

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 11, 2013

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THIS WEEK:

- **Guilty Plea; Habeas Corpus**
- **Wiretaps; Listening Posts**
- **Burglary; Sufficiency of Evidence**
- **Guilty Pleas**
- **Voire Dire; Judicial Comment**
- **Disqualification of Counsel; Conflict of Interest**
- **Proximate Cause of Death; Juror Qualification**
- **Motion for New Trial; Standard of Review**
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Guilty Plea; Habeas Corpus

Valldeparas v. State, A12A1704 (1/8/13)

Appellant pled guilty to child molestation. He argued that the trial court erred in construing his motion to modify his sentence as a motion to withdraw his guilty plea and in dismissing it as untimely, and thus in failing to address the motion on its merits. The record showed that after filing two Motions to Modify Sentence, both of which were denied, appellant filed a third Motion to Modify Sentence (the "Third Motion"), asserting that his guilty plea was not intelligently made or fully understood nor voluntary, but undertaken while under duress, stress, and prolonged anxiety. Appellant also acknowledged that any attempt to withdraw his guilty plea was barred by the restriction on motions and expired

court terms. His motion once again sought modification of his sentence. Despite appellant's acknowledgment in the Third Motion that he could not seek to withdraw his guilty plea, the trial court denominated the motion as a motion to withdraw a guilty plea in its orders setting the matter for a hearing. The trial court subsequently issued an order stating that it had construed the Third Motion as a motion to withdraw a guilty plea based on the nature of the motion and dismissed the motion as untimely.

The Court held that the trial court erred in interpreting the Third Motion as a motion to withdraw appellant's guilty plea and in dismissing it as untimely. Appellant clearly expressed his understanding in his motion, and at the hearing, that the time had passed to file a motion to withdraw his plea and that he was not asserting such a motion. Moreover, the Court held that the trial court should have looked past the form of the Third Motion to its substance to determine whether it could have been considered as a valid petition for habeas corpus. Appellant asserted in the Third Motion that his guilty plea was not fully understood, knowing or voluntary, but was entered under duress. The motion also asserted that he received ineffective assistance of counsel in the form of withheld facts and misrepresentations at the time of entering his plea. The proper remedy for making a claim of ineffective assistance of counsel in connection with a guilty plea is to move to withdraw the plea or, if the term of court in which the plea was entered has expired, to petition for a writ of habeas corpus. Here, because a motion to withdraw would have been untimely, the trial court should have considered whether it was appropriate to treat the Third Motion as a habeas petition. Accordingly, the case was

remanded for a consideration of the motion on its merits.

Wiretaps; Listening Posts

Luangkhot v. State, S12G0895; S12G0905; S12G0912 (1/9/2013)

Appellants, along with approximately 34 others, were indicted in connection with an alleged ecstasy trafficking ring, resulting from an investigation led by the Atlanta High Intensity Drug Trafficking Area (HIDTA) task force. As part of the investigation, the Gwinnett County District Attorney obtained a series of investigative warrants from the Gwinnett County Superior Court authorizing the interception of conversations from 18 different phone lines. Appellants moved to suppress the evidence obtained through the wiretaps contending that the trial court lacked jurisdiction to issue the warrants. The motions were denied; on interlocutory appeal, the Court of Appeals affirmed. The indictments alleged that the narcotics distribution ring was operating out of Gwinnett County. The listening post from which the communications were intercepted was located in Fulton County. The State did not attempt to prove that any of the monitored telephones were ever used in Gwinnett County. Thus, in sum, while the charged crimes were alleged to have been committed in Gwinnett County, the State did not show that any of the interceptions made pursuant to the wiretap warrants took place in Gwinnett County.

The Georgia wiretap statute confers the power to issue wiretap warrants generally on superior court judges, to the extent the same is consistent with and subject to the terms, conditions, and procedures provided for by the federal wiretap statute. O.C.G.A. § 16-11-64(c). Regarding the scope of the wiretap order, the federal wiretap statute provides that the order may authorize interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting. Accordingly, which court may authorize a wiretap warrant in a particular case turns on the meaning of the terms “interception” and “territorial jurisdiction.” In *Evans v. State*, 252 Ga. 312 (1984), the Court held that the site of the “interception” was the listening post from which the phone calls were overheard. That holding was based on the meaning of the term “intercept,” which the federal statute defined at the time as the

aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device. Reasoning that the only aural acquisition of the defendant’s communications occurred at the listening post where the contents of the communications were first overheard, the Court held in *Evans* that the wiretap warrant had been properly issued from the judicial circuit in which the listening post was located. The federal definition of “intercept” has since been expanded to encompass “the aural or other acquisition of the contents of” targeted communications. 18 USC § 2510. Thus, under the current version of Title III, “interceptions” of phone calls are deemed to occur not only at the listening post where the communications are overheard (“aural acquisition”), but also at the situs of the tapped phone from which the contents of the communications are being redirected (“other acquisition”). The “territorial jurisdiction” over which a court has authority depends entirely on state law. In Georgia, the territorial jurisdiction of a judge of the superior courts is the judicial circuit in which the judge presides. Consequently, a superior court’s authority to issue warrants is generally limited to places within that court’s territorial jurisdiction.

The Court held that in the absence of any state statute expressly granting superior courts authority to issue wiretap warrants that apply outside their own judicial circuits, current state law vested the authority to issue wiretap warrants only in those superior courts of the judicial circuits in which the tapped phones or listening posts are located. If the legislature had intended to grant superior courts the authority to issue wiretap warrants effective for interceptions outside their circuits, it could have done so explicitly, as it has done in other areas. The Court concluded that the Gwinnett County Superior Court lacked the authority to issue wiretap warrants for the interceptions at issue, which, on the evidence presented, took place exclusively in Fulton County. Therefore, the warrants were invalid, and the judgment of the Court of Appeals was reversed.

Burglary; Sufficiency of Evidence

Newton v. State, A12A1735(1/9/13)

Appellant was convicted of burglary, theft by taking, and forgery for taking jewelry

while touring a home he claimed he wanted to purchase. Appellant contended the evidence was insufficient to support the burglary conviction. The record showed a man that identified himself as D. Flynn contacted real estate agent Harris, and told her that he was relocating and wanted to look at homes. Harris met with the man and presented him with a buyer’s brokerage agreement, which he signed as D. Flynn, even providing a driver’s license with his picture and the name D. Flynn. At trial, Harris identified appellant, Newton, as the man she knew as D. Flynn. The victim homeowner let appellant and Harris into her home because there was no lockbox on the door, and then left them at her home. While Harris and appellant were upstairs, Harris heard a door shut and ran downstairs. The victim had returned and spoke to Harris while appellant was alone in the master bedroom. The victim and Harris then went upstairs to look for appellant. The victim checked a chest in her closet where she kept two boxes of jewelry and saw that both boxes were still there, but did not open them. Harris found appellant, they finished touring the house and left. A week later, the victim checked her jewelry boxes and they were empty. The victim testified that from the time appellant toured her house until she discovered her jewelry was gone, only immediate family members had access to the area where her jewelry was stored.

Appellant contended that the evidence was insufficient to support the burglary conviction because there was no proof that he entered the victim’s house without authority. The burglary statute provides that a person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains in an occupied, unoccupied, or vacant dwelling house of another. O.C.G.A. § 16-7-1(a). The jury was instructed that a person commits burglary when, without authority and with the intent to commit a theft therein, he enters a room in the dwelling house of another. To constitute the offense of burglary, it is not necessary that it be shown that a break-in occurred or that a theft was accomplished. The trial court denied the motion for new trial, noting that appellant never had authority to enter the house because only a person named D. Flynn was so authorized. Appellant maintained that he was escorted into the victim’s house by his real estate agent and argued that there was no

evidence that he did not have permission to be in the victim's house or any room in her house at that time.

"Without authority" . . . is defined as 'without legal right or privilege or without permission of a person legally entitled to withhold the right.'" *Abney v. State*, 240 Ga.App. 280 (1999). The Court explained that, even assuming the evidence at trial showed that appellant intended to commit a theft when he entered the home, there was no evidence that he entered the home "without authority." The victim let Harris and appellant in her home and left them there. There was no evidence that she specified any rooms as off limits. And there was no evidence that the victim was only willing to let someone she thought was named D. Flynn in her home at that time. Although appellant's use of a fictitious name was relevant to the forgery charge, it had no real significance for the burglary charge because the victim gave Harris's client permission to enter her house that day, regardless of his name. Because the evidence did not prove that appellant entered the victim's home without authority, the Court reversed the burglary conviction. Appellant's remaining convictions were affirmed, and the case was remanded for resentencing.

Guilty Pleas

Kennedy v. State, A12A2138(1/9/13)

Appellant entered a negotiated guilty plea to various offenses, and then timely filed a pro se direct appeal from the judgment of conviction and sentence entered on the plea. Appellant contended his fourth amendment rights were violated by an illegal stop and search which led to the charges against him. However, the Court held that appellant waived the right to challenge the stop and search by pleading guilty. "Once a defendant has solemnly admitted in open court that he is in fact guilty of the offense charged, he may not thereafter raise independent claims alleging the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. With a few limited exceptions, a plea of guilty generally waives all defenses except that based on the knowing and voluntary nature of the plea."

Appellant also asserted that his due process rights were trampled when the trial court

"browbeat" him into pleading guilty. The transcript from the guilty plea hearing disclosed that appellant was faced with a choice between accepting the negotiated plea offer or foregoing his opportunity to plead guilty so he could file his motion to suppress. Although this was not the option appellant wanted, the transcript did not disclose that the trial court coerced him into entering his guilty plea. Accordingly, the Court affirmed.

Voir Dire; Judicial Comment

Ellis v. State, S12A1923 (1/9/13)

Appellant was convicted of murder, attempted armed robbery, and possession of a firearm during the commission of a felony. Appellant argued that the trial court improperly limited his voir dire of prospective jurors. The record showed that voir dire began with general questions put to the venire as a whole, and during this portion of the voir dire, appellant asked whether any jurors had strong feelings about individuals involved in the sale of illegal drugs. Many jurors responded affirmatively to this question, and so, when appellant was given the opportunity to question the prospective jurors individually, he asked a juror who had indicated that she had such strong feelings whether she could put those feelings aside if "mention of this is brought up in trial." The prosecutor objected that this question would require the juror to prejudge the case, and the trial court sustained the objection. By doing so, appellant contended, the trial court improperly limited his examination of the prospective jurors.

Georgia law provides for voir dire examination that may be relatively broad in scope: "[c]ounsel for either party shall have the right to inquire of the individual prospective jurors examined touching any matter or thing which would illustrate any interest of the prospective juror in the case, including any opinion as to which party ought to prevail . . . any fact or circumstance indicating any inclination, leaning, or bias the prospective juror might have respecting the subject matter of the action or the counsel or parties thereto. . ." O.C.G.A. § 15-12-133. Nevertheless, the scope of voir dire is not unlimited, and generally, questions that

require a prospective juror to assume facts that are yet to be proved and to prejudge the case based on those assumed facts are inappropriate. Accordingly, the scope of voir dire and the propriety of particular questions are left to the sound discretion of the trial court.

The Court determined that it need not decide in this case, however, whether the trial court abused its discretion when it sustained the objection about which appellant complained. Even assuming that appellant was entitled to ask the prospective jurors whether they could put aside strong feelings about sellers of illegal drugs if "mention of this is brought up in trial," this was not a case in which the trial court foreclosed all inquiry concerning the subject matter to which the question was directed. To the contrary, appellant was permitted to question the venire as a whole to identify prospective jurors who had strong feelings about individuals involved in the sale of illegal drugs, and even after the trial court sustained the objection at issue, appellant was permitted to rephrase his inquiry and to ask a prospective juror individually whether she could make a decision based on the law and evidence, "no matter what your feelings are for or against anything else that might be mentioned." Consequently, any error in sustaining the objection at issue was harmless, and the Court found no reversible error in the way that the trial court limited the voir dire examination of the prospective jurors.

Appellant also argued that the trial court improperly commented on the credibility of a witness in the presence of the jury. The record showed that a detective testified that appellant admitted he set up the victim for an armed robbery. On cross-examination, appellant asked the detective about his testimony at a pretrial hearing, specifically about his failure to testify at that hearing about appellant setting up an armed robbery. In response, the prosecuting attorney sought to admit a document as a prior consistent statement by the detective. Appellant objected, and during the colloquy that followed, the judge said, "I think it is admissible as a prior consistent." Appellant urged that this statement was an improper comment on the evidence.

Under O.C.G.A. § 17-8-57, it is error for any judge in any criminal case, during

its progress or in his charge to the jury, to express his opinion as to what has or has not been proved or as to the guilt of the accused. However, this rule does not generally extend to colloquies between the judge and counsel regarding the admissibility of evidence. Furthermore, the remarks of a judge assigning a reason for his ruling are neither an expression of opinion nor a comment on the evidence. Here, the statement at issue was made by the trial judge in the context of a colloquy concerning an evidentiary objection and the ruling of the court on that objection. Accordingly, the statement did not amount to an expression of an opinion of the proof or the guilt of the accused. Moreover, the trial court cautioned the jury explicitly at the close of the trial that “[b]y no ruling or comment that the court has made during the progress of this case has the court intended to express any opinion upon the facts of the case, upon the credibility of the witnesses, upon the evidence, or upon the guilt or innocence of the defendant.” Therefore, no violation of O.C.G.A. § 17-8-57 occurred.

Disqualification of Counsel; Conflict of Interest

Heidt v. State, S12A1430 (1/10/13)

Appellant was convicted of the murders of his father and brother, an aggravated assault and aggravated battery upon his mother, and other related crimes. Appellant contended that the trial court erred when it disqualified one of his lawyers for a conflict of interest. The record showed that appellant had a sexual relationship with his sister-in-law, who was married to his youngest brother, and that this sexual relationship was involved in appellant’s motive for the crimes he committed. After appellant’s father confronted appellant and the sister-in-law about the affair, someone entered the home of appellant’s mother and father, and shot appellant’s brother, father and mother. Appellant’s brother and father succumbed to their injuries, but appellant’s mother was able to call for emergency assistance and ultimately survived.

Appellant argued that the trial court abused its discretion when it disqualified one of his two lawyers. The trial court found that

the attorney had a conflict of interest because he also represented appellant’s sister-in-law, with whom appellant was having an affair, who was anticipated to testify in the prosecution of appellant, and who herself was charged with intimidating a witness in appellant’s prosecution. The Sixth Amendment guarantees the right of the accused in a criminal prosecution “to have the assistance of counsel for his defen[s]e.” An element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. The right to counsel of choice is not, however, absolute. Among the limitations of the right is the settled principle that a defendant does not have a right to be represented by an attorney who is ethically prohibited from doing so, most commonly due to a conflict of interest. Whether a lawyer should be disqualified from representing an accused in a criminal prosecution as a result of a conflict of interest is a question committed to the sound discretion of the trial court.

The Court concluded that the trial court did not abuse its discretion in the case and affirmed. Although appellant claimed that both he and his sister-in-law consented to the dual representation, clients may not consent to a conflict that “involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.” Ga. R. Prof. Conduct 1.7(c)(3). And in the context of a criminal prosecution, the consent of the accused does not always cure the problem of a conflict. While appellant and his sister-in-law may not have foreseen any conflict between their interests at the time that they consented to the dual representation, their interests ultimately were not aligned, inasmuch as the sister-in-law ended up testifying against appellant, and the criminal charges against her were dismissed. Because the prospects of the attorney advising the sister-in-law about any deal that might be proposed by the State to secure her testimony against appellant or cross-examining her on behalf of appellant were rife with serious ethical problems, the trial court did not abuse its discretion when it determined that the attorney’s representation of the sister-in-law would materially and adversely affect his representation of appellant and disqualified the attorney for that reason.

Proximate Cause of Death; Juror Qualification

Clarke v. State, S13A0021(1/10/13)

Appellant was convicted of malice murder. The evidence showed that he struck the 74 year old victim in the head with a large board and then struck her twice more while she lay motionless on the ground. He contended that the evidence was insufficient to establish that his actions were the cause of the victim’s subsequent death. Specifically, he argued that there was no evidentiary connection between his admittedly striking the victim and her death, and that her pre-existing medical conditions led to her demise. He also argued that the medical examiner’s finding of the cause of death was based upon mere speculation, and his expression of belief that the manner of death was a homicide was unsupported by the evidence and was “a clear and impermissible violation of expressed opinion testimony” regarding the ultimate issue before the jury.

The Court stated that an injury is the legal proximate cause of death when either the injury itself is the sole proximate cause of the death, the injury directly and materially contributed to the happening of a subsequent accruing immediate cause of the death, or the injury materially accelerated the death, although the death was proximately occasioned by a pre-existing cause. Here, there was evidence that the victim was unconscious and unresponsive upon arrival at the hospital and exhibited obvious wounds to her head. Medical tests revealed that she had fractures to her jaw and the temporal bone of her skull. Because of the broken jaw, her teeth were wired shut and a feeding tube was inserted into her stomach. Even though further tests indicated that she had previously had some minor strokes, the immediate cause of medical concern was the severe blows to her head sustained in the attack. Doctors discovered that she was also suffering from severe sepsis, necrotic bowels, a urinary tract infection, shock, and respiratory failure; however, her condition was exacerbated by the fact that she had been bedridden since the time of the attack. The victim’s advanced age contributed to her inability to recover from the attack. And, even though her autopsy revealed other medical conditions including cardiovascular disease, the medical examiner determined that the cause of the victim’s death

was delayed complications from the blunt force trauma to her head; he testified that as a 74-year-old woman, the victim had “a lot of natural disease processes,” but that her head injury was the underlying process that “started the ball rolling” in a “continuous downhill course,” culminating in her death.

The Court held that the medical examiner’s conclusion about the cause of death was not premised upon speculation. Rather, he testified in great detail about the factual basis for his opinion of the cause of death of the victim. Further, the medical examiner’s testimony about the manner of the victim’s death being a homicide did not improperly invade the province of the jury on the ultimate issue of criminal liability. Accordingly, the evidence, including that of proximate causation, was sufficient to enable a rational trier of fact to find appellant guilty beyond a reasonable doubt.

Motion for New Trial; Standard of Review

Walker v. State, S12A1575(1/10/20)

Appellant was convicted of malice murder and possession of a firearm during the commission of a felony. He contended the trial court, in ruling on his amended motion for new trial, did not apply the standard of review requiring the exercise of discretion with which it is imbued under O.C.G.A. §§ 5-5-20 and 5-5-21. Here, the trial court found, under the standard of *Jackson v. Virginia* that “the evidence adduced at trial, viewed in the light most favorable to the prosecution, was sufficient to enable a rational trier of fact to find the defendant guilty of the offenses charged in the bill of indictment.” However, O.C.G.A. §§ 5-5-20 and 5-5-21 allow the trial court to weigh the evidence and in effect, sit as a “thirteenth juror.” In fact, when faced with a motion for new trial based on these general grounds, the trial court has the duty to exercise its discretion and weigh the evidence. A trial court does not exercise its discretion when it applies the standard of *Jackson v. Virginia* to a motion for new trial based on the general grounds embodied in O.C.G.A. §§ 5-5-20 and 5-5-21. Here, the record reflected that the trial court applied an incorrect standard of review and, in so doing, failed to exercise its discretion and weigh the evidence in ruling on the

merits of claims under O.C.G.A. §§ 5-5-20 and 5-5-21. Therefore, the Court vacated the judgment and remanded the case to the trial court for consideration of the motion under the proper standard of review.

Prior Consistent Statements

Kidd v. State, S12A1521(1/10/13)

Appellant was convicted of murder and possession of a firearm during the commission of a crime. He alleged the trial court erred when, over his objection, it allowed the State to bolster the testimony of two witnesses by using their prior consistent and sworn statements. The evidence showed that Stephanie Fallen, the victim’s cousin, testified that appellant approached her, looking for the victim and threatening to kill the victim. The record showed that on cross-examination, appellant challenged Fallen’s veracity by posing questions that suggested she had been dishonest about how long she had known appellant and about whether appellant knew she was the victim’s cousin. Thomas Reynolds was an eyewitness to the shooting of the victim and testified on direct examination that he saw something shiny in appellant’s hand when he and the victim began to fight, but did not know what the shiny object was. Reynolds also stated that he heard three gunshots in quick succession and that the gunshots sounded as if they were fired from a small caliber weapon. On cross-examination, defense counsel similarly challenged Reynolds’s veracity by posing questions that suggested Reynolds had previously stated that he saw a gun in appellant’s hand and that the gunshots he heard were muffled. Defense counsel’s questions implied that Reynolds’s trial testimony was recently fabricated.

The Court stated that a witness’ prior consistent statement is admissible if the veracity of the witness’s trial testimony has been placed in issue at trial, the witness is present at trial, and the witness is available for cross-examination. A witness’s veracity is placed in issue if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross-examination. For the prior consistent statement to be admissible, it must also predate the alleged fabrication, improper influence, or improper motive. In both instances, the State, on re-direct, used the witnesses’ prior sworn statements to rehabilitate their trial testimony.

Under these circumstances, the Court held that the trial court did not abuse its discretion in allowing the admission of the prior consistent statements.

Statements; Hearsay Exception

Bunnell v. State, S12A1504 (1/10/13)

Appellant was convicted of malice murder and tampering with the evidence in connection with the beating death of a 70-year old woman. He contended that the trial court erred in denying his motion to suppress the statement he made to law enforcement officers. Specifically, he alleges that an investigating officer misstated the law during questioning when she told him that “this is your time, your opportunity to tell me what happened After tonight you may not get another opportunity to tell me what happened.” Citing *State v. Darby*, 284 Ga. 271 (2008), he argued that this erroneous legal information and his altered state of mind meant that he did not make his statements freely and voluntarily.

Whether a defendant waives his rights under *Miranda v. Arizona*, 384 U. S. 436 (1966), and makes a voluntary and knowing statement depends on the totality of the circumstances. In ruling on the admissibility of an in-custody statement, a trial court must determine whether a preponderance of the evidence demonstrates that the statement was made freely and voluntarily. When controlling facts discernible from a videotape are not disputed, an appellate court’s standard of review is de novo. Here, the trial court found that appellant was read his Miranda rights, signed a form waiving those rights, was alert and coherent in answering questions, was not impaired by alcohol and prescription drugs taken hours earlier, and understood what he was doing when he waived his rights and agreed to talk to officers. The trial court concluded that appellant was properly advised of his rights, he knowingly and intelligently waived those rights, and police made no promises or threats to induce him to speak. Unlike the *Darby* case, where officers erroneously told the defendant that he would have to sign a waiver form before he gave a statement to police, the officer in this case did not mislead appellant or give him erroneous legal information when she said that this was his opportunity to tell her his side of the story before other persons were

interviewed and began telling their version of events. Therefore, because the totality of the circumstances showed that appellant gave his statement knowingly and voluntarily, the trial court did not err in denying his motion to suppress.

Appellant also alleged as error the admission of hearsay evidence by three witnesses concerning statements that the victim made about her relationship with appellant. O.C.G.A. § 24-3-1(b) provides that hearsay evidence “is admitted only in specified cases from necessity.” For hearsay to be admitted under the necessity exception, the proponent of the evidence must show that the declarant’s statement is relevant and more probative of a material fact than other available evidence and that it exhibits particular guarantees of trustworthiness. Whether a statement is trustworthy is a matter for the trial court’s discretion, and the trial court’s decision will not be disturbed on appeal unless there is an abuse of discretion. The trial court does not abuse its discretion when it uses the necessity exception to admit hearsay testimony that relates an uncontradicted statement made by the unavailable witness to one in whom the declarant placed great confidence and to whom the declarant turned for help with problems. Here, the Court reviewed the relationship of each witness with the decedent – victim and determined that in each instance, the trial court did not abuse its discretion in admitting the evidence under the necessity exception.