

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 27, 2012

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THIS WEEK:

- **Jury Charges; Self-Defense**
- **Jury Charges; Voluntary Manslaughter**
- **Venue; Statements**
- **Statements; *Miranda***
- **Jurors; Pre-trial Instructions**
- **Jurors; OCGA § 15-12-1.1 (a)**
- **Search & Seizure; Vehicular Homicide**
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Jury Charges; Self-Defense

Milnavicius v. State, S11A1281 (1-23-12)

Appellant was convicted of the malice murder of a male and female employee of his business. Appellant testified that he acted in self-defense. Specifically, appellant argued that the male employee shot at appellant twice, but missed. When the gun jammed, the male employee attacked appellant with a chair. Appellant then shot the employee multiple times with the employee's weapon. Appellant did not say he shot the female employee, but implied that the other victim had shot her.

Appellant contended the trial court erred when it failed to include certain language in its charge on justification. The charge given by the trial court was as follows: "A person is justified in threatening or using force against another person when and to the extent that he reasonably believes that such threat of force is necessary to defend himself against the other person's —the other's imminent use of unlawful force. A person is justified in using force

that is intended or likely to cause death or great bodily harm only if that person reasonably believes that such force is necessary to prevent death or great bodily injury to himself."

Appellant argued the trial court erred when it left out the words "or to prevent the commission of a forcible felony" at the end of the charge. Appellant contended this portion of the instruction was important because he alleged the male employee's wielding a chair against him was a forcible felony (i.e., aggravated assault). The Court disagreed. Inasmuch as the charge as a whole was not an incorrect statement of the law and the charge instructed the jury that appellant was justified in defending himself against the "imminent use of unlawful force" and against "great bodily injury," the trial court's omission of this phrase did not undermine the legal adequacy of the charge. The charge as a whole fairly represented the issue of justification and, therefore, appellant's allegation of error was without merit.

Jury Charges; Voluntary Manslaughter

Davis v. State, S11A1865 (1-23-12)

Appellant was convicted of felony murder and aggravated assault. The evidence showed that he suffocated his wife in their bedroom. Appellant's sole defense to the charges of malice murder and felony murder was that he committed the lesser offense of voluntary manslaughter, which required the jury to find that appellant caused the victim's death "solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. . . ." OCGA § 16-5-2 (a). Although the jury was given a special verdict form requiring consideration of this lesser offense prior

to murder, appellant contended that the trial court erred when it charged the jury that words alone were insufficient provocation to support a verdict of manslaughter and that it must find that words were accompanied by menaces in order to sustain a manslaughter verdict. In support of his argument, he cited *Strickland v. State*, 257 Ga. 230, 231-232 (2) (1987) and *Brooks v. State*, 249 Ga. 583, 586 (1982).

The Court found that this case was distinguishable from *Strickland* and *Brooks*. Here, there was no evidence that the victim recounted her adulterous conduct to appellant or taunted him with descriptions thereof. In fact, the only evidence that the victim even committed adultery was that appellant told his ex-wife on the phone that his wife admitted to an affair. At trial, appellant testified about some problems with his marriage, but he never said that his wife told him that she was having an affair. Appellant testified that he asked his wife “who was the person” and that she replied it was none of his business. There was certainly no evidence that the victim recounted, taunted, or bragged about her sexual involvement with other men. Therefore, the circumstances regarding the victim’s alleged adulterous conduct were not of the type contemplated by the Court in *Strickland* and *Brooks* and thus did not suffice to replace the requirement of menaces. Accordingly, the trial court’s instruction to the jury regarding voluntary manslaughter was not error.

Venue; Statements

Rogers v. State, S11A1709 (1-23-12)

Appellant was convicted of the malice murder of Birmingham and Patterson. The evidence showed that the police found the body of Birmingham, but Patterson’s body was never found. With respect to Patterson, appellant argued that his confession to a third party was not corroborated by sufficient supporting evidence and was not sufficient proof that venue was proper in DeKalb County.

The Court stated that as to venue, OCGA § 17-2-2 (h) provides that “[i]f in any case it cannot be determined in what county a crime was committed, it shall be considered to have been committed in any county in which the evidence shows beyond a reasonable doubt that it might have been committed.” Use of subsection (h) to determine venue in a homicide case is not precluded. Although appellant argued that the

standard of proof must be “beyond a reasonable doubt” and that the additional language “might have been committed” is conflicting and illogical, the Court upheld OCGA § 17-2-2 (h) as a constitutional mechanism for resolving the issue of venue when the location in which the crime is committed cannot be determined with certainty. Furthermore, subsection (h), whether applied in a homicide or non-homicide case, is not unconstitutionally vague or indefinite. Thus, the Court perceived no inconsistency in the wording of OCGA § 17-2-2 (h). The evidence relevant to venue showed that Patterson was last seen alive in DeKalb County, that he left from that county, that appellant confessed that he shot Patterson back in Atlanta which is partly in DeKalb County, and that appellant and Patterson had been together every day at appellant’s residence in DeKalb County where appellant had previously shot Birmingham and had buried him in the woods in that county. This evidence was sufficient to show beyond a reasonable doubt that the murder might have been committed in DeKalb County.

As for the corroboration of appellant’s confession to a third party, the Court stated that OCGA § 24-3-53 provides that “[a] confession alone, uncorroborated by any other evidence, shall not justify a conviction.” However, a confession, freely and voluntarily made, is evidence of the highest character, and any corroboration thereof will be sufficient to sustain a conviction. A confession need be corroborated only by any particular, not every particular. In determining whether a confession is corroborated, the jury is not required to find the corpus delicti beyond a reasonable doubt from evidence separate from and wholly independent of the confession, and instead may consider the confession along with other facts and circumstances independent of and separate from it in determining whether or not the corpus delicti has been established to their satisfaction. To establish the corpus delicti in a homicide prosecution, the State must prove that a death occurred, but there is no requirement that a dead body be produced. Appellant’s confession was sufficiently corroborated by other evidence.

At trial, an investigator testified, in response to the prosecutor’s questions that appellant did not want to talk about the question of whether he had had sex with a particular male companion. Appellant contended that the question was an inadmissible comment on appellant’s right to remain silent. The Court

disagreed. An assertion of the right to remain silent during custodial interrogation must be unambiguous and unequivocal before interrogators are required to stop their questioning. Citing persuasive authority from other states, the Court stated that numerous cases have sanctioned the admissibility of testimony regarding a defendant’s silence or nonverbal conduct during questioning subsequent to a valid waiver of rights. Here, appellant specifically waived his rights pursuant to *Miranda*, including his right to remain silent, and responded to the investigator’s questioning. Many cases have held in such a situation that a defendant’s failure to respond to some questions during questioning—while responding to others—may be the subject of testimony at defendant’s trial, at least where the defendant’s silence cannot be construed as an attempt to reassert his rights and cut off questioning altogether.

In fact, the Supreme Court of the United States recognized that a defendant’s refusal to answer certain questions is not the equivalent of a request to end the interrogation. And the Eleventh Circuit has indicated that a suspect’s refusal to answer certain questions is not tantamount to the invocation, either equivocal or unequivocal, of the constitutional right to remain silent and that questioning may continue until the suspect articulates in some manner that he wishes the questioning to cease. Thus, the Court concluded, the trial court properly found that appellant’s expressed desire not to talk about a particular subject in the middle of a lengthy *Mirandized* statement was not an “invocation of the right to silence” so as to raise the concerns addressed in *Mallory v. State*, 261 Ga. 625, 630 (5) (1991) and appellant’s reliance on it was misplaced.

Statements; Miranda

Williams v. State, S11A1835 (1-23-12)

Appellant was convicted of the malice murder of two women. Appellant waived his *Miranda* rights and agreed to talk to GBI agents after his arrest. During this custodial interrogation, appellant made several incriminating statements he contended should not have been admitted at trial because he unequivocally asserted his right to remain silent during the interview and questioning did not cease.

The Court stated that the admissibility of the challenged portion of appellant’s statement

depends upon whether appellant articulated a desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent. Here, the record was replete with evidence that appellant was emotionally distraught after the shootings, at various times sobbing and laying on the ground. While appellant was being questioned about who was in the house when he returned from work, appellant responded, “Both of them.” When asked to specifically identify the victims by name, appellant stated, “I can’t do it, sir. I can’t go on answering these questions.” The GBI agent testified he did not interpret these statements as a request for the interview to stop but that they reflected appellant’s emotional state and how difficult it was for him to go back through what he had done. Appellant then continued to answer the agent’s questions without hesitation.

The Court held that viewed in context, appellant’s statement “I can’t go on answering these questions” was not an unambiguous and unequivocal assertion of the right to remain silent. Rather, like the accused’s statement, “I don’t want to say nothing,” in *Weaver v. State*, 288 Ga. 540, 544 (2011), it was part of the “give and take” of interrogation and may also be reasonably understood to express appellant’s internal conflict and pain in being asked to recount all that had happened. Because the statement was not an unequivocal assertion of the right to remain silent, the agents had no obligation to cease the interview and it was not error to admit appellant’s incriminating statements into evidence.

Jurors; Pre-trial Instructions

Butler v. State, S11A1827 (1-23-12)

Appellant and a co-defendant were convicted of malice murder, armed robbery, burglary, hijacking a motor vehicle and other crimes. Appellant contended that the trial court erred in removing Juror Number 12 and replacing him with an alternate juror after the State rested even though the prosecutor failed to show prejudice. OCGA § 15-12-172 provides: “If at any time, whether before or after final submission of the case to the jury, a juror dies, becomes ill, upon other good cause shown to the court is found to be unable to perform his duty, or is discharged for other le-

gal cause, the first alternate juror shall take the place of the first juror becoming incapacitated.”

The Court stated that a trial court must exercise its discretion in removing a juror, and it may effect such a removal even after deliberations have begun. But, there must be some sound basis upon which the trial judge exercises his discretion to remove the juror. A sound basis may be one which serves the legally relevant purpose of preserving public respect for the integrity of the judicial process. Where the basis for the juror’s incapacity is not certain or obvious, some hearing or inquiry into the situation is appropriate to the proper exercise of judicial discretion. Dismissal of a juror without any factual support or for a legally irrelevant reason is prejudicial.

Here, the trial court individually questioned the bailiff and all of the jurors. The bailiff stated that Juror 12 emotionally told other jurors over and over again that the jury had no right to take the young defendants’ lives in its hands and weigh their lives against the evidence. Two of the jurors stated that on several occasions, Juror 12 expressed his opinion that the defendants were innocent. The jurors also stated that they could still be impartial to both the State and the accused. One of those jurors further indicated that Juror 12 strongly expressed his opinion and took issue with specific evidence which had been offered by the State. Juror 12 admitted that he was confused by the evidence, could not see finding the two young defendants guilty of murder, and mentioned this opinion once to one of the jurors. After a considerable number of ambiguous statements, Juror 12 eventually indicated that he could still be fair and impartial to the State and the accused. The trial court, noting that it was resolving a question of credibility, found that Juror 12 had violated the court’s instructions not to discuss the case and had already formed an opinion.

The Court held that the fact that the juror eventually stated that he could be impartial does not require the trial court to ignore the numerous times he equivocated or the other jurors’ testimony showing that he expressed a fixed and definite opinion and does not make the trial court’s credibility decision to strike him error. Thus, the trial court did not abuse its discretion in concluding that the opinion of Juror 12, combined with his violation of the court’s instructions by attempting to influence other jurors with that opinion prior to

deliberations, constituted “legal cause” for his removal. Moreover, appellant did not contend that the alternate juror who replaced him was not qualified to serve.

Jurors; OCGA § 15-12-1.1 (a)

Young v. State, S11A1679 (1-23-12)

Appellant was convicted of malice murder and a plethora of other serious felonies. He contended that the trial court erred by excusing several potential jurors because allegedly there was no evidence that these jurors filed a request to be excused or an affidavit as required by OCGA § 15-12-1.1. He further argued that the jurors were excused indiscriminately in violation of this Court’s holding in *Yates v. State*, 274 Ga. 312, 314-316 (2) (2001).

Pursuant to OCGA § 15-12-1.1 (a), a trial court may excuse a potential juror if he or she is engaged “in work necessary to the public health, safety, or good order,” is a full-time student, is the primary caregiver of a child six years of age or younger, is a “primary teacher in a home study program,” or shows other good cause. However, whether to excuse a juror for hardship lies within the trial court’s discretion. Moreover, a trial court’s discretion to excuse jurors exists independent of and in addition to its statutory duty to excuse jurors.

The Court held that contrary to appellant’s assertion, the trial court did not issue a blanket, indiscriminate excusal of all jurors who raised a hardship. Besides the fact that some jurors were denied a hardship request, the record showed that the trial court complied with the county superior court’s standing order regarding juror excusals. The court issued two separate orders listing every juror that was excused as well as the reason for the excusal. In the second order, the trial court thoroughly explained the procedure that was followed with regard to excusing potential jurors: “First, no juror was excused or deferred unless that juror made inquiry to the clerk’s office requesting to be excused. After the juror requested to be excused, the clerk informed the [trial court] of the reason for the request, and the [trial court] made a decision to excuse the juror based on that information, to contact the juror personally and inquire of him or her as to the request, or to deny the request.” At a pre-trial hearing, the trial court went through the list of all jurors who were excused and gave

reasons for his actions. Additionally, there was no evidence that the excusals or deferrals were allowed in such a manner as to alter, deliberately or inadvertently, the representative nature of the jury lists. Finally, the jury panels which were put upon the accused contained 101 veniremen, substantially more than required by OCGA § 15-12-160.

Moreover, the Court found that *Yates* was distinguishable. The *Yates* Court emphasized that the discretion to excuse jurors lies with the trial court. However, in *Yates*, the county clerk, without any written guidelines and without any input by the trial court, granted the excusals. Here, the trial court, not the clerk, granted all the excusals and also followed specific written guidelines provided by the judicial circuit. The *Yates* Court also pointed out that the clerk made no inquiry into the nature of most of the excuses and appeared to have granted every request. In contrast, the trial court here personally telephoned those jurors who he believed required a deeper inquiry into their hardship request, and not all jurors were granted a deferral. Finally, the excusals of potential jurors in *Yates* were in violation of a previous order in that case issued by the trial court requiring the defense to be present when any juror was excused, and the defense was not given any notice of any excusals until the first day of voir dire. Here, the trial court issued an order informing appellant that he would be granting excusals to potential jurors without counsel present, and also provided appellant with updates of the jurors excused and the reasons therefore. Hence, *Yates* did not demand a reversal in this case. Although the record did not contain an affidavit for every excused juror, after a thorough review of the trial court's procedure, the Court did not find such disregard of the essential and substantial provisions of the statute as would vitiate the array.

Search & Seizure; Vehicular Homicide

Jones v. State, A11A1608 (1/18/12)

Appellant was convicted of two counts of first degree homicide by vehicle, one count of first degree feticide by vehicle, and two counts of DUI. She argued that the trial court erred in denying her motion to suppress the results of her blood-alcohol test because the warrant used to obtain her blood samples from the

hospital where she was treated on the night of the accident was unlawfully broad.

The Court found that the warrant specifically stated that the items to be seized were on the property of the hospital where appellant was treated on the night of the accident and described the items as follows: "blood samples withdrawn from Blossom Lorayne Jones, all medical records pertaining to the treatment, and toxicology screens received during admission, which is evidence in the crime of Homicide by Vehicle . . ." Appellant argued that the warrant was unlawfully broad in that it allowed the State to seize any of her medical records regardless of whether such records related to the accident.

The Court disagreed. Citing *King v. State*, 276 Ga. 126 (2003), the Court held that a defendant's rights are not violated "when the State obtains private medical records through a search warrant without notice to the defendant or a hearing on the request." This is because the limitations on the State's ability to obtain medical records through a search warrant is narrowly tailored to satisfy the State's compelling interests, and there is no need to strike a new balance between these interests and a defendant's privacy concerns. Here, as in *King* and contrary to appellant's assertion, the warrant was narrowly drafted to seek only the blood samples and medical records from the hospital where she was treated on the night of the accident.

Moreover, the Court stated, even if the warrant could be construed, as appellant argued, as authorizing a broader seizure of all of her medical records instead of only those relevant to her treatment related to the accident, she failed to show that any such broader seizure occurred and thus failed to show any harm. Indeed, where a search as it was actually conducted is lawful, it is not rendered invalid merely because the warrant pursuant to which it was made was overbroad. Accordingly, the trial court did not err in denying appellant's motion to suppress the results of her blood-alcohol-content test obtained via the seizure of her blood samples and pursuant to the search warrant.

Jurors; Mistrial

White v. State, A11A1759 (1/18/12)

Appellant was convicted of VGCSA. He argued that the trial court erred by denying his

motion for mistrial, on the ground that "bias and prejudicial interest were demonstrated by the jurors because they were worried about [appellant's] note-taking." The record showed that prior to being sworn, the jury delivered a message to the trial judge that they were concerned with their personal information being made available since they were identified as jurors. Defense counsel moved for a mistrial or to otherwise dismiss the jury, arguing that the jury's concern, as a whole, that appellant had their names and where they worked, was biased or prejudicial on its face.

The Court stated that as an initial matter, a mistrial is not a proper or viable remedy before the jury has been empaneled and sworn. Even though counsel failed to follow the correct procedure or to use the proper procedural tool, however, a court will not rely upon inaccurate nomenclature when the relief sought is clear. Trial courts have broad discretion to evaluate and rule upon a potential juror's impartiality, based upon the ordinary general rules of human experience, and appellate courts will not interfere with that discretion unless it has been abused. The test to be applied is whether the remarks were inherently prejudicial and deprived defendant of his right to begin his trial with a jury free from even a suspicion of prejudgment or fixed opinion.

Here, after appellant's motion for mistrial, the trial court presented to each individual juror a curative instruction, as well as additional voir dire questions, to evaluate their impartiality prior to the commencement of trial. At the conclusion of the instruction, the trial court asked whether the instruction answered their concerns. Each juror responded to the trial court's question in the affirmative. Upon further voir dire questioning, as requested by defense counsel, each of the jurors expressed that he or she had not formed any opinion concerning the guilt or innocence of appellant, did not have any prejudice or bias, either for or against him, and that he or she was perfectly impartial between the State and appellant.

The Court found that the trial court's curative instruction and the jurors' responses to the additional voir dire questions were adequate to dispel any alleged juror bias or prejudice. As such, each juror was prima facie competent to serve. Therefore, the trial court did not abuse its discretion in denying appellant's motion for mistrial.

Wiretaps; Listening Posts

Luangkhot v. State A11A1688; A11A2146; A11A2281 (1/18/12)

Three appeals were consolidated. In each, appellants argued that the trial court erred in denying their motions to suppress because the wiretap warrants, extensions, and amendments were not authorized under Georgia's wiretap statute. The record showed that in early 2007, state and federal officers assigned to the Atlanta High Intensity Drug Trafficking Area task force ("Atlanta HIDTA") received information from a confidential informant regarding an ecstasy distribution ring operating in and around Gwinnett County. Based on phone number information provided by the informants, recordings of phone calls between the informants and the targeted suspects, as well as surveillance of several controlled buys of ecstasy from the targeted suspects in Gwinnett County, the Gwinnett County District Attorney obtained a series of 25 investigative warrants, extensions, and amendments from Gwinnett County Superior judges authorizing wiretaps of numerous telephone lines. Because Atlanta HIDTA was conducting the investigation, the monitoring station was located at the Atlanta HIDTA office in Fulton County. The actual interceptions occurred in the "wire room" of the Atlanta HIDTA office. The warrants, extensions, and amendments resulted in the interception of a number of appellants' communications, all of which they subsequently moved to suppress.

Appellants did not dispute that Gwinnett County Superior Court judges had both subject matter jurisdiction and venue over the crimes for which they were indicted. Rather, appellants contended that the wiretap warrants, extensions, and amendments were not authorized under the state wiretap statute, because both the listening post and the physical location of the intercepted phones were located outside Gwinnett County.

The Court disagreed. OCGA § 16-11-64 (c) provides that "[u]pon written application, under oath, of the prosecuting attorney having jurisdiction over prosecution of the crime under investigation, or the Attorney General, made before a judge of superior court, said court may issue an investigation warrant permitting the use of such device, as defined in Code Section 16-11-60, for the surveillance of such person or place to the extent the same

is consistent with and subject to the terms, conditions, and procedures provided for by Chapter 119 of Title 18 of the United States Code Annotated, as amended." Citing 18 USC § 2518 (1), (3) for their interpretation, appellants argued that Georgia law, like federal law, imposes a "territorial jurisdiction" upon Georgia superior court judges that is limited to the county in which the judge sits, and that therefore the Gwinnett County Superior Court judges could not issue wiretap warrants for interceptions occurring beyond the bounds of Gwinnett County.

The Court looked at the legislative history of Georgia's wiretap statute and found that currently, the plain language of the wiretap statute places a territorial limitation only upon the prosecuting attorney who applies for the warrant, i.e. "the prosecuting attorney having jurisdiction over prosecution of the crime under investigation[.]" OCGA § 16-11-64 (c). The statute otherwise requires only that the wiretap warrant be issued by "a judge of superior court[.]" OCGA § 16-11-64 (c). Thus, given the plain language and legislative history of our state's wiretap statute, combined with Congress' intent for the states to define "territorial jurisdiction," the Court held that OCGA § 16-11-64 (c) authorized Gwinnett County Superior Court judges, who had jurisdiction over the crimes being investigated, to issue wiretap warrants for interceptions occurring outside of Gwinnett County. Therefore, the trial court properly denied appellants' motions to suppress the evidence obtained from the wiretaps.