irrational behavior or unusual demeanor sufficient to require the court to make further inquiry regarding his competency. Indeed, the record showed that although appellant had some apparent confusion about his decision to testify, both the trial court and

his attorney provided him with further explanation on the issue. The record also showed that appellant himself affirmed that he understood his rights. Also, citing *Biggs v. State*, 281 Ga. 627 (2007), the Court found that trial counsel's testimony that appellant showed no signs of incompetency during trial, understood the proceedings against him, assisted with the development and presentation of his case, and coherently articulated his defense supported the trial court's denial of appellant's claim of incompetency to stand trial. Moreover, appellant provided no medical opinion regarding his competence which would have caused the trial court to make further inquiry about it. Thus, the Court concluded, because appellant failed to show the type of behavior or demeanor at trial that would reasonably raise a bona fide question about his competence, and because the only medical opinion in evidence indicated that appellant was competent to stand trial, appellant's competency argument failed.

Appellant also argued that the trial court erred in denying his motion to sever his trial from Wainwright's. The Court noted that when two or more defendants are jointly indicted for non-capital offenses, “such defendants may be tried jointly or separately in the discretion of the trial court.” OCGA § 17-8-4 (a). In ruling on a severance motion, the court should consider: (1) the likelihood of confusion of the evidence and law; (2) the possibility that evidence against one defendant may be considered against the other defendant; and (3) the presence or absence of antagonistic defenses. The burden is on the defendant requesting the severance to do more than raise the possibility that a separate trial would give him a better chance of acquittal. He must make a clear showing that a joint trial would lead to prejudice and a consequent denial of due process. And the mere presence of antagonistic defenses is insufficient to require severance in a non-death penalty case; instead, the defendant must show that considering these antagonistic defenses, a joint trial was so prejudicial as to amount to a denial of his right to due process. I

The Court found that appellant made no such showing. Here, the law applicable to the two defendants was substantially the same, all of the evidence presented at trial was admissible against both defendants, and there was minimal risk of the jury being confused or of evidence being improperly considered against either defendant. Although appellant's defense

was that he simply was not the person who committed the crimes with Wainwright, while Wainwright's counsel argued that appellant pressured Wainwright into robbing the victims and that Wainwright shot the victim in defense of appellant during the ensuing physical altercation, the presence of these antagonistic defenses alone did not require severance. "In case after case where codefendants acted in concert, we have found that severance was not required simply because the defendant argued about identity or the codefendant blamed—or even put forth evidence against—the defendant." Thus, the Court concluded, appellant did not show any denial of his due process rights, much less one that could have been avoided by severance of the codefendants' trial, and there was strong evidence at trial showing that appellant and Wainwright acted together in the robbery and in killing the victim. Thus, the trial court did not abuse its discretion in denying his motion to sever.

Defendant's Right to Testify; Continuances

Terrell v. State, S18A0478 (6/4/18)

Appellant was convicted of murder and related crimes. He contended that the trial court deprived him of his constitutional right to testify. The Court disagreed.

The record showed that after the prosecution rested, the trial court engaged appellant in an extensive colloquy outside the jury's presence, about his constitutional right to testify. Appellant couldn't decide because he was stressed out. He also was concerned that there were no other witnesses to testify on his behalf and that the prosecutor would take "unfair shots" at him. He requested a continuance until the next morning to make a decision. The court rejected his request, stating that the jury would be present for another hour and 15 minutes, and that if appellant wished to testify, he would have to begin that day. When appellant refused to take the stand, the trial court found that appellant "chose not to testify, with a complete understanding of his rights."

The Court stated that while a defendant has a fundamental constitutional right to testify on his own behalf, this right is not without limitation. A trial court may impose reasonable restrictions on the defendant's right to testify, as long as those restrictions are not arbitrary or disproportionate to the purposes they are

designed to serve. And here, the Court found, there was no dispute that appellant consulted with his lawyer about his right to testify and that he fully understood the benefits and consequences of testifying. It was also clear that, after engaging appellant in a colloquy about his right to testify, the trial court gave him a full opportunity to do so, and appellant voluntarily chose not to testify at that time. Nothing suggested that appellant was confused about the scope of his right to testify or that he misunderstood what the trial court told him during the colloquy. Appellant's only problem was that he wished to testify but not at the time set by the court. So the real issue here was whether the trial court abused its discretion in refusing to grant a continuance to appellant until the next morning, as appellant requested.

The Court concluded that no abuse of discretion occurred. Appellant did not explain to the trial court why a continuance was necessary for him to testify, other than saying he was "stressed out" and "too upset right now." While no doubt the proceedings were of great importance to him, with his freedom at stake, such is the case with any defendant in a murder trial. It was not clear why a continuance until the next day would have caused appellant to be less stressed or upset. Furthermore, the only specific reason appellant offered for being upset is that he did not have other witnesses to testify on his behalf. But the trial court had no indication that this situation would have changed by the next morning. Appellant also implied that he was afraid of being cross-examined, saying that he did not want the prosecutor to have "unfair shots at me." But cross-examination is not something appellant could have avoided by delaying his testimony until the next day.

In sum, the Court found, appellant failed to show any convincing need for a continuance, and the trial court reasonably could believe that any delay would have been fruitless. Thus, the trial court did not abuse its discretion in denying a continuance and did not deprive appellant of his right to testify.

Mutually Exclusive Verdicts

Nalls v. State, S18A0148 (6/4/18)

Nalls and Baskin were convicted of malice murder and other offenses. The evidence, briefly stated, showed that the victim arranged to purchase drugs from Baty. When the victim

arrived at Baty's apartment, Nalls and another man matching Baskin's appearance, emerged and started shooting. Baskin later that same day dropped Nalls and Baty, both of whom had gunshot wounds, off at the hospital. The police attempted to stop the vehicle in which Baskin was driving. Baskin drove off, later exited the vehicle, fled on foot and escaped apprehension.

Baskin was convicted of murder and hindering (OCGA § 16-10-50 (a)). He contended that an omission in the trial court's instructions resulted in mutually exclusive verdicts of guilty on both murder and hindering such that he is entitled to a new trial on both counts. Specifically, he argued that (1) the trial court plainly erred when it failed to instruct the jury that it was not permitted to find him guilty of murder as a party to the crime if it found that his participation was limited to being an accessory after the fact, and (2) the trial court erred by vacating his hindering convictions but not his murder conviction. The Court noted that both of Baskin's arguments rested on the assumption that murder and hindering are always mutually exclusive — that is, a guilty verdict on one count logically excludes a finding of guilt on the other.

The Court found that in *Jordan v. State*, 272 Ga. 395, 396-397 (2) (530 SE2d 192) (2000), it relied on *Ivey v. State*, 186 Ga. 216, 216-217 (1938) and *Moore v. State*, 240 Ga. 210 (1977) to find that a defendant's conviction of both murder and hindering must be reversed because the two offenses are mutually exclusive. Citing *Moore*, *Jordan* suggested that, under the common law, an accessory after the fact was not considered a party to the crime. And, *Jordan* cited *Ivey* for the notion that liability under our hindering statute eliminates the possibility that one guilty of hindering participated as a party to the crime in the perpetration of the major crime. Since then, the Court noted, it has repeatedly reaffirmed the holding in *Jordan* that convictions for murder and hindering cannot coexist.

But, in reviewing the law, the Court found that it was wrong. There is nothing in the text of our hindering statute requiring the conclusion that a hindering conviction can never coexist with a conviction for the primary crime. OCGA § 16-10-50 speaks of hindering the apprehension or punishment of "a person" the defendant knows or has reason to believe has committed a crime; it does not refer to

hindering the apprehension of “the person” who committed the crime. There is nothing in the statute that precludes a conclusion that a person who was a party to the primary crime may also be guilty of the separately charged crime of hindering, where the evidence shows that person has hindered the apprehension or punishment of another person who also is a party to that crime. To conclude otherwise would read into the statute an element — that the defendant was not a party to the primary crime — that is not present. The Court therefore overruled its decisions and those of the Court of Appeals to the extent they have suggested that one can never be convicted of both hindering and murder.

Here, the Court determined, the evidence presented at trial entitled a reasonable jury to conclude that Baskin (1) was one of the gunmen who shot at the victim and (2) subsequently hindered the apprehension of Baty and Nalls by driving them from the scene of the crime. There is no legal or factual reason why the jury could not arrive at both of those conclusions. Applying the proper analysis, it would not have been a correct statement of the law to tell the jury that it had to choose between convicting Baskin of murder and convicting him of hindering. Thus, the Court concluded, because the verdicts here were not mutually exclusive, Baskin was not entitled to a new trial based on the jury's return of guilty verdicts on both murder and hindering.