

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 4, 2011

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Guilty Pleas; Boykin Rights

Wilson v. Kemp, S10A1465 (1/24/11)

The Supreme Court reversed the denial of appellant's habeas petition. Appellant pled guilty to voluntary manslaughter at a "mass guilty plea hearing." Speaking to almost 20 defendants, the trial court stated, "Let me also tell you that you have a right to remain silent thereby not giving any evidence against yourselves; however, if you want to proceed and dispose of your case by pleading guilty, I need for you to answer my questions out loud. ... Do ya'll [sic] understand that?" The record showed that the trial court accepted appellant's plea without otherwise addressing the right against compulsory self-incrimination.

The Court held that while nothing in *Boykin* requires the use of any precisely-defined language or "magic words" during a guilty plea proceeding, the trial court's discussion of appellant's "right to remain silent" did not comply with the requirements of *Boykin* because the trial court specifically limited its discussion of appellant's "right to remain silent"

to the guilty plea hearing itself, without ever informing him that, by pleading guilty, he would waive that right at trial. Although defense counsel testified that he advised appellant of his "constitutional rights," the Court noted that many constitutional rights come into play with a guilty plea. Thus, the conclusory statement was insufficient to support the record to show that appellant was properly apprised that by pleading guilty he would waive his privilege against compulsory self-incrimination. Therefore, the habeas court erred by finding that the State met its burden of establishing that appellant's guilty plea was made voluntarily, knowingly, and intelligently.

Mug Shots; Jurors

Sharpe v. State, S10A1883 (1/24/11)

Appellant was convicted of murder and related crimes. He contended that the trial court erred by admitting a photo array of photos, including his own, which was obviously a mug shot or booking photograph relating to a prior crime. The Court held that in general, mug shots of a defendant taken after arrest with regard to the crime for which they are currently being prosecuted do not prejudice the defendant. If a mug shot relating to a previous crime is introduced into evidence, however, such a photograph is the equivalent of oral testimony establishing the defendant's arrest for a prior crime and would therefore impermissibly place his character in evidence. Accordingly, the trial court erred by admitting appellant's mug shot from a prior arrest. The error, nonetheless, was found to be harmless because of the overwhelming evidence of guilt.

Appellant contended that the trial court erred in giving an unrequested and inappropriate *Allen* charge. The record showed that

after two hours of deliberations, the jury was split and could not reach a verdict, and given the late hour, the court gave, in essence, an abbreviated *Allen* charge. In part, the court stated as follows: “Somebody is going to have to decide this case, okay? And there’s no reason to think that the next jury that gets it is going to be any different than you. Or that the case is going to be tried any differently...” The Court noted that it disapproved of language instructing jurors that a case “must be decided” by some jury. However, the inclusion of such language would not create reversible error where that language was only a small part of an otherwise fair and non-coercive charge. In such cases, the offending language does not cause the charge to become so coercive so as to cause a juror to abandon an honest conviction for reasons other than those based upon the trial or the arguments of other jurors. Moreover, even in situations where the questionable language is more prominent, other factors, such as the length of deliberations following the *Allen* charge and the results of polling the jury on the verdict, may be considered to determine whether a given charge is unduly coercive or not. Based on these factors, the Court determined that the trial court’s *Allen* charge did not improperly coerce the jury, as the jurors deliberated for a considerable time after the instruction was given and reaffirmed their verdict when polled.

Search & Seizure; Hearsay *Glenn v. State, S10A1378 (1/24/11)*

Appellant was convicted of murder and feticide. He argued that the trial court erred in denying his motion to suppress 10 search warrants. The State argued that the motion to suppress was insufficient as a matter of law because it made conclusory allegations and did not state any facts. The Court stated that OCGA § 17-5-30(b) requires the defendant to state in the motion why the search and seizure were unlawful so as to afford notice of the legal issues which will be before the trial court. In other words, the motion must be sufficient to put the State on notice as to the type of search or seizure involved, which witness to bring to the hearing on the motion, and the legal issues to be resolved at that hearing. Here, appellant’s motion to suppress claimed the search warrants were invalid because, among other grounds, the affidavit offered in support of the warrant

applications lacked sufficient reliability because it contained illegally-obtained evidence and was insufficient to authorize a neutral and detached magistrate to believe a crime had occurred. The Court found that the motion filed by appellant was sufficient to put the State on notice that all of the searches it had conducted pursuant to a warrant were at issue, that it was necessary to have present at the hearing the affiant detective, and that the legal issue for resolution was the sufficiency of the affidavit. Accordingly, appellant’s motion to suppress met the requirements of OCGA § 17-5-30(b).

The appellant argued that the warrants were insufficient because they were based on custodial statements made by him that were suppressed. The State conceded that the statements were properly suppressed but argued that when the statements were excised from the affidavit, there was still probable cause for the issuance of the warrants. The Court agreed with the State. In reviewing the affidavit and the warrants, the Court found that the trial court did not err in determining that the remaining contents of the affidavit supported the issuing magistrate’s determination that “there is a fair probability that contraband or evidence of a crime will be found” in the different places to be searched.

Appellant also contended that the trial court erred in denying his motion in limine in which he sought to preclude the State from presenting through the testimony of the victim’s friend and roommate the victim’s hearsay statement about the paternity of the fetus the victim was carrying when she was killed. Acknowledging that the victim/declarant was not available to testify at trial and that the State presented evidence of the reliability of the hearsay, appellant argued that the hearsay statement regarding the paternity of the fetus the victim was carrying was not “more probative of the material fact than other evidence” since the issue of paternity could have been established by means of a paternity test. A paternity test was done by the GBI, but the GBI refused to give the prosecutor an oral result of the test and a written result of the test was not given to the prosecutor until the second day of trial at which time it was shared immediately with defense counsel. Defense counsel argued that the results should not be admitted because of the discovery violation. The Court found that assuming for the sake of argument that it was error to admit the contested hearsay

testimony, that error would not constitute reversible error, because appellant failed to establish harm for the error.

Failure to Preserve Evidence; Law of the Case *State v. Mizell, S10A2064 (1/24/11)*

The State appealed from an order dismissing the murder indictment against Mizell for failing to preserve evidence. The facts, briefly stated, are as follows: The victim’s body was found in a dumpster. In a close-by dumpster at the same apartment complex, other evidence of the murder was found, including cigarette butts. A search of Mizell’s apartment revealed it to be the site of the murder. Other cigarette butts were found in there as well. In a custodial statement, Mizell claimed that someone named Brealand borrowed his apartment and it was he, not Mizell, who committed the murder. Prior to trial, the defense requested that the cigarette butts be preserved as evidence and DNA-tested. The trial court agreed and so ordered. The cigarette butts were requested by the State for DNA testing by the GBI, but long story short, the butts in the dumpster were lost and the ones in the apartment were found after trial. Mizell was convicted at trial. The trial court then granted a new trial because the State failed to preserve the cigarette butts. Thereafter, Mizell filed a motion to dismiss the indictment because the failure to preserve the cigarette butts in the dumpster was the result of bad faith on the part of the State. The trial court agreed, dismissed the indictment and the State appealed.

The Supreme Court reversed. Citing its two recent cases of *Krause v. State*, 286 Ga. 745 (2010) and *State v. Miller*, 287 Ga. 748 (2010), the Court stated that in dealing with the failure of the State to preserve evidence which might have exonerated the defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence. To meet the standard of constitutional materiality, the evidence must possess an exculpatory value that was apparent before it was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. With regard to materiality, the fact that evidence may be “potentially useful” in a defendant’s attempt at exoneration is insufficient to sustain a claim that

the defendant has suffered an abridgment of due process of law due to the destruction or loss of the evidence. The key is the “apparent exculpatory value” of the evidence prior to its destruction or loss and “apparent” in this context has been defined as “readily seen; visible; readily understood or perceived; evident; obvious.”

Here, the cigarette butts were “potentially useful” to the defense Mizell raised in his custodial statement and at trial (that Brealand committed the crimes), but that does not establish that the butts had an “obvious” or “readily perceived” exculpatory value. In fact, “[a]s far as the State knew at the time the butts disappeared, and indeed as far as we know today, the butts were more likely to be *inculpatory* of Mizell.” Even if true that Mizell’s ability to impeach Brealand’s testimony and alibi by placing Brealand at the scene would have been pivotal to Mizell’s defense, the fact remained that the DNA testing of the butts could have been exculpatory or inculpatory. Therefore, the lost cigarette butts were not constitutionally material and that the trial court therefore erred in granting Mizell’s motion to dismiss the indictment.

Mizell also argued that the trial court, in granting his motion for new trial, decided that the cigarette butts were constitutionally material and that the State acted in bad faith in losing the evidence. Consequently, he argued, the doctrines of collateral estoppel, *res judicata*, and law of the case precluded the State from re-litigating those issues in opposing the motion to dismiss the indictment. The Court disagreed. Collateral estoppel and *res judicata* are inapplicable because both require a previous action between the same parties, and the trial court’s orders came in the same action now on appeal. Moreover, the law of the case doctrine applies only when the same issue has been actually litigated and decided. Here, Mizell did not file the motion to dismiss the indictment until after the trial court granted the new trial. Consequently, whether the lost cigarette butts were constitutionally material and whether the State acted in bad faith, were not put in issue until that time, and in granting the motion for new trial, the trial court clearly did not decide those issues. Instead, the new trial order relied solely on the State’s failure to comply with the court’s order to test the cigarette butts, regardless of their “exculpatory or inculpatory nature,” and the order did not mention whether the State acted in good or bad faith.

Search & Seizure

Lewis v. State, A10A1669 (1/21/11)

Appellant was convicted of possession of a firearm by a convicted felon, carrying a concealed weapon, and loitering and prowling. He contended that the trial court erred in denying his motion to suppress. The evidence showed that officers noticed appellant hanging around a gas station/convenience store. Appellant appeared to be “casing” the place. The officers approached and patted him down. The gun was discovered and appellant was arrested.

Appellant conceded that the officers had a particularized and objective basis for stopping and briefly detaining him, but argued that they did not have a reasonable belief that he was armed or posed a danger. The Court disagreed. Here, the Court found, the pat-down was supported by the following combined, particularized facts observed by the officers: the presence of appellant late at night in a high-crime area known for armed robberies; his proximity to a closed convenience store that had been robbed on numerous occasions during closing; appellant’s observation of the store manager in the process of closing the store while standing in an unlit parking lot; his extreme nervousness; his wearing of baggy clothing in which a weapon could be easily concealed; the inadequacy of his explanation to the officers for his presence outside the store; and his initial fleeing from the officers when they pulled into the parking lot. Appellant’s actions were consistent with the officers’ hypothesis that he was contemplating a robbery of the store manager, which, it is reasonable to assume, would likely involve the use of weapons.

Nevertheless, appellant contended, he told the officers that he was waiting for the bus and this should have dispelled their fears for their safety. However, the Court found, one of the officers knew from past experience that this was not a place to be waiting for a bus, and in any event, “[t]he officers were not required to stake their safety on [appellant]’s explanation rather than upon their own determination of whether [appellant] was armed.”

Judicial Comment; OCGA § 17-8-57

Byrd v. State, A10A2279 (1/20/11)

Appellant was convicted of aggravated assault and possession of a knife during the

commission of a crime. He contended that the trial judge violated OCGA § 17-8-57 by expressing to the jury his opinion that venue had been proven in the case. The Court agreed and reversed. During trial, the prosecutor started to ask if crime location was in the county when the trial court judge interrupted the question and said: “It’s in Taylor County. We’ve had two folks to tell us that already.” The prosecutor said: “I understand. Just making sure, Judge.” The judge responded: “I bet that’s the one thing right now I guarantee you that the jury doesn’t have a question that this happened in Taylor County.”

Venue is a jurisdictional fact, and is an essential element in proving that one is guilty of the crime charged. Therefore, the Court held, the trial court violated OCGA § 17-8-57 by expressing his belief that this fact had been proven. The State argued that at the close of the case, the parties stipulated to the fact that venue had been proven and therefore, the error was harmless. The Court disagreed. At the time that the trial court made the improper comment, the issue of venue was still a contested fact. Thus, in light of the mandatory nature of the statute and the case law interpreting the statute, appellant’s conviction was reversed and the case remanded to the trial court for a new trial.

Jury Charges; Closing Arguments

Williams v. State, A10A1984 (1/20/11)

Appellant was convicted of aggravated assault. He argued that the trial court erred in failing to instruct the jury on simple assault as an essential element of aggravated assault. The Court noted that appellant failed to request a charge on simple assault. Thus, the failure to give an unrequested charge constitutes reversible error only when the omission is clearly harmful and erroneous as a matter of law in that the charge that was given fails to provide the jury with the proper guidelines for determining guilt or innocence. The Court found that the charge as given, when viewed as a whole was sufficient to define the offense charged and provided a proper guideline for the determination of appellant’s guilt or innocence.

Nevertheless, appellant contended that *Coney v. State*, 290 Ga. App. 364 (2008) supported his argument that the trial court’s failure to define simple assault in its instruction on

aggravated assault constituted plain legal error. The Court rejected his contention, finding it distinguishable from this case. In *Coney*, there was evidence that the defendant and the victim struggled over a gun and that a gunshot rang out, injuring the victim's hand. Based on this, the defendant requested a jury charge on criminal negligence in connection with reckless conduct as a lesser included offense of aggravated assault, which charge the trial court gave. Since the evidence raised a question as to whether the defendant was guilty of criminal negligence as a lesser included offense to aggravated assault, the *Coney* Court held that the trial court erred in failing to charge the statutory definition of assault. Here, however, there was no evidence that appellant's acts constituted criminal negligence or reckless conduct. Thus, any alleged error in omitting the statutory definition of assault from the trial court's charge on aggravated assault was harmless.

Appellant also argued that the trial court erred in failing to grant a mistrial when the State in its closing argument improperly commented on his failure to call his wife as a witness. The Court noted that appellant immediately moved for a mistrial, arguing that this argument shifted the burden to the defense to produce an alibi witness. But when the trial court denied the motion, appellant failed to request a curative instruction. The Court found that given the overwhelming evidence and the trial court's instructions to the jury explaining the State's burden of proof and the lack of any burden on appellant to introduce evidence or prove his innocence, any alleged error was harmless.

Jury Charges

Osorto-Aguilera v. State, A10A1783 (1/20/11)

Appellant was convicted of child molestation. The indictment accused appellant of committing child molestation by placing his fingers in the victim's vagina. Appellant argued that he was entitled to a new trial because the jury charge was not tailored to the indictment. In support, he cited *Hopkins v. State*, 255 Ga. App. 202 (2002), an aggravated battery case, and *Walker v. State*, 146 Ga. App. 237 (1978), a theft by taking case. The Court found these cases distinguishable because the respective indictments in *Hopkins* and *Walker* alleged that the defendant had committed a crime by one method, and the court instructed

the jury that the crime could be committed by another method not alleged in the indictment. That did not occur in this case because OCGA § 16-6-4 (a) does not provide several methods for committing the offense of child molestation. Thus, it was highly unlikely that the jury found appellant guilty for committing the offense in some other manner than that charged in the indictment.

Appellant contended that the trial court erred in denying his written request to charge the jury on good character. Appellant argued that the charge was warranted based on his testimony that he had no criminal record other than a single misdemeanor involving license plates. However, the Court found, there was no error, because merely having no convictions or a clean record is insufficient to invoke good character.

Continuing Witness Rule

Miller v. State, A10A1702 (1/21/11)

Appellant was convicted of robbery. He argued that the trial court violated the continuing witness rule when the court instructed the jury that it should "collectively share their ideas and share [their] notes [taken during the course of the trial]" during deliberations. The Court held that appellant waived the issue by not objecting. But even if he had objected, the rule was not violated because "notes reflecting an attentive juror's recollection or interpretation of the evidence presented during a trial—which are not evidence and have no evidentiary value—do not fall within the contemplated scope of the continuing-witness objection."