

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 27, 2015

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Chuck Olson
General Counsel

Lalaine Briones
State Prosecution Support Director

Sharla Jackson
Domestic Violence, Sexual Assault,
and Crimes Against Children
Resource Prosecutor

Todd Hayes
Sr. Traffic Safety Resource Prosecutor

Joseph L. Stone
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Leah Hightower
State Prosecutor

Kenneth Hutcherson
State Prosecutor

Nedal S. Shawkat
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

- **Sentencing for Juveniles; Judicial Misconduct**
- **Similar Transactions; Rule 404**
- **Victim's Rights; Prosecutorial Misconduct**
- **Influencing a Witness; Testimony of Court Reporter**
- **Motion for Continuance; Dilatory Tactics**
- **Appellate Jurisdiction; Untimely Motion for New Trial**
- **Recusal; State's Right of Appeal**

Sentencing for Juveniles; Judicial Misconduct

Bun v. State, S14A1703 (2/16/15)

Appellant was convicted of the malice murder of a deputy sheriff. Although he was 17 years old at the time of the offense, he was sentenced to life without parole. He contended that the United States Supreme Court's decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 567 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. ____ (2012), required a finding that the imposition of a sentence of life without parole on a juvenile defendant in a homicide case constitutes cruel and unusual punishment in violation of the federal and state constitutions. The Court disagreed.

The Court noted that the identical issue was raised and decided adversely to appellant in *Foster v. State*, 294 Ga. 383, 387 (11) (2014), based on the Court's recognition that O.C.G.A. § 16-5-1 does not under any circumstance mandate life without parole but gives the sentencing court discretion over the

sentence to be imposed after consideration of all the circumstances in a given case, including the age of the offender and the mitigating qualities that accompany youth. Moreover, the Court looked to the Eleventh Circuit and other jurisdictions and found that these courts have similarly concluded that *Roper*, *Graham*, and *Miller* do not stand for, or demand, the conclusion that a sentencing court is categorically barred from sentencing juveniles in a homicide case to life imprisonment without the possibility of parole.

Appellant also argued that his trial counsel rendered ineffective assistance by failing to object to the testimony of a former juvenile judge who had presided over a number of appellant's juvenile cases but was no longer acting in any judicial capacity. The Court noted that the judge's testimony, offered during the sentencing phase of trial, related to factual information from appellant's juvenile court records, including information regarding appellant's delinquency dispositions, involvement in gang activity, poor academic record, psychological disorders, and drug use. She also offered her view that appellant's juvenile record indicated he was a threat to society and that he should receive a sentence of life without parole. Appellant argued his counsel should have objected to the judge's testimony because it was prohibited under Canon 2 of the Georgia Code of Judicial Conduct which states that judges "shall avoid impropriety and the appearance of impropriety in all their activities" and "should not testify voluntarily as [] character witnesses."

However, the Court found, appellant's reliance on the Code of Judicial Conduct was misplaced. The Code of Judicial Conduct, which is intended to provide a

structure for regulating judicial conduct through disciplinary agencies, is limited in its application to officers of a judicial system performing judicial functions and, in some circumstances, to judicial candidates. Thus, even assuming the Code of Judicial Conduct could be asserted in a criminal proceeding as a basis for the exclusion of evidence, the Code did not apply to the judge because she was not a judge or judicial candidate at the time her testimony.

Similar Transactions; Rule 404 *Chynoweth v. State, A14A1764 (2/11/15)*

Appellant was convicted of one count each of riot in a penal institution and felony obstruction. Appellant argued that the trial court erred in allowing as a similar transaction evidence of his unprovoked attack on a cellmate that occurred more than two months prior to trial. Following the Eleventh Circuit, the Court stated that it utilizes a 3-part test for determining if evidence is admissible under Rule 404(b): 1) it must be relevant to an issue other than the defendant's character; 2) there must be sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the act(s) in question; and 3) the probative value of the evidence cannot be substantially outweighed by undue prejudice, and the evidence must otherwise satisfy the Rules of Evidence.

Appellant argued that the subsequent act served only to show a general propensity for violence. The trial court found that the act was relevant to the issue of intent, particularly with the notice of intent to raise the defense of insanity. The Court stated that the relevance of other crimes evidence to "intent" is determined by comparing the defendant's state of mind in committing both the extrinsic and charged offenses. Where the state of mind required for both offenses is the same, the extrinsic crime is relevant to the charged offense. Quoting Milich, the Court stated as follows: The test is to ask: under the facts of the case, is there any danger that a rational jury could find that although the defendant committed the objective, charged acts, he did not intend to do so?

Here, the Court noted, while appellant argued that his defense of insanity "never materialized," there was nevertheless evidence presented that appellant had earlier

been prescribed antipsychotic medication, overdosed on methamphetamine, and had been sent to a mental health facility for evaluation. He also requested jury instructions concerning lack of mental capacity and mental illness. Furthermore, the trial court gave various instructions on mental illness and insanity. The Court found that this was sufficient to raise an issue concerning his state of mind, and it created a danger that a jury could have concluded that while he committed the charged act, he did not intend to do so. Intent was therefore at issue in this case. Consequently, the subsequent act of attacking a cellmate without warning was therefore probative of appellant's criminal intent in the crime charged, and the trial court did not err in allowing it for that purpose.

Victim's Rights; Prosecutorial Misconduct

Atty. Griev. Comm'n of Md. v. Smith, 2015 Md. LEXIS 29 (Md. Feb. 23, 2015)

The highest court in Maryland held that a prosecuting attorney violates the Code of Professional Conduct if he or she fails to comply with state statutes mandating notification of, and communication with, crime victims. As a result, the now former prosecutor has been indefinitely suspended from the practice of law, but may apply for reinstatement after 60 days.

The record showed that the now former prosecutor was assigned a case of an alleged incident of child sexual abuse involving a 10-year old girl. Maryland's victim rights act requires prosecutors to notify victims (and in this case the foster parent) "of their rights under State law, preparing them for the trial, and informing them of critical proceedings in the case." After receiving the case, the prosecutor did not do anything to notify the victim or her foster parent that the case was being prosecuted, took an *Alford* plea without the knowledge of the victim or her foster parent, and did not let them know that when the defendant was later released from custody, he was subject to a "no-contact" order. The prosecutor also obtained a continuance in the case by telling the court that the victim and her foster parent were out of state, when he had not in fact had contact with the victim's family. The victim's foster parent learned that the defendant had entered a plea when he was

about to be released and complained to the State's Attorney (district attorney). As a result, the assistant was terminated and a complaint was filed with the lawyer disciplinary authority.

The Maryland Court of Appeals (their Supreme Court) held that the prosecutor violated Rule 1.3 of the Rules of Professional Conduct by failing to comply with the state's victim rights statute that requires notification and consultation with the victim of a crime. Rule 1.3 provides that "A lawyer shall act with reasonable diligence and promptness in representing a client." [The Maryland Rule 1.3 is identical to GRPC R. 1.3; the maximum penalty is disbarment.] The Court also held that the prosecutor's conduct violated Maryland's RPC R. 8.4(d) ("engage in conduct that is prejudicial to the administration of justice") but, Georgia has not adopted an equivalent rule.

Influencing a Witness; Testimony of Court Reporter *Howell v. State, A14A2073, A14A2074 (2/11/15)*

Appellant was charged in two separate indictments for various offenses relating to domestic abuse of two victims. The indictments were consolidated for trial and he was convicted. The record showed that a recess was taken during one of the victims' testimony. Before the jury came back into the court room to continue with her testimony, the court reporter observed appellant silently "mouth" the words "I love you" to the victim, who was sitting on the witness stand. Later, during cross-examination of appellant, the State asked him if he had done so, and appellant denied it. The trial court then allowed the State to call the court reporter to testify as a rebuttal witness over appellant's objection.

Appellant contended that the trial court erred because the court reporter's testimony constituted improper impeachment on a collateral matter. The Court disagreed. Although a witness may not be impeached because of a discrepancy in his or her testimony regarding a matter that is wholly irrelevant to the case, a witness may be impeached about a collateral issue that is indirectly material to the case. Here, the Court found, if the jury believed that appellant told the victim that he loved her just before she resumed her testimony, the jury could infer that appellant

had intended to influence her testimony and it is well-settled that evidence of a defendant's attempt to influence or intimidate a witness can serve as circumstantial evidence of guilt.

Citing *Slakman v. State*, 272 Ga. 662 (2000), appellant also argued that allowing the court reporter to testify on behalf of the State eradicated the integrity and fundamental fairness of the trial. In *Slakman*, the court reporter overheard a confession of the defendant and that confession was captured on her audiotape. The Supreme Court found that because there was an audiotape of the defendant's statement from which the jury could make its own determination of what had been said, the court reporter should not have been permitted to testify as to what she heard or to testify that the audiotape "verified" her testimony. Here, however, there was no recording of appellant's gesture to the victim for the jury to evaluate. Furthermore, the court reporter did not improperly bolster her own testimony; she merely testified that she had observed appellant "mouth" the words "I love you" to the victim during the recess. Most importantly, the trial court instructed the jury that it was to determine the credibility of the court reporter on the same basis as any other witness. Based on these facts, the Court concluded that the trial court acted properly within its discretion in allowing the court reporter to testify. And, even if it was error to allow the testimony, such error was harmless in light of the overwhelming evidence of appellant's guilt.

Motion for Continuance; Dilatory Tactics

Lewis v. State, A14A2132 (2/10/15)

Appellant was convicted in a bench trial of false imprisonment, abuse of an elderly person, aggravated assault, and hindering a person from making an emergency call. He argued that the trial court abused its discretion by denying his request for continuance, which he requested on the day of trial, after firing his fourth attorney. The Court disagreed.

The Court found that under the circumstances, the trial court was authorized to conclude that appellant was attempting to use the discharge of counsel as a dilatory tactic, which was the functional equivalent of a knowing and voluntary waiver of counsel. In such instances, the trial court may deny

a continuance and proceed to trial with the defendant representing himself. In so holding, the court rejected appellant's argument that a continuance was necessary for him to review evidence handed to him on the day of trial. The Court found that the trial court offered appellant time to review this evidence at the beginning of the proceedings and appellant did not explain how more time would have helped him.

Appellate Jurisdiction; Un- timely Motion for New Trial

Davis v. State, A14A1546 (2/17/15)

Appellant was convicted of burglary and other crimes. His trial counsel filed a motion for new trial more than 30 days after the entry of his sentence and despite the trial court properly informing appellant of his right to appeal. Thereafter, appellant's new counsel amended the motion three times. After a hearing on the motion, appellant filed a timely notice of appeal from the denial of his motion.

The en banc Court dismissed appellant's appeal. The Court found that an untimely motion for new trial is void and did not toll the time for filing a notice of appeal. Therefore, even though the notice of appeal was timely from the order denying the motion for new trial, it was untimely from the judgment and sentence.

Nevertheless, the Court stated, it was mindful of the principle that there is no magic in mere nomenclature, and pleadings are construed to serve the best interests of the pleader, and are judged by function rather than name. Thus, before dismissing appellant's appeal, the Court reviewed the substance of his pleadings to determine whether there was another basis for the Court to exercise jurisdiction over the appeal. First, the Court looked to see if it could be construed as an extraordinary motion for new trial pursuant to O.C.G.A. § 5-5-41(b). The Court found it could not; but even if it could, an appeal from such a motion must utilize the discretionary appeal procedures and appellant had not done so here.

The Court next looked to see whether it could be construed as a motion for new trial filed pursuant to an authorized out of time appeal. Distinguishing *Washington v. State*, 276 Ga.255, 656 (1) (2003), the Court found that nothing in the record showed that the

trial court expressly recognized appellant's untimely motion for new trial as both a request to file an out-of-time motion for new trial and as a motion for new trial. Moreover, nothing in the record showed that the trial court consulted with counsel or that the State consented to treating the out-of-time motion as including a request for an out-of-time appeal. In the absence of any indication in the record that the trial court considered evidence regarding the reasons that appellant's motion was not timely filed, or that the untimeliness of the motion was even brought to the attention of the trial court, the Court could not infer merely from the fact that the trial court ruled on the untimely motion on the merits that the trial court determined that appellant lost his right to appeal due to an error of counsel and that he was therefore entitled to an out-of-time appeal.

Finally, the Court stated that it did not matter if appellant and the State were to join in a request that the Court decide the appeal on the merits, rather than remanding for a formal determination of the issue of whether appellant is entitled to an out of time appeal. Under Georgia law, parties cannot confer appellate jurisdiction by consent, even for the sake of judicial economy and justice. Thus, dismissal was mandated regardless of whether the State consented to the Court's consideration of the unauthorized appeal.

Recusal; State's Right of Appeal

State v. Osborne, A14A1975 (2/12/15)

Prior to arraignment, the DA filed a motion to recuse the judge assigned to the case. Without referring the motion for a hearing before a different judge, the assigned judge dismissed the motion, concluding that it was "legally insufficient on its face." The State appealed, contending that the motion to recuse "should have been heard by a different [j]udge."

The Court stated that under O.C.G.A. § 5-7-1(a)(9), the State may appeal a denial of a motion by the State to recuse a judge. However, the State is not exempt from the requirement of obtaining a certificate of immediate review from the trial court and obtaining permission to file an interlocutory appeal from the appellate court in order to appeal such an order. And, while O.C.G.A.

§ 5-7-2(b) exempts several types of orders, decisions, and judgments listed in O.C.G.A. § 5-7-1(a) from the requirement of obtaining a certificate of immediate review, an appeal from the denial of a motion to recuse a judge is not one of them. Compliance with the applicable statutory provisions is an absolute requirement to confer jurisdiction on an appellate court to hear an appeal, and courts have no authority to create equitable exceptions to such jurisdictional requirements imposed by statute.

Furthermore, the Court found, the State failed to show that compliance with the statutory requirement for appeal should be excused, as necessary to avoid or remedy a constitutional violation concerning the appeal, or that the circumstances attendant in this case rise to a constitutional level. In other words, the State failed to show that jurisdiction had been conferred upon the Court under the “collateral order doctrine.” Accordingly, the Court held, the State having failed to obtain a certificate of immediate review pursuant to O.C.G.A. § 5-7-2, the attempted appeal was nugatory and did not activate the appellate jurisdiction of the Court. The appeal was therefore dismissed.