

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING NOVEMBER 29, 2013

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## THIS WEEK:

- **Juveniles; Statements**
- **Ineffective Assistance of Counsel; Mental Competency**
- **Child Molestation; Evidence of Physical Arousal**
- **Search & Seizure**
- **Jury Charges; Sentencing**
- **Statements; Garrity**

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### ***Juveniles; Statements***

*Bowman v. State, A13A1150 (11/15/13)*

Appellant was convicted of armed robbery, aggravated assault, aggravated battery and three counts of possession of a firearm during the commission of a crime. He argued that his custodial statements were admitted in violation of his Fifth Amendment right against self-incrimination. Specifically, appellant, who was 16 when he gave his custodial statement, contended that the trial court should not have considered the factors set forth in *Riley v. State*, 237 Ga. 124, 128 (1976), in ruling that this statements were admissible. The Court noted that *Riley* addresses a juvenile's waiver of his *Miranda* rights while in police custody, but appellant contended that the *Riley* factors did not apply because his guardians did not consent in his presence to his police interrogation. Appellant maintained that his custodial statements were therefore not knowing and voluntary because, as a minor, he should have been present when his guardians consented to him being interviewed by the police. Because he was not present when they consented, appellant argued, he had no way

of knowing what his guardians had been told, whether they had been informed of his *Miranda* rights, or whether they had actually consented at all.

The Court noted that the *Riley* Court created a nine-factor analysis as a method for determining whether a juvenile made a knowing and voluntary waiver of his right to remain silent when he gave an incriminating statement outside his parents' presence. The presence or absence of a parent when the statement was made is simply one factor to be considered in determining whether the statement was voluntary and admissible; it is not dispositive of the issue, as appellant suggested. The question of a voluntary and knowing waiver depends on the totality of the circumstances, and the State has a heavy burden in showing that the juvenile understood and waived his rights. However, age alone is not determinative of whether a person can waive his rights. Instead, the question of waiver must be analyzed by a consideration of several factors. Those factors include (1) age of the accused; (2) education of the accused; (3) knowledge of the accused as to both the substance of the charge and the nature of his rights to consult with an attorney and remain silent; (4) whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney; (5) whether the accused was interrogated before or after formal charges had been filed; (6) methods used in interrogations; (7) length of interrogations; (8) whether the accused refused to voluntarily give statements on prior occasions; and (9) whether the accused has repudiated an extra judicial statement at a later date.

The Court found that after a hearing, the trial court applied the *Riley* analysis and

concluded that appellant's statement was admissible. The evidence demonstrated that appellant was four months shy of his 17th birthday, and that he appeared to understand his juvenile *Miranda* rights when an officer explained them to him, including the right to talk with an attorney and have an attorney present when he was questioned. Appellant also read the juvenile *Miranda* rights out loud, and appeared to understand the charges against him. He told officers that he would talk with them without a lawyer present, and did not request the presence of his guardians during the interview. The officers testified that there were no offers or promises made to appellant in exchange for his statements, nor were there threats of injury. The interview lasted approximately 35 to 45 minutes. Accordingly, the Court concluded that the trial court, upon due consideration of the totality of circumstances, did not abuse its discretion in admitting the statement into evidence.

### ***Ineffective Assistance of Counsel; Mental Competency***

*Brown v. Parody, S13A0899 (11/25/13)*

The Warden appealed from the grant of a habeas corpus petition finding that Parody received ineffective assistance of counsel by his plea counsel. The record showed that Parody pled guilty but mentally ill to two counts of child molestation involving acts he committed on his younger brother and the State agreed to dismiss three additional charges alleging aggravated child molestation. Prior to the entry of his plea, Parody underwent three mental evaluations. The first was conducted by a doctor retained by Parody who opined that Parody "does not comprehend or understand the consequences of his actions. It would be my recommendation that he have a full evaluation, be placed on appropriate medications to help him function more appropriately, and to look into a more stable living environment for him. I ... would like to see him have some kind of treatment, total evaluation, and then to re-visit whether he is competent to stand trial." The second evaluation, performed at the request of the trial court, was one to determine Parody's threat level to the community as a sex offender, not his mental capacity generally, and concluded that Parody presented a high risk of being a repeat sex offender, that Parody

would benefit from continued treatment, and that, as a result, he was not a good candidate for incarceration in a general jail population. Finally, at the request of plea counsel, the trial court ordered that Parody be evaluated by a psychologist at Georgia Regional Hospital. This doctor found that Parody was competent to stand trial based on a "clear, rational appreciation of his criminal charge." The doctor reached this conclusion by interviewing Parody and by reviewing, among other things, both of the prior evaluations listed above.

With all of this information, plea counsel discussed the options of entering a plea or going to trial with both Parody and his parents. All agreed that they wanted to avoid a trial if at all possible. To obtain this result, plea counsel pressed the State for a plea agreement, which was ultimately negotiated and offered. This agreement to enter a plea of guilty but mentally ill allowed Parody to avoid prosecution for the most serious charges against him, to be placed in a medical prison rather than the general prison population, and to receive treatment, all things recommended by the experts evaluating his mental condition. Nevertheless, despite the beneficial nature of the agreement, Parody's plea counsel expressed her concerns regarding Parody's mental capacity prior to the entry of the plea. As a cautionary matter, the trial court entered into an extended and wide-ranging colloquy with Parody at the plea hearing. Following this colloquy, the trial court made its own assessment that Parody was competent to stand trial and enter his guilty plea.

The habeas court found that plea counsel failed to adequately investigate Parody's mental capacity. The Court disagreed. The Court found that with the benefit of three separate evaluations, discussions with both her client and his parents, and a consideration by the plea court of Parody's competency, plea counsel secured a beneficial plea agreement for Parody. As a result, the record did not support the habeas court's legal conclusion that plea counsel failed to conduct an effective investigation of her client's mental competency. Rather, the Court found, based on all of the evidence before her, plea counsel's actions were clearly reasonable, and thus, not ineffective assistance.

Moreover, the Court found, even if there had been deficient performance by counsel, there was no showing of prejudice. To show

sufficient prejudice to warrant relief, a petitioner must show that there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Here, the Court noted, the habeas court only made a conclusory finding of prejudice, determining "that [Parody's] outcome could have been different." But, the Court stated, even overlooking that there was nothing identified that plea counsel failed to investigate, the test was not whether the result could have been different. To establish prejudice, there must be a reasonable probability the result would have been different. Nothing in the record supported a finding of prejudice, and there was no contention or evidence that Parody would have received a more beneficial result had anything been done differently. Accordingly, the Court reversed the grant of the writ of habeas corpus.

### ***Child Molestation; Evidence of Physical Arousal***

*Brown v. State, A13A1595 (11/14/13)*

Appellant was convicted of four counts of child molestation of two victims, J. C. and her older sister, T. D. He argued that the evidence was insufficient to support his convictions. Specifically, he argued that to convict him of child molestation, the State was required to prove that he committed an "immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person." O.C.G.A. § 16-6-4(a)(1). Appellant contended that even if the State did prove that he forced J. C. to watch pornography and showered with T. D., the State failed to prove that he engaged in that conduct "with the intent to arouse or satisfy [his] sexual desires." In support of this contention, appellant argued that the victims' testimony proved that he showed no signs of physical arousal during either of these incidents.

However, the Court stated, the child molestation statute does not require proof of the defendant's actual arousal. Instead, the law requires only that the defendant have acted with the intent to arouse his sexual desires. The question of intent is peculiarly a

question of fact for determination by the jury, which may infer a defendant's intent from the evidence presented at trial. Where the jury finds the requisite intent, that finding will not be reversed on appeal provided there was some evidence supporting the jury's inference.

The Court noted that it has previously found that evidence showing that the defendant simply exposed his sexual organs to a child without any physical conduct, even if the child did not actually see those organs, sufficed to prove that the defendant acted with the intent to arouse or gratify his sexual desires. Accordingly, the jury could infer that when appellant showered in the nude with a naked T. D., he did so with the intent to arouse or satisfy himself sexually. The jury could also infer that appellant acted with the intent to arouse himself when he forced J. C. to watch a pornographic movie with him. Thus, considering appellant's conduct as shown by the acts testified to by his victims, and especially given that his victims testified that appellant engaged in this type of conduct on more than one occasion, the Court held that the evidence showed beyond a reasonable doubt that appellant acted with the intent to arouse or satisfy his sexual desire.

## Search & Seizure

*Pitchford v. State*, S13A0884 (11/25/13)

Appellant, who was 17 years of age at the time of the offenses, was convicted of murder, burglary, armed robbery, and related offenses. The evidence showed that appellant and a co-defendant, Oliver, burgled the home of the victim and stole his Apple laptop computer. Eleven days later, the victim was found shot to death in his home.

Appellant contended that the evidence seized in the search of his home should have been suppressed. Specifically, he argued that the police lacked probable cause when they arrested him; that his *Miranda* rights were violated when he was interrogated after his arrest; and therefore that the search of his home, spawned by his post-arrest statements, was improper and its fruits should have been suppressed.

The Court found that appellant brought himself to the attention of police by voluntarily approaching the scene of the murder and inquiring about what had happened. In response to an officer's question

as to whether appellant knew the victim, appellant mentioned that he had recently had a "run-in" with the victim over a cell phone and that he was "still angry" about it because the phone had not been replaced. Appellant also confirmed that Oliver, who was observing the scene from up the street, was "his boy," i.e., his friend. After appellant walked away to rejoin Oliver, the officer and another officer approached the pair, and Oliver immediately asked whether someone had been shot, which raised the officers' suspicions because details of the crime were as yet unknown even to the officers. During the conversation that followed, Oliver stated that he was in possession of a laptop belonging to the victim and that appellant had stolen it. At that point, one of the officers verified that a previous burglary had been reported at the victim's home; that two people were suspected of committing that burglary; and that Oliver was under suspicion as one of the two perpetrators. Appellant and Oliver were then detained for further questioning by detectives, who ultimately ordered them arrested in connection with the prior burglary.

Based on these facts, the Court found that the police had sufficient probable cause to arrest both Oliver and appellant in connection with the prior burglary. Thus, the Court found, there was ample evidence to support a reasonable belief by the arresting officers that both appellant and Oliver had participated in the burglary of the victim's home: the pair were clearly associates; Oliver was already suspected in the burglary and admitted to possessing the stolen laptop; Oliver stated that appellant had actually stolen it; appellant admitted to having been angry with the victim, providing a possible motive for the burglary; and both boys were loitering around the scene of the burglary and now murder, expressing unusual interest in and potential knowledge about the murder.

As to appellant's post-arrest statements, the interrogating officer testified at the pretrial suppression hearing that, when he initially questioned appellant, he was unaware that appellant was under arrest for the prior burglary and believed he was merely being questioned as a person of interest in the murder. He therefore did not read appellant his *Miranda* rights at the outset. Appellant made various incriminating statements during this first phase of questioning, which the Court

found the trial court properly suppressed. But, once appellant was Mirandized, he requested an attorney, and the officer asked no further questions regarding the crimes. Nevertheless, the officer, having observed appellant's tattoos, did ask him if he was a member of a particular gang, at which point appellant, in the officer's words, "jumped back into talking about a laptop that was taken from the deceased's residence," which appellant claimed to have received from Oliver on the night of the murder. With this information, officers obtained a search warrant for appellant's home, which led to the seizure of the incriminating items found there.

Appellant argued that his statements should have been suppressed because they were prompted by the officer's continued questioning, in violation of his right to counsel under *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981). However, the Court stated, it need not decide whether the statement itself was admissible in order to assess the validity of the search of appellant's home because the Court has held unequivocally that the "fruit" of a voluntary statement obtained in violation of *Edwards v. Arizona* is not subject to the exclusionary rule. Only if the statement was made involuntarily would the "fruits" thereof be subject to suppression. Here, the Court found, there was no evidence or allegation that appellant's statements were induced by another by the slightest hope of benefit or remotest fear of injury, so as to render it involuntary. Therefore, even if appellant's statements were obtained in violation of *Edwards*, the evidence yielded from the subsequent search based on this statement was properly admitted.

Finally, appellant challenges the seizure of violent and expletive-laden writings found in his bedroom in the course of the police search, on the ground that they exceeded the scope of the warrant. Specifically, he contended that because the warrant sought only computer equipment, weapons, blood-stained clothing, and other items constituting "fruits ... [or] instrumentalities linked to the crime[s] of murder ... and burglary," the warrant did not authorize the seizure of his writings. The Court disagreed. The writings were filled with references to killing and guns and thus could be properly considered an "instrumentalit[y] linked to the crime of murder" sufficiently within the scope of the warrant.

## **Jury Charges; Sentencing**

*Givens v. State, S13A1016 (11/25/13)*

Appellant was convicted of malice murder and related charges. The evidence showed that appellant met the victim in a club, brought her home, and killed her after suspecting that she stole money from him. Appellant raised two issues concerning the jury charges given at his trial. Since he did not object at the time, the Court reviewed the alleged errors under the plain error standard. First, appellant contended that the jury charge regarding his testimony at trial, followed by a charge regarding single witness testimony caused confusion to the jury by giving the impression, in violation of O.C.G.A. § 17-8-57, that the trial court believed appellant's testimony was not credible. The Court disagreed. The Court found that the charges were not obviously erroneous and did not affect the outcome of the proceedings. Appellant did not and could not contend that the instruction on single witness testimony was an incorrect statement of the law because he requested the charge. Further, when the trial court gave the charge on single witness testimony it spoke generically as to all witness testimony and made no distinction or emphasis as to the creditworthiness of appellant's testimony. Thus, it was highly unlikely the jury was confused by these back-to-back charges when rendering its verdict.

Appellant also argued that the trial court erred when it gave instructions on criminal intent which he contended alleviated the State's burden to prove specific intent beyond a reasonable doubt. Specifically, he contended that the charge on intent, followed by a charge on voluntary intoxication and by a charge on the definition of criminal negligence had the effect of providing the jury with an option to convict appellant on a theory of criminal negligence, i.e. that appellant acted with criminal negligence when he became intoxicated and killed the victim rather than on a theory of malice murder. But, the Court found, the charge on criminal negligence was a correct statement of the law inasmuch as it set forth verbatim O.C.G.A. §16-2-1(b) which, along with subsection (a), sets forth the statutory definition of a "crime." In addition, the jury was informed of the crimes for which appellant was indicted, instructed on the elements of the crimes charged, and

instructed that the State had the burden to prove each element of each crime charged beyond a reasonable doubt. Therefore, the Court rejected appellant's argument that the trial court's giving the charge on criminal negligence, at whatever point during its overall instructions to the jury, amounted to plain error.

Finally, appellant argued that the trial court erred when it sentenced him to serve, concurrently to his life sentence on malice murder, life sentences on counts two through ten which were "merged" by the trial court. The Court agreed. Since the charges of felony murder were vacated as a matter of law and the remaining charges merged as a matter of fact, there was no reason for the trial court to sentence appellant on any conviction other than malice murder. Accordingly, the life sentences on counts two through ten were vacated.

## **Statements; Garrity**

*Lengsfeld v. State, A13A0889 (11/18/13)*

Appellant, a police officer, was convicted of four counts of child molestation, four counts of enticing a child for indecent purposes, and five counts of violation of oath by public officer. Appellant contended that statements he made to a GBI agent were not voluntarily made, and therefore, should have been suppressed. Specifically, he contended under *Garrity v. New Jersey*, 385 U.S. 493 (1967), that the statements he made during the interview with a GBI agent were protected because he believed that he would be terminated from his job as a police officer if he refused to speak with the GBI agent. The Court disagreed.

In applying *Garrity*, a court must apply a totality-of-the-circumstances test to determine whether statements made by a public employee during an investigation into his activities are voluntary. Factors to be considered include whether the state actor made an overt threat to the defendant of the loss of his job if he did not speak with investigators or whether a statute, rule, or ordinance of which the defendant was aware provided that the defendant would lose his job for failing to answer questions. If no express threat is present, the court may examine whether the defendant subjectively believed that he could lose his job for failing to cooperate and whether, if so, that belief was

reasonable given the State action involved. In determining whether the defendant's belief was objectively reasonable, the court may examine whether the defendant was aware of any statutes, ordinances, manuals, or policies that required cooperation and provided generally, without specifying a penalty, that an employee could be subject to discipline for failing to cooperate. The court may also consider whether the investigator implicitly communicated any threat of dismissal either in written or oral form; whether, before the interrogation began, the defendant was told he was free to leave at any time; and whether the defendant was told he had the right to have a lawyer present.

Applying this test, the Court found that the facts supported the trial court's determination that the statements should not be suppressed under *Garrity*. First, there was no evidence that the State coerced appellant to speak with the GBI agent. Appellant contended that the police chief encouraged him to speak to the GBI agent and that this amounted to coercion. But, the Court found, such encouragement does not rise to the level of coercion. Moreover, even assuming arguendo that the police chief ordered appellant to speak to the GBI agent, a direct order to speak to an investigator does not, by itself, show coercion unless that order is coupled with the threat of termination for failing to follow such order. Here, the police chief encouraged appellant to cooperate with the GBI's criminal investigation, but made no threat, either implicit or explicit, that appellant would suffer a consequence for declining to do so. Additionally, the deputy chief testified that he would not have considered any refusal by appellant to speak with the GBI agent as an act of insubordination.

Since no express threat was made, the Court then looked to whether appellant had a reasonable subjective belief that he would lose his job for failing to cooperate. Appellant suggested that he was punished for failing to cooperate when he was placed on administrative leave following the conclusion of the GBI interview. However, the Court found, the record showed that before he agreed to speak with the GBI agent, appellant had already been made aware that he was going to be placed on administrative leave. Additionally, appellant was asked whether he would be willing to take a polygraph test

given by the GBI agent, and his refusal was honored. Consequently, the chief's decision to place appellant on administrative leave clearly was not a punishment for his failure to cooperate with the GBI investigation.

Appellant also argued that departmental policy required him to cooperate with the GBI agent. The Court again disagreed. The policy relied upon by appellant pertinently provides that "Employees are to cooperate with all internal investigations by answering questions, responding to lawful orders, presenting materials, and making statements." The departmental policy explicitly stated that it is limited to internal investigations, while the interview here was conducted as part of a criminal investigation. Also, the Court found, appellant's claim that he was unaware that the GBI agent was conducting a criminal investigation, as opposed to an internal investigation, was belied by the record which showed that, before he met with the agent, appellant acknowledged that the GBI would be conducting a criminal investigation. And, the Court added, to the extent appellant claimed not to have known the difference between internal and criminal investigations, "this assertion strains credulity in light of his eleven years of experience as a police investigator."

Moreover, the Court found no compulsion of the defendant's statements on the basis of a departmental policy. The policy in this case did not provide that failure to cooperate with an investigation would result in termination. Also, appellant was presented with no form or letter threatening termination. As a result, the departmental policy here could not have reasonably been interpreted as threatening termination for failing to cooperate with a criminal investigation.

Nevertheless, appellant contended that he was coerced into the interview because he was not free to leave. The Court found that this claim was also without merit. Here, the Court found, at the time of the interview, appellant was neither handcuffed, physically restrained, nor placed under arrest. Additionally, the GBI interview ended at appellant's request based upon his desire to consult an attorney. And, although appellant argued that he was without a vehicle and, therefore, was confined, the Court found that his state-issued vehicle had not yet been confiscated when the interview started; his vehicle was not confiscated until

after he terminated the interview; and he was informed in advance of the interview that he was required to turn in all government property as part of his administrative leave. Additionally, nothing prevented appellant from leaving the police department by simply walking out. As a result, there was no evidence that he was prevented from leaving. According, the Court concluded that under the totality of the circumstances, the trial court correctly ruled that appellant's statements were not required to be suppressed under *Garrity*.