

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 28, 2016

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THIS WEEK:

- **Severance; Bifurcated Trials**
- **Void Sentences; Parole Eligibility**
- **Motions for Continuance**
- **Character Evidence**
- **Motions for Mistrial; In-life Photographs of Victim**
- **Juror Questioning of Witnesses**

Severance; Bifurcated Trials

Cooks v. State, S16A0719 (10/17/16)

Appellant was convicted of murder and other related crimes. He contended that he was denied the effective assistance of counsel because his trial lawyer failed to ask the trial court to sever the count of unlawful possession by a convicted felon so that he could be separately tried on that charge. And because of that failure, he contended, the jury learned that he had a prior conviction for unlawfully entering an automobile. The Court disagreed.

The Court noted that in cases where a felon-in-possession firearm charge is unrelated to another count for which the defendant is to be tried, the proceedings should be bifurcated so that the jury will hear and decide the more serious charge(s) before learning about the firearm charge and the defendant's prior conviction. But where, as here, the count charging possession of a firearm by a convicted felon might serve as the underlying felony supporting a felony murder conviction, a motion to bifurcate should be denied. Furthermore, the Court stated, bifurcation would also have been inappropriate in this case because appellant was charged with malice murder, and appellant's status as a convicted

felon would have allowed the jury to find him guilty of the lesser offense of felony murder (based on the felon-in-possession charge) even if appellant had not been charged separately with that crime. And because the trial court would have denied any motion to bifurcate, appellant failed to show that his lawyer's performance was deficient for failing to file such a motion.

Void Sentences; Parole Eligibility

Ellison v. State, S16A0602 (10/17/16)

In September 1994, appellant pled guilty to malice murder and was sentenced to life in prison. Under the plea agreement, which was expressly incorporated into appellant's sentencing order, appellant agreed that he would not apply for parole or other relief from imprisonment for at least 25 years and that he would not be considered for parole or released from confinement for any reason prior to the expiration of 25 years. In April 2015, appellant filed a motion to correct void sentence, challenging the validity of such limitations on his ability to seek or be granted parole. The trial court summarily denied appellant's motion.

The Court reversed. Citing its recent decision in *Humphrey v. State*, 297 Ga. 349 (2015), the Court held that appellant's sentence was void to the extent it purports to limit the power of the State Board of Pardons and Paroles to consider or grant parole to appellant as soon as permitted under applicable statutory law. But, the Court stated, that provision – but only that provision – must be vacated. Thus, only the judgment denying appellant's motion to correct void sentence was reversed and the case remanded

with direction to the trial court to vacate that provision of the sentence purporting to limit appellant's eligibility for parole in a manner inconsistent with applicable statutory law.

Motions for Continuance

Lane v. State, S16A0721 (10/17/16)

Appellant was convicted of malice murder and other crimes. He contended that the trial court erred in denying his motion for a continuance. The record showed that the trial court entered an order specially setting trial for December 5, 2011; the order specified that no continuances would be granted. At a pretrial hearing on December 1, 2011, Payton, appellant's appointed trial counsel, informed the court that appellant was unwilling to communicate with her and that she was unable to prepare appellant for trial, and asked for a continuance; Payton also informed the court that appellant's family was attempting to retain counsel for appellant. The court observed that appellant had ample opportunity to cooperate with counsel, stated that appellant would not be allowed to control the court's calendar, and reiterated that trial was set for Monday, December 5, 2011. During the hearing, the prosecutor noted that appellant had been found competent to stand trial and opined that appellant's lack of cooperation was simply a delaying tactic, as the eyewitnesses who saw him shoot the victim had known appellant for years and appellant simply did not want to be held responsible for his actions. Also during the hearing appellant said: "I don't know what she talking about. The [expletive] voices saying [Payton is] a demon, and I ain't working with no demon, I'm not working with a demon."

On December 5, 2011, the court cleared the courtroom except for court personnel and the defense team. Payton told the court that appellant had given her information that introduced the defense of accident, which had not previously been an issue in the case, and that a continuance was needed to secure an expert to determine if the weapon used to kill the victim could have misfired; she also stated that appellant heard voices and, although he had been found competent to stand trial, a continuance should be granted to allow an examination to determine whether he could be held criminally responsible. Payton also informed the court that appellant did not

want her to represent him, and that appellant's family had retained an attorney, who was present. Upon being addressed by the court, that attorney stated that she was "prepared to enter an appearance . . . and get up to speed as quickly as possible." The court ruled, however, that no continuance would be granted as appellant caused any delay by his attempt to present new counsel the day of trial, and that any belief Payton had that she was not able to proceed with trial was due to appellant's unwillingness to communicate with her until the eve of trial. Payton represented appellant in the ensuing trial.

The Court stated that premitting whether, at the time of trial, appellant communicated to the court that retained counsel was *his* choice of counsel, and not merely the choice of a family member, while every defendant has the right to hire counsel, a defendant must use reasonable diligence in obtaining retained counsel. A defendant may not use a request for change of counsel as a dilatory tactic. And here, the Court found, on December 1, 2011, the trial court warned appellant that the scheduled trial date of December 5, 2011, would not be changed, and reiterated that point when the case was previously specially set, providing appellant's family with that amount of time to obtain additional counsel. In such circumstance, it was not error to deny the motion for a continuance.

Character Evidence

Huff v. State, S16A0996 (10/17/16)

Appellant was convicted of the murder of Issac, Weston, and White. The evidence showed that the three victims agreed to buy a large amount of cocaine from appellant and his co-conspirator. Appellant and the co-conspirator, however, shot the victims and robbed them of their money.

Appellant contended that the trial court erred when it admitted the testimony of his probation officer, who testified about a phone number that appellant had given to the officer. That number linked appellant to the phone from which numerous calls were placed to Weston on the day of the murders. Appellant argued that the State could have used other evidence to connect him to the phone, and that the testimony of his probation officer was unfairly prejudicial, inasmuch as it informed the jury that he was on probation. Therefore, he

contended, the trial court should have excluded the testimony of the probation officer under O.C.G.A. § 24-4-403. The Court disagreed.

First, the Court found, the testimony was clearly relevant. Second, it had substantial probative value. Connecting appellant to the phone from which calls were placed to Weston was an important part of the prosecution's case, and although appellant identified some other evidence in the record that tended to establish that connection, none of it established a connection as directly or strongly as the testimony of the probation officer. And, the Court found that as to prejudice, other evidence informed the jury that appellant was on probation, and in any event, the probation officer did not tell the jury about the crimes for which appellant was on probation. Therefore, the trial court's determination that the probative value of the probation officer's testimony was not substantially outweighed by its prejudicial effect was not an abuse of discretion.

Motions for Mistrial; In-life Photographs of Victim

Ragan v. State, S16A1107 (10/17/16)

Appellant was convicted of murder and other offenses. At trial, the defense presented a single witness, Dr. Catherine Boyer, a clinical and forensic psychologist, who testified regarding appellant's pre-existing mental health problems and how his mental health could have influenced his perception of the events at the time of the murder. During cross-examination, the prosecutor asked, as part of a line of questioning to determine that he was of sound mind and rational thought, the following: "Additionally, he reportedly requested an attorney before making any statements?" Appellant moved for a mistrial, contending that the State commented on his post-arrest invocation of counsel and the right to remain silent. The trial court denied the motion.

The Court stated that it is a violation of the defendant's due process rights for the State to comment on the defendant's invocation of his right to remain silent or to an invocation of the right to counsel. However, such a violation is harmless if the error had no substantial and injurious effect or influence in determining the jury's verdict. And here, the Court found, it was not clear that the jury would have inferred from the question itself that appellant did, in fact, request an attorney. The prosecutor's

question, though highly improper, suggested only that appellant may have, or “reportedly,” requested an attorney, and there was no response from Dr. Boyer. To the extent that the jury could have inferred that appellant had requested an attorney, it could not be said that such an inference was particularly prejudicial or detrimental to appellant’s defense. Specifically, the crux of Dr. Boyer’s testimony was that appellant suffered from an inability to gauge threats during conflicts and charged circumstances. As evident in the exchange between the State and Dr. Boyer, any request by appellant for an attorney was made well after he was removed from the situation which elicited the heightened response and, thus, had no bearing on his conduct at the time of the murder. Simply put, the Court stated, the gravamen of appellant’s defense was not an ongoing incompetency, insanity, or intellectual disability, but, instead, was limited to situations in which appellant perceived that he was threatened. In light of this limited defense, the fact that he requested an attorney at a later time did not undermine his theory at trial. Furthermore, the Court determined, its conclusion that the error was harmless was bolstered by the overwhelming evidence of appellant’s guilt, the curative instruction provided by the trial court, and the fact that appellant’s “reported” request for an attorney was never again mentioned.

Appellant also argued that the trial court erred in admitting five photographs of the victim while in life and erred in denying his subsequent motion for mistrial after the photographs elicited an emotional response from the jury. The Court noted that as part of its case for murder, the State was required to prove that appellant caused “the death of another human being.” O.C.G.A. § 16-5-1, and a photograph of a victim in life may be relevant to prove an element of the corpus delicti, that is that the person alleged to have been killed is actually dead. However, the Court noted, it has repeatedly stressed that certain steps must be taken to ensure that the tenuous probative value of a victim-while-in-life photograph is not subsumed by the substantial prejudicial impact. But, here, the State failed to heed that caution and adduced *five* photographs of the victim – depicting her alone and with her children – using her surviving husband (a victim himself) to identify the photographs. With no serious

question as to the victim’s existence or identity, any probative value of the photographs was outweighed by the cumulative prejudicial effect therefrom, and the trial court erred when it admitted the photographs. But, the Court found, the error was harmless because the evidence against appellant was strong, and the jury was well aware – independent of the photographs – that the victim was both a wife and a mother.

Nevertheless, appellant argued, he was entitled to a mistrial after the photographs caused members of the audience to cry and elicited an “emotional display” from the jury. The Court disagreed. While appellant’s trial counsel noted on the record that members of the audience were “crying” and that there was an “emotional response” from the jury, the record was silent on the nature and extent of the “emotional response” described by trial counsel. Trial courts are vested with great discretion to grant or deny mistrials because they are in the best possible position to determine whether one is warranted and nothing in the record suggested that the trial court abused its discretion here.

Juror Questioning of Witnesses

Hernandez v. State, S16A0936 (10/17/16)

Appellant was convicted of malice murder and a firearms offense. The record showed that at the beginning of the trial, the court told the jurors that they could submit written questions for the witnesses. After each witness had been examined by the parties, the jurors could submit their questions, if any, to the court. The questions were then shared with counsel, who were given an opportunity to object before the court posed any questions it found proper to the witness. The parties were also allowed to ask follow-up questions to the witness. Using this procedure, the trial court asked more than 70 questions from the jury; the jurors submitted no questions for some witnesses, while the court asked other witnesses more than ten jury questions.

Appellant argued that the trial court erred by soliciting the jury for questions to ask the witnesses and by asking the witnesses so many jury questions. But, the Court found, these objections to the process for and quantity of jury questions were not raised at trial, and thus, his claims were not preserved

for review. Nevertheless, the Court found, the trial court followed the proper procedure for jury questions approved by the Court. While jurors in Georgia courts may not ask questions of witnesses directly, a trial court may receive written questions from the jury and ask those questions which the court finds proper, or allow counsel for either party to ask a testifying witness the questions found to be proper. Moreover, the Court noted, appellant failed to identify a single jury question asked by the court that was improper, much less harmfully so. Nor did he identify any question or set of questions that the court asked on behalf of the jury which improperly intimated the court’s opinion about the evidence or appellant’s guilt or innocence. Thus, the Court concluded, although trial courts must be cautious in soliciting and asking jury questions, particularly in large numbers, the trial court did not deviate from the proper procedure or otherwise abuse its discretion as to the jury questions that were asked.