

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 12, 2016

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THIS WEEK:

- **State's Right to Appeal; O.C.G.A. § 5-7-1(a)(5)**
- **Discovery; Prosecutorial Misconduct**
- **Character; Evidence of Gang Participation**
- **Insanity Defense; Double Jeopardy**
- **Severance**
- **Jury Charges**
- **Timeliness of Delinquency Petitions; O.C.G.A. § 15-11-521(a)**

State's Right to Appeal; O.C.G.A. § 5-7-1(a)(5)

State v. Andrade, S15G866 (2/8/16)

The trial court granted Andrade's motion to suppress the statements he made to law enforcement, finding them to be involuntarily made. The State appealed 17 days later. The Court of Appeals dismissed the State's appeal as untimely, finding that the State had attempted to bring its appeal under O.C.G.A. § 5-7-1(a)(5), which requires that a notice of appeal be filed within two days of the order or judgment from which the appeal is taken. The Supreme Court granted the State's petition for writ of certiorari.

The State contended that the appeal was taken under O.C.G.A. § 5-7-1(a)(4), pursuant to which it had thirty days to file a notice of appeal. The Court agreed. The Court stated that for nearly forty years, both it and the Court of Appeals have acknowledged repeatedly that an appeal from an order suppressing a statement on the ground that it was involuntary or otherwise obtained by unlawful means is properly brought under O.C.G.A. § 5-7-1(a)(4). Nevertheless, the

Court of Appeals appeared to have thought that this 40 years of precedents were somehow abrogated in 2013 when the General Assembly amended O.C.G.A. § 5-7-1 to add paragraph (a)(5). But, the Court found, there is nothing in the 2013 legislation that suggests any limitation of the previously settled scope of O.C.G.A. § 5-7-1(a)(4). Just as it did before the enactment of O.C.G.A. § 5-7-1(a)(5), O.C.G.A. § 5-7-1(a)(4) authorizes the State to take appeals from pretrial orders that suppress or exclude evidence on the ground that it was obtained in violation of law. A pretrial order suppressing evidence of a statement on the ground that it was involuntary is such an order. An appeal from such an order is *not* authorized by O.C.G.A. § 5-7-1(a)(5), which is concerned instead with evidence excluded on *other grounds*, such as evidence excluded pursuant to general rules of evidence. Therefore, the Court concluded, the Court of Appeals was mistaken when it found that the appeal here was subject to O.C.G.A. § 5-7-1(a)(5), and it erred when it dismissed the appeal.

Discovery; Prosecutorial Misconduct

Tarpley v. State, S15A1457 (2/8/16)

Appellant was convicted of malice murder. He contended that the trial court abused its discretion by refusing to exclude the medical examiner as a witness when the State violated the reciprocal discovery requirements by failing to include the medical examiner's name on a witness list and by failing to provide the defense with a copy of the autopsy report. Specifically, he argued that the untimely disclosure of the medical examiner

as a witness prevented him from learning that the medical examiner “had pending forgery charges and had been disciplined for inappropriate conduct by the [Georgia Bureau of Investigation]” and using that information to impeach the medical examiner. Further, because he did not receive a timely copy of the autopsy report, he did not learn until halfway through trial that swabbings from the victim’s hands had not been tested for gunshot residue.

But here, the Court found, the trial court remedied the discovery violation in the following ways: appellant was allowed to interview the medical examiner; the trial court continued the trial to allow the gunshot residue test to be completed; once it was determined that there was gunshot residue on the victim’s hands, appellant was permitted to interview the individual who performed the gunshot-residue test and call him as a witness; and the parties were permitted to conduct an additional voir dire of the jury to address the two new witnesses.

Moreover, the Court found, while appellant contended that the trial court should have excluded the testimony of the medical examiner, appellant failed to establish prejudice sufficient to warrant such a harsh sanction; notably, appellant acknowledged that he killed the victim, and he failed to demonstrate that his inability to impeach the medical examiner hindered his defense. Thus, the Court concluded, in light of the lack of prejudice resulting from the discovery violations, the trial court exercised sound discretion in this case.

Character; Evidence of Gang Participation

Finley v. State, S15A1595 (2/8/16)

Appellant was convicted of murder and conspiracy to commit armed robbery. The evidence showed that appellant and his long-time friend Cushenberry, after spending all their money partying, were looking to make some money through a robbery. They targeted the victim because he had a job and he was a drug dealer. Appellant, Cushenberry, and an additional two co-conspirators attempted to rob the victim and during the robbery, the victim was shot and killed.

Appellant argued that the trial court erred when it admitted evidence that tended to show he was involved in a gang. This evidence

included tattoos, photographs of rap albums, social media postings, and drawings that appellant had apparently made on his shoes. The Court stated that it is within the trial court’s sound discretion to determine whether to admit evidence, and evidence that is relevant and material to an issue in the case is not rendered inadmissible because it incidentally places the defendant’s character in issue. Here, the evidence showing that appellant and his three co-conspirators were all involved in a gang was relevant to show the affiliation between the four men and explain the motive of the principals in committing the crimes. The jury could infer that two of the co-conspirators were willing to commit crimes that had been orchestrated by appellant and Cushenberry — and that allowed the unemployed appellant and Cushenberry to continue their weekend of “partying” by living off the spoils of crimes directly committed by the other two conspirators — because they all were affiliated with the same gang. It is well established that involvement with a gang may be admissible to show motive and, the Court found, the evidence of gang involvement here supported the State’s theory of how the co-conspirators were affiliated and what motivated them to commit the crimes in the way that they did. As a result, the trial court did not err when it admitted evidence of gang involvement.

Insanity Defense; Double Jeopardy

Otis v. State, S15A1717 (2/8/16)

Appellant was charged with malice murder and six other related offenses. After opening arguments in a jury trial, the defense revealed its intent to pursue an insanity defense, for which it had not given prior notice to the State. The defense contended that notice pursuant to Uniform Superior Court Rule 31.1 was not required, citing *Abernathy v. State*, 265 Ga. 754 (1995). The State sought a continuance in order to prepare to present rebuttal evidence. The trial court, however, sua sponte, and over appellant’s objection, declared a mistrial. Appellant filed a plea in bar, alleging double jeopardy and after the trial court denied the plea, he appealed. The Court reversed.

The Court noted that in *Abernathy*, it stated that “[b]ecause the purpose of notice is to give the State an opportunity to obtain an independent expert mental health evaluation and prepare its

evidence in rebuttal, ... [a defendant] need not provide notice pretrial if he intends to present evidence of mental illness solely through lay witnesses.” The trial court found that *Abernathy* only applied in death penalty cases. But, the Court found, its holding and reasoning were not limited to that context. The Court also noted that in the two decades since *Abernathy* was decided, the Council of Superior Court Judges has not sought to amend the Uniform Superior Court Rules in any manner that would narrow the *Abernathy* holding in this regard. Accordingly, the circumstances in this case did not demand entry of mistrial. The trial court therefore erred in entering a mistrial over the appellant’s objection because appellant did not violate USCR 31.1 when he announced his intent to raise the insanity defense based solely on lay witness testimony without first giving timely notice to the State. As a result, appellant may not be retried because such retrial would be a violation of appellant’s right against double jeopardy.

Severance

Marquez v. State, S15A1459 (2/8/16)

Appellant was convicted of murder and the unlawful possession of a firearm during the commission of a felony. Appellant and two others conspired to rob a dope dealer and the dope dealer was shot and killed. All three were indicted together. One of them pled and testified against appellant and his remaining co-defendant. Appellant argued that the trial court erred in failing to sever his case from the remaining co-defendant. The Court disagreed.

The Court stated that in ruling on a severance motion, the court should consider: (1) the likelihood of confusion of the evidence and law; (2) the possibility that evidence against one defendant may be considered against the other defendant; and (3) the presence or absence of antagonistic defenses. The burden is on the defendant requesting the severance to do more than raise the possibility that a separate trial would give him a better chance of acquittal. He must make a clear showing that a joint trial would lead to prejudice and a consequent denial of due process.

Here, appellant only argued that he and his co-defendant asserted antagonistic defenses at trial. Appellant testified at trial and claimed that his co-defendant shot the victim by accident. His co-defendant did not testify, but called several witnesses in support of his alibi defense, claiming

he was not at the scene at the time of the killing. The Court stated that it would assume that these defenses were somewhat antagonistic. However, the presence of antagonistic defenses alone is insufficient to require severance and prejudice must also be shown.

Appellant argued that the joint trial forced him not only to defend against the proof offered by the State, but also to defend against the alibi defense pressed by his co-defendant. But, the Court stated, this is true in any case in which co-defendants present antagonistic defenses. Appellant also argued that he was prejudiced because he could not call his co-defendant as a witness in a joint trial. But, the Court stated, the inability to compel the testimony of a co-defendant in a joint trial does not require severance in the absence of a showing that the co-defendant would, in fact, have been more likely to testify if they were tried separately and that the testimony of the co-defendant would have been exculpatory. And here, appellant made no such showing. Finally, appellant argued that he was unable to test the antagonistic alibi defense by a thorough and sifting cross-examination of his co-defendant. But, the Court noted, appellant had no opportunity to cross-examine his co-defendant because his co-defendant did not testify and appellant did have an opportunity to cross-examine the witnesses that his co-defendant called in support of the alibi defense. Accordingly, because appellant failed to show that he was so prejudiced by a joint trial that he was denied due process, he failed to show an abuse of discretion in the denial of his motion to sever.

Jury Charges

Springer v. State, A15A0598 (1/12/16)

After the Supreme Court reversed the Court of Appeals in *State v. Springer*, 297 Ga. 376 (2015) regarding mutually exclusive verdicts, the case was remanded to the Court of Appeals to consider appellant's remaining enumerations of error. Specifically, appellant contended that the trial court erred in refusing to charge the jury on transferred justification and that the trial court erred in instructing the jury that it could consider a witness's level of certainty regarding identification.

As to the instruction regarding transferred justification, the Court noted that rather than give appellant's requested

charge on transferred justification, the trial court instructed the jury on justification, self-defense, and misapprehension of fact and intent. It further charged the jury that accident or speculation of guilt was insufficient to authorize a conviction. Further, at the request of appellant's counsel, the trial court did not charge the jury on transferred intent. Thus, the Court concluded, although the better practice may have been for the trial court to include a specific charge on transferred justification, considered as a whole, the court's charge made clear to the jury that it should acquit appellant if it determined he was justified in firing his weapon, regardless of whom the bullet struck.

As to the level of certainty instruction, the State conceded that the instruction was error, but argued that it was harmless error. The Court agreed, given the evidence at trial and the trial court's instructions on a whole.

Timeliness of Delinquency Petitions; O.C.G.A. § 15-11-521(a)

In re C.M.B., A15A2070 (1/11/16)

In a case of first impression, appellant appealed from an order denying his petition to dismiss the delinquency petition against him as untimely. The evidence showed that the order following his detention hearing was signed by the juvenile court at 1:00 p.m. on Thursday, February 5, 2015. The delinquency petition was filed on Monday, February 9, at 1:24 p.m.

Appellant contended that the trial court erred in its interpretation of the 72-hour rule under O.C.G.A. § 15-11-521(a). Specifically, he contended that under the law, the delinquency petition had to be filed by Sunday, February 8, 2015 at 1:00 p.m. to be timely. The Court disagreed.

The Court found that under the clear meaning of the time-calculating provision of O.C.G.A. § 15-11-5(a) and (c), the time did not run as appellant contended. First, "hours" are a "measurement of time" under O.C.G.A. § 15-11-5(a), and thus the first day when the detention order was signed does not count toward the calculation. Therefore, Friday, February 6, 2015 comprised the first 24 hours of the 72-hour period. Second, because seventy-two hours is clearly a period of time that is less than seven days, under O.C.G.A. § 15-11-5(c), intervening weekend days are

excluded from the computation, and under the new Juvenile Code, "[w]eekend" means Saturday or Sunday." O.C.G.A. § 15-11-2(76). Thus, the Court held, after applying the plain and unambiguous language of O.C.G.A. § 15-11-5(a) and (c), the 72-hour period expired at the end of the day on Tuesday, February 10. Accordingly, the trial court properly found that the delinquency petition was timely filed on Monday, February 9.