

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 3, 2017

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THIS WEEK:

- **Jury Charges; Recanted Testimony**
- **Sentencing; Void Sentences**
- **Authentication; Cross-examination**
- **Recusal; Judicial Disqualification**
- **Discovery; Expert Opinion**
- **Reputation Evidence; Rule 608**
- **Voir Dire; Excusals for Cause**
- **Juvenile Court; Jurisdiction**

Jury Charges; Recanted Testimony

Huff v. State, S16A1619 (2/6/17)

Appellant was convicted of malice murder and other felonies. He contended that the trial court failed to instruct the jury that the testimony of an accomplice must be corroborated. However, because he did not object at trial, the Court's review was limited to whether the failure to charge amounted to plain error.

The Court noted that evidence from multiple witnesses, including appellant's witnesses and appellant himself, corroborated the accomplice's testimony. Moreover, the Court found, appellant's reliance on *Stanbury v. State*, 299 Ga. 125 (2016), was misplaced. There, the trial court instructed the jury in the language of Georgia Suggested Pattern Jury Instruction § 1.31.90, that "the testimony of a single witness, if believed, is generally sufficient to establish a fact." However, the court failed to charge the relevant language of O.C.G.A. § 24-14-8 requiring corroboration of an accomplice. Under the specific facts of that case, the Court noted that it held

that the trial court did not merely fail to give a corroboration charge, but in effect expressly authorized the jury to convict on the testimony of the accomplice alone, in direct violation of O.C.G.A. § 24-14-8. Under the circumstances of that case, the omission of an accomplice corroboration instruction amounted to plain error.

Here, in contrast, the parties agreed that the trial court did not charge the jury that the testimony of a single witness is sufficient to prove a fact. Instead, the trial court instructed the jury that it was to consider "the evidence in this case, the testimony of the witnesses and the facts and circumstances of the case" in order to determine whether appellant was a party to the alleged crimes. The trial court also charged on mere presence and parties to a crime, repeating the requirement that the State prove every element of the crime beyond a reasonable doubt. Nevertheless, the Court stated, it need not decide whether the absence of a correct instruction, rather than the presence of an incorrect instruction, is reversible error. Here, given the quantum of evidence, combined with the fact that the instruction was incomplete rather than overtly incorrect, appellant failed to show that the instruction likely affected the outcome of the proceedings. Accordingly, there was no plain error.

Appellant also argued that the trial court erred in denying his motion for new trial because the accomplice recanted his trial testimony. But, the Court stated, the fact that a material witness for the State, who at trial gave direct evidence tending strongly to show the defendant's guilt, has since the trial made statements even under oath that his former testimony was false, is not cause for a new trial. Declarations made after trial are entitled

to much less regard than sworn testimony delivered at trial. The only exception to the rule against setting aside a verdict without proof of a material witness' conviction for perjury, is where there can be no doubt of any kind that the State's witness' previous testimony was the purest fabrication. Moreover, the trial court expressly found that it "does not find credibility in [the accomplice]'s recantation." According, the Court found not abuse of discretion in denying the motion for new trial.

Sentencing; Void Sentences

Kimbrough v. State, S16A1610 (2/6/17)

Appellant appealed the trial court's order denying his 2015 motion to vacate as void his sentence of life in prison without the possibility of parole, which was imposed under O.C.G.A. § 17-10-7(b) for a murder he committed in 2004 after being convicted of kidnapping in Florida in 1994. He contended that his sentence of life without parole is void under *Funderburk v. State*, 276 Ga. 554 (2003) which recognized that the sentencing provision under former O.C.G.A. § 17-10-7(c) (2000), the successor to O.C.G.A. § 17-10-7(b) (1991), did not apply to capital offenses, such as murder.

However, the Court found, appellant was sentenced as a recidivist under O.C.G.A. § 17-10-7(b), addressing second-time offenders for "serious violent felon[ies]," not § 17-10-7(c) like *Funderburk*. When appellant committed murder in July 2004, § 17-10-7(b) authorized a sentence of life without parole for "a serious violent felony" like murder if the defendant previously had been convicted in Georgia of a "serious violent felony" or had "been convicted under the laws of any other state or of the United States of a crime which if committed in this state would be a serious violent felony." And, the Court noted, appellant did not dispute that his 1994 kidnapping conviction in Florida was for a crime that if committed in Georgia would be a serious violent felony. O.C.G.A. § 17-10-7(c) begins with the phrase "[e]xcept as provided in subsection (b)," and the Court stated, as it explained in *Funderburk*, the statutory provisions other than § 17-10-7(c) authorized a sentence of life without parole for murder, including specifically § 17-10-7(b).

Nevertheless, appellant argued, even assuming O.C.G.A. § 17-10-7(b) authorized his sentence of life without parole for murder,

his sentence is still void, citing *State v. Ingram*, 266 Ga. 324 (1996); *Johnson v. State*, 280 Ga. App. 341 (2006); *Williams v. State*, 291 Ga. 19 (2012); and *Moore v. State*, 293 Ga. 705 (2013). Appellant contended that these cases stand for the proposition that a sentence of life without parole was available for murders committed before April 29, 2009, *only* if the State had sought the death penalty. The Court disagreed. The clear language of O.C.G.A. § 17-10-7(b) required appellant to be sentenced to life without parole for his conviction of the July 2004 murder in light of his prior kidnapping conviction. Nothing the Court said in cases not involving recidivist sentencing rendered appellant's sentence erroneous, much less void. Furthermore, the Court held, "[t]o the extent that cases like *Ingram*, *Johnson*, *Williams*, and *Moore* may be read as precluding a life without parole sentence based on the recidivist sentencing statutes, that reading is disapproved." Accordingly, the Court affirmed the trial court's judgment denying appellant's motion to correct his sentence.

Authentication; Cross-examination

Smith v. State, S16A1781 (2/6/17)

Appellant was convicted of murder and related offenses. He first contended that the trial court erred by admitting two incriminating recorded jail calls – one between appellant and his brother and the other between appellant and his wife – alleging that the State failed to lay the proper foundation for the phone calls to be admitted. Specifically, he argued that the State failed to properly identify the speakers, the proper operation of the recording devices, and whether any changes or deletions were made to the recordings as required by *Davis v. State*, 279 Ga. 786 (2005) and its progeny.

But, the Court noted, because appellant was tried after Jan. 1, 2013, O.C.G.A. § 24-9-923(c) of the new Evidence Code, not *Davis*, controls. O.C.G.A. § 24-9-923(c) allows the admission of computer controlled audio recordings, such as jail phone calls, "when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered..." And here, an investigator from the DA's Office testified that she was able to access the jail's recorded phone calls through a computer program. The investigator listened

to appellant's recorded calls and explained that she was able to identify the parties on both phone calls because they identified themselves in the recordings on numerous occasions. Moreover, both recordings contained automated information from the County Jail, including the number called, the inmate number, the date and time the call was placed, and a male voice identifying the caller as "Lil' Chris," appellant's nickname. Finally, during the calls, the parties discussed information regarding the case, such as potential witnesses, the ongoing investigation by law enforcement, and the role of appellant's co-indictees in the crimes. All of this evidence tended to show that the automated recordings were, in fact, recordings of the phone calls appellant made from jail to both his brother and wife. Consequently, the Court held, the trial court did not abuse its discretion in admitting these two phone calls at trial.

Next, appellant argued that the trial court erred by admitting letters adduced by the State at trial as authored by him because the State failed to lay the proper foundation for their admission. The Court disagreed. O.C.G.A. § 24-9-901 requires "authentication or identification as a condition precedent to admissibility" which "shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Authentication may be achieved through many means, including, but not limited to: "[t]estimony of a witness with knowledge that a matter is what it is claimed to be," at (b)(1); "[n]onexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation," (b)(2); and, "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" (b)(4). The party proffering the evidence must present sufficient evidence to make out a prima facie case that the proffered evidence is what it purports to be. Once that prima facie case is established, the evidence is admitted and the ultimate question of authenticity is decided by the jury.

Here, appellant's co-indictee testified that he was familiar with appellant's handwriting and further identified the handwriting in many of the letters as belonging to appellant. The co-indictee also testified that many of the letters were either directly given to him by appellant, or were delivered by a third party at

appellant's request. Finally, the content of the letters referenced information concerning the case, including potential witnesses, evidence, and even included an affidavit for the co-indictee to sign stating that appellant was not involved in the crimes. Accordingly, the trial court did not abuse its discretion by admitting appellant's handwritten letters at trial as the State provided sufficient evidence to establish a prima facie case that the letters were written and sent by appellant.

Finally, appellant contended that the trial court violated his right of confrontation by prohibiting trial counsel from fully cross-examining the co-indictee regarding his bias and motive. But, the Court noted, where a witness has not obtained a concrete plea deal from the State in exchange for his testimony, the accused may not bring out the potential penalties faced by the witness. And here, the Court found, the record showed that defense counsel was permitted to cross-examine concerning the co-indictee's potential motive or bias, including the charges he was facing and any potential plea deal. The mere fact that appellant was unable to ask the co-indictee to conjecture about possible punishment did not diminish appellant's attempt to show the co-indictee's motive for testifying on behalf of the State, and did not amount to an abuse of the trial court's discretion.

Recusal; Judicial Disqualification

Barnett v. State, S16A1892 (2/6/17)

Appellant was convicted of malice murder. Appellant argued that the trial judge should have recused herself prior to trial after disclosing that she had represented the victim in an unrelated matter. The transcript showed that at the start of trial, the judge disclosed her previous representation of the victim before becoming a judge. Both defense counsel and appellant waived any conflict.

On appeal, appellant contended that the information disclosed was insufficient for him and his counsel to make a voluntary, knowing and informed waiver. However, the Court noted, the record reflected that appellant made no further inquiry into the trial judge's representation of the victim, and made no motion to recuse the trial judge. Generally, when a party learns of grounds for the potential disqualification of

the judge, he must promptly move for the recusal of the judge, and if he does not, the question of disqualification is not preserved for appellate review. Furthermore, even after appellant learned of the grounds for the potential disqualification of the trial judge, he apparently decided to take his chances with the same judge. Having done so, he could not still preserve the disqualification issue for review in the appellate courts.

Moreover, the Court stated, even assuming the trial judge's failure to recuse could in a rare instance constitute reversible error even though the parties knew of the grounds for recusal but did not make a motion, there was no reversible error. When considering the issue of recusal, both O.C.G.A. § 15-1-8 and Canon 3 of the Code of Judicial Conduct should be applied. The Code of Judicial Conduct provides a broader rule of disqualification than does O.C.G.A. § 15-1-8.

And although none of the provisions of O.C.G.A. § 15-1-8 apply to the facts of this case, appellant contended that the judge's failure to recuse herself constituted a "violation of judicial ethics" and a violation of his due process rights. The Court disagreed. Canon 3 (E)(1)(a) of the former Code of Judicial Conduct, applicable at the time of appellant's trial, provided in part: "Judges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where: . . . the judge has a personal bias or prejudice concerning a party." The alleged bias of the judge must be of such a nature and intensity to prevent the defendant from obtaining a trial uninfluenced by the court's prejudgment. And to be disqualifying, the alleged bias must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. Any analysis of the necessity for recusal is necessarily fact-bound, requiring an examination of the nature and extent of any business, personal, social or political associations, and an exercise of judgment concerning just how close and how extensive (and how recent) these associations are or have been.

The Court found that with regard to appellant's bare assertion that he was denied due process, the constitutional guarantee of due process is not concerned with mere appearances of partiality. To the contrary, due process is concerned with actual bias and absent

a showing of actual bias, due process requires recusal only in particular circumstances in which the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable. And here, the Court determined, while there are no cases in Georgia involving a trial judge's former representation of a victim, federal courts have held that under 28 USC § 455(a) (requiring a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned"), a judge's prior representation of a witness or a party in an unrelated matter does not automatically require disqualification.

Nevertheless, appellant contended that the judge was biased against him as evidenced by her pre-trial order that there would be no continuances, her comments about domestic violence outside of the presence of the jury as she ruled to allow evidence of appellant's acts of violence against others, and her ruling limiting his examination of trial counsel at the hearing on the motion for new trial. However, the Court stated, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. And although some of the trial judge's comments concerning domestic violence took into account considerations not shown by the evidence of record, appellant did not show that these comments were motivated by bias resulting from her prior representation of the victim in the earlier unrelated matter. Thus, appellant failed to show a violation of the former Code of Judicial Conduct and failed to show actual bias or constitutionally intolerable likelihood of bias to support his claim that he was denied due process.

Discovery; Expert Opinion

Wyatt v. State, S16A1581 (2/6/17)

Appellant was convicted of murder in connection with the death of a 2-year-old. During the trial, the State qualified Dr. Andrew Reisner, the neurosurgeon who operated on the victim, as an expert in the field of pediatric neurosurgery. During his direct examination, the prosecutor asked the doctor whether the victim's injuries were "consistent with a shaken baby, shaken impact type injury." Appellant objected because the State failed to provide notice of the doctor's opinion regarding Shaken Baby Syndrome 10 days prior to trial as required by O.C.G.A. § 17-16-4(a)(4). The State argued that it did not violate the reciprocal discovery

statute because there was no written report or oral opinion produced by Dr. Reisner regarding Shaken Baby Syndrome and because the defense had access to the doctor equal to the State. The trial court overruled the objection, finding that appellant was not prejudiced by the alleged non-disclosure as the State had identified and produced reports to the defense regarding the Shaken Baby Syndrome opinions of two other expert witnesses, both of whom had already testified.

The Court found that appellant failed to show he was prejudiced by the State's non-disclosure of Dr. Reisner's opinion regarding Shaken Baby Syndrome, warranting an exclusion of the testimony. As the trial court noted, two of the State's expert witnesses had already testified regarding Shaken Baby Syndrome, and defense counsel admitted that he was on notice that this theory could be put forward by the State through those experts. More importantly, the defense presented its own expert at trial as rebuttal expert testimony. Namely, the expert opined: that the contusions on the victim's brain did not occur as a result of being shaken; that, while the victim's death was caused by blunt impacts to the head, there was no way to determine if the injuries were caused accidentally or intentionally; and that prior falls could account for the victim's brain damage, as is typically seen in cases of sudden infant death syndrome. Accordingly, the Court held, the trial court did not abuse its discretion in admitting the doctor's testimony.

Reputation Evidence; Rule 608

Douglas v. State, A16A1488 (2/8/17)

Appellant was convicted of one count of child molestation. He contended that the trial court abused its discretion by failing to allow him to cross-examine the victim's mother as to her own allegations of molestation by her stepfather, which appellant's counsel contended were false allegations because the stepfather was acquitted of same. Appellant suggested that if the mother made a false accusation against her own stepfather, she was likely to have coached the victim to make a false accusation against him. But, the Court stated, regardless of whether such a line of inquiry would be permissible under O.C.G.A. § 24-6-608(b) (when appellant sought to use the mother's alleged prior false allegations

of sexual misconduct not only to question her credibility but also to indirectly question the victim's credibility as well), the Court stated that it could not say that the trial court abused its discretion in precluding any such cross-examination under the circumstances of the case. Thus, the fact that the victim's mother's stepfather was acquitted on charges of molestation did not necessarily mean that the mother's accusations against her stepfather were false, and appellant offered no other proof of falsity during his proffer, such as a recantation by the mother. Additionally, this specific instance of conduct was temporally remote from the victim's allegations against appellant, and there was no showing of any similarity between the mother's accusations against her stepfather and the victim's allegations against appellant. Therefore, it was not an abuse of discretion to preclude questioning as to this specific instance of conduct.

Moreover, the Court found, even if the trial court erred in precluding appellant's cross-examination of the victim's mother, the error was harmless. Here, appellant's conviction for child molestation was based upon the victim's repeated allegation (both to her mother, the forensic interviewer, and in her trial testimony) that appellant showed her a "dirty" or "nasty" movie on his phone, which she described as containing adults engaged in sexual activities. Additionally, appellant's ex-girlfriend testified that he admitted to having and watching pornography on his phone during the relevant time period, and appellant testified to the same when he took the stand in his own defense. And, of course, law enforcement not only located ten pornographic videos on appellant's phone but also two .pdf documents containing stories that graphically depicted the rapes of girls five-years-old and younger—and the victim was four years old when she claimed that appellant viewed the pornographic video with her on his phone. Thus, in light of this evidence, the Court concluded it was highly probable that if the trial court erred in precluding the cross-examination, the error did not contribute to the jury's verdict.

Voir Dire; Excusals for Cause

Truong v. State, A16A1560 (2/8/17)

Appellant was convicted of robbery, false imprisonment, battery and theft by taking. He

contended that the trial court erred in failing to excuse for cause a prospective juror who had made campaign contributions to the county sheriff. Specifically, he contended that the issue was similar to, and controlled by *Post v. State*, 298 Ga. 241 (2015). The Court disagreed.

First, the Court found that appellant's reliance on *Post* was misplaced because it did not involve the issue of excusing a juror for cause, but instead involved recusal of a judge. And here, there was no showing that the prospective juror held any opinion of appellant's guilt or innocence, let alone an opinion that was so fixed or definite that he was unable to set it aside and decide the case based on the evidence and the court's charge. In fact, the Court noted, when questioned by defense counsel during voir dire about the effect his relationship with the sheriff might have on his impartiality, the juror responded, "I don't think it would have any effect whatsoever." Thus, the Court concluded, because the juror's response to defense counsel's questions demonstrated that he could set aside any opinion and could decide the case on the evidence, the trial court did not abuse its discretion in denying the motion to excuse for cause.

Juvenile Court; Jurisdiction

In Re J.M.A., A16A1481 (2/7/17)

On July 18, 2014, appellant was adjudicated delinquent and placed on probation for one year. On July 16, 2015, the State filed a complaint in the juvenile court, alleging that appellant had committed the delinquent act of violating his probation by failing to complete his community service hours or pay the full supervision fee in violation of O.C.G.A. § 15-11-2(19)(B) (2014). The State subsequently filed a delinquency petition against appellant that contained the same allegations as the complaint and again cited to O.C.G.A. § 15-11-2(19)(B) as the basis for the charge. Appellant moved to dismiss the petition, alleging that the juvenile court lost jurisdiction once his probation ended. The juvenile court denied the motion and after a hearing, adjudicated him a delinquent.

Appellant argued that the juvenile court erred in denying his motion to dismiss the delinquency petition for lack of jurisdiction. Specifically, he argued, the juvenile court no longer had jurisdiction to adjudicate

his alleged violations of probation once his original one-year probationary term ended in July 2015 because there was no statutory or common law basis for tolling the probationary period. The Court stated that as a general rule, once a sentence has been served, the sentencing court loses jurisdiction over the criminal defendant to modify or alter the sentence. Therefore, a sentencing court's jurisdiction to revoke or modify an adult criminal defendant's probation ceases once the term of the defendant's probationary sentence has ended, unless the expiration of the sentence has been tolled based on statutory or common law principles.

However, the Court found, revocation of probation is not the exclusive remedy available to the State under Georgia's new Juvenile Code when a juvenile defendant has violated the conditions of his probation. Thus, the State is afforded two alternative procedural avenues for addressing a violation of probation in juvenile proceedings: file a new delinquency petition alleging the probation violation as a delinquent act pursuant to O.C.G.A. § 15-11-2(19)(B), or file a motion to revoke the juvenile's probation under O.C.G.A. § 15-11-608(b). And here, the State chose the first procedural avenue and filed a new delinquency petition against appellant, alleging that his violation of the conditions of his probation constituted a delinquent act under O.C.G.A. § 15-11-2(19)(B), and the juvenile court adjudicated him delinquent under that petition.

Thus, the Court determined, Georgia case law addressing the jurisdiction of a sentencing court to revoke or modify a probationary sentence, relied upon appellant to support his motion to dismiss, was simply inapposite. Instead, jurisdiction turns on the provisions of the new Juvenile Code that address a juvenile court's jurisdiction over petitions alleging delinquent acts, and in this regard, the Code plainly and unambiguously provides that a juvenile court has exclusive original jurisdiction to hear and decide cases, like the present one, where a child under the age of 17 years is alleged to have committed a delinquent act. Moreover, the Court found, nothing in these statutory provisions suggests that the delinquent act of a violation of probation should be treated differently from other delinquent acts for jurisdictional purposes, and the Court declined to impose different jurisdictional rules by

way of judicial fiat. Accordingly, the Court concluded, the juvenile court had jurisdiction and therefore, did not err in denying appellant's motion to dismiss.