

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 17, 2015

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THIS WEEK:

- **Plea Bargains; Successor in Office**
- **Search & Seizure**
- **Expert Testimony; Harper**
- **Similar Transactions; O.C.G.A. § 24-4-404**
- **Motions for New Trial**
- **Motions to Suppress; Wiretaps**

Plea Bargains; Successor in Office

Syms v. State, A14A1498 (3/18/15)

Appellant appealed from the trial court's denial of his motion to enforce his plea agreement. The record showed that appellant was charged with possession of oxycodone with intent to distribute, which carries a punishment of ten to forty years, or life; two counts of using a communication device during a felony, which is punishable by one to four years; and selling alprazolam, which carries a punishment of one to ten years. The indictment further alleged that appellant had five prior felony convictions. The State also petitioned to revoke appellant's probation for the commission of the four new crimes. The prosecutor and defense counsel reached a plea bargain in which (1) appellant would plead guilty to the charged crimes in exchange for the State not seeking recidivist punishment and recommending a ten-year total sentence, and (2) appellant would not challenge the revocation of his probation, and the State would make no recommendation to the trial court about the appropriate punishment upon revocation, a so-called "open-ended" revocation. On Nov. 13, 2012, the plea

agreement was affirmed in open court at a calendar call, but the plea was put off twice at the request of appellant. Thereafter, on Jan. 1, 2013, a new D. A. took office, the prosecutor who made the agreement resigned, and the new ADA notified defense counsel that it would not honor the plea agreement because it was no longer the policy of the office to waive recidivist sentencing. The trial court denied the motion to enforce the agreement finding that there was no clear, definite and enforceable agreement.

The Court granted an interlocutory appeal and reversed. The Court stated that public policy and the greater ends of justice generally require the enforcement of plea agreements between prosecutors and defendants. Furthermore, the integrity of the office of the district attorney demands that promises made by the district attorney are binding on successors in office to the extent that they are valid and enforceable. A plea agreement is, in essence, a contract between a defendant and the State. Here, the Court noted, the trial court acknowledged that the parties had reached an agreement, but deemed it unenforceable. However, the Court found, according to the principles of contract law, a contract is enforceable as long as the parties have reached agreement on the essential terms, and the absence of agreement on nonessential terms does not render the agreement unenforceable. The Court determined that the essential terms of this plea agreement was that the sentence was ten years to serve, with the probation revocation open-ended. That the agreement was silent as to the specific sentences for each of the charges, in the absence of any agreement that any of the charges would be dropped or reduced,

did not render the agreement unenforceable. Accordingly, the Court concluded, this was simply a case where an agreement as to terms was clearly made, and then the State changed its mind and no longer wanted to honor it. Thus, the trial court erred by denying appellant's motion to enforce the agreement.

Search & Seizure

Duncan v. State, A14A1927 (3/18/15)

Appellant was charged with VGCSA. The trial court denied her motion to suppress and the Court granted her an interlocutory appeal. The evidence showed that appellant was stopped for speeding. Appellant gave the officer her license and appeared particularly nervous. The officer returned to his vehicle, wrote the citation and checked her license status. He was told that she was on probation, but was not told why. He then returned to appellant and asked her to step out of the vehicle. The officer explained the citation to appellant. After she signed the citation, the officer gave her a copy of it and returned her driver's license to her. The officer then asked appellant questions about her probation, including why she was on probation, what were the conditions of her probation, and whether she was reporting in a timely manner. Appellant informed the officer that she was on probation for possession of methamphetamine and driving under the influence. The officer then asked appellant whether she was using drugs and if she had any drugs in the car. Appellant, who appeared very nervous and had labored breathing, responded that she did not have any drugs in the car. The officer nevertheless asked for consent to search, which appellant gave. Methamphetamine was found in the vehicle.

The Court noted that the initial traffic stop was valid. However, once the officer issued appellant's ticket, the initial traffic stop was over and any continued inquiry constituted a second detention. To be lawful, the second detention had to be supported by reasonable suspicion.

Although appellant was on probation, there was no evidence presented that she was subject to a search condition and even if she was, the officer would still have needed reasonable or good faith suspicion to conduct a search because a person's probation status, alone, is not sufficient to justify a search.

Similarly, the Court stated, appellant's nervous behavior was not sufficient to constitute reasonable suspicion of other illegal activity.

Moreover, the Court added, the traffic stop never became a consensual encounter. Normally, a traffic stop ends when a police officer informs the driver that she is free to leave. Notably, the officer never told appellant that she was free to go and a reasonable person in her position, asked to step out of her car on the highway and interrogated by an officer, would not likely have felt free to go about her business. Although a request to search made contemporaneously, or nearly so, with the fulfillment of the traffic stop does not unreasonably prolong the detention, the request must occur immediately, or almost immediately, with the conclusion of the stop. Here, the Court found, after the officer concluded the stop by giving appellant the citation and returning her license, he interrogated her about her probation status, conditions, and reporting, and asked whether she had drugs in her vehicle before he requested consent to search the vehicle. Accordingly, the officer's request to search was not made contemporaneously with the conclusion of the traffic stop and thus, the officer exceeded the scope of a permissible investigation by continuing to detain appellant and asking for her consent to search after he completed the traffic stop. Therefore, the trial court erred in denying appellant's motion to suppress.

Expert Testimony; Harper

Reinhard v. State, A14A1725 (3/18/15)

Appellant was convicted of rape, aggravated sexual battery, and four counts of child molestation against his daughter. He contended that the trial court erred in refusing to grant a mistrial based on a therapist's testimony that his daughter suffered from PTSD. Specifically, he argued that the testimony was inadmissible because the State did not establish that the tests that the therapist administered to his daughter were admissible under *Harper v. State*, 249 Ga. 519, 524-525 (1) (1982). The Court disagreed.

The Court stated that under the longstanding precedent of *Harper*, scientific evidence is not admissible in criminal cases unless the procedure or technique in question has reached a scientific stage of verifiable certainty. It is the role of the trial court to

determine whether a scientific procedure or technique constitutes competent evidence under *Harper*. The trial court may make this determination from evidence presented to it at trial by the parties; in this regard expert testimony may be of value.

Here, the Court found, the therapist testified that her evaluations of children are based on her conversations with and observations of them, as well as standardized assessments and tests. The therapist explained that the standardized assessments that she uses and that she administered to appellant's daughter can only be administered by credentialed therapists, after they have gone through a period of supervised use of the tests. The therapist had been administering these tests for more than five years. The tests are highly reliable; they are designed to give consistent results even if read by different people; they have been used by many people; and research shows that they are accurate and measure what they are designed to measure. Additionally, one standardized assessment used in evaluating appellant's daughter, the Trauma Symptoms Checklist, has a built-in validity scale that indicates whether a child is over-reporting or under-reporting. Appellant cross-examined the therapist as to her qualifications, the assessments she used, and her treatment of his daughter.

Thus, the Court concluded, the State established through the therapist's testimony that the use of these assessments had reached a scientific state of verifiable certainty justifying their admission. Accordingly, the trial court did not abuse its discretion in allowing the therapist to testify that she had diagnosed appellant's daughter with PTSD based, in part, on these tests. And, since the evidence was admissible, a mistrial was not required.

Similar Transactions; O.C.G.A. § 24-4-404

Amey v. State, A14A1803 (3/18/15)

Appellant was convicted of armed robbery, aggravated assault, possession of firearm during commission of a felony, and possession of a firearm by a first offender probationer. He contended that the trial court erred in admitting as a similar transaction evidence of a prior attempted armed robbery (appellant pled guilty under first offender to attempted robbery).

The evidence, briefly stated, showed that in 2011 appellant approached a victim, a woman, as she got out of her car at her apartment complex. Appellant placed a gun to her head and demanded money. He then took her wallet and made her lie on the ground. He then apparently left in a vehicle the woman believed had been following her before she stopped her vehicle. In the 2009 similar transaction, appellant and another person approached a woman while she was unloading items from the trunk of her car. They put a gun to her head and demanded money, so she gave them her purse. Finding no money, they asked for her car keys, but then decided to just leave without taking the vehicle.

The trial court permitted the State to use the similar transaction to prove “identity, proof of motive, and opportunity.” The Court stated that it must use the Eleventh Circuit’s three-part test to determine if evidence of other crimes or acts can be admitted pursuant to Rule 404 (b): (1) the evidence must be relevant to an issue other than defendant’s character; (2) the probative value must not be substantially outweighed by its undue prejudice; and (3) the government must offer sufficient proof so that the jury could find that defendant committed the act.

The Court first looked at Identity. Quoting Milich, the Court stated that “[e]vidence of independent crimes, wrongs, or acts only proves identity, as distinguished from the defendant’s bad character, or propensity to commit a crime, when the other incidents are similar to the charged defense in distinct ways that serve as the defendant’s signature.” The inference of identity flowing from the other crime must be extremely strong and bear such peculiar, unique, or bizarre similarities as to mark them as the handiwork of the same individual. A much greater degree of similarity between the charged crime and the uncharged crime is required when the evidence of the other crime is introduced to prove identity than when it is introduced to prove a state of mind. Much more is demanded than the mere repeated commission of crimes of the same class, such as repeated murders, robberies, or rapes. And here, the Court found, the State failed to prove that appellant’s prior attempted robbery was so similar to the charged offense that the charged offense must have been his handiwork. Robbery of a woman alone at night after she has parked her car “is not in

the nature of a signature so as to be proof of the perpetrator’s identity.”

Next, the Court addressed Motive. Evidence of another crime may be admitted to show the defendant’s motive for committing the crime with which he is charged, but not to demonstrate “a propensity to act in accordance with the character indicated by that other crime or conduct. “Propensity” evidence and “motive” evidence need not overlap. Here, the Court noted, the State asserted that the “evidence makes clear that the motive for the instant and the prior crime was to gain money” because “Appellant demanded money from both women.” As support for this, the State presented evidence that appellant had no job and was sleeping on a futon in the living room of friends at the time of the 2011 charged offense. But, again quoting Milich, the Court noted, “[t]he fact that the accused has committed one kind of crime in the past does not, without more, prove his motive to commit the same kind of crime again. Such logic would make all prior robberies admissible in any robbery case, all prior murders admissible in any murder case, and so on.” Thus, the Court found, in order for the prior attempted robbery to be relevant to the issue of motive, the State would also have had to present evidence showing that appellant lacked a job or had some other specific need for money at the time of the 2009 attempted robbery. The attempted robbery would then be relevant to show that appellant was willing to commit robbery when he had a specific need for money. Therefore, based upon the State’s failure to present evidence of appellant’s impecuniousness at the time of the prior attempted robbery, motive was not a proper purpose for admitting such evidence. The general motive of gaining wealth, which could be the underlying basis for almost any crime, is not sufficient to establish a motive.

The Court then addressed Opportunity. Quoting Milich again, the Court noted that opportunity is “probably the most rarely used purpose of those listed in [Rule] 404 (b). It admits evidence that relates to the defendant’s specific ability or wherewithal to commit the crime charged.” Thus, the Court found, the prior attempted robbery had no connection to the charged robbery that took place almost three years later; it therefore did not provide evidence of appellant’s specific ability to commit the charged crime. While the State

presented evidence showing that appellant was living in close proximity to the location of the charged offense at the time it was committed, it did not present corresponding evidence of appellant’s proximity in connection with the prior robbery at the time it was committed almost three years before. Consequently, opportunity was not a proper ground for admission of the prior robbery evidence.

Finally, the Court addressed whether the admitted evidence prejudiced appellant or was harmless error. The Court found that the evidence was legally sufficient, but not overwhelming. Therefore, based upon the inherently prejudicial nature of other-crime evidence, and the lack of overwhelming evidence, it reversed appellant’s convictions.

Motions for New Trial

State v. Reid, A15A0537 (3/18/15)

Appellants, Reid and Pope, and co-defendant Lewis, were charged with RICO and theft by taking based upon their alleged joint conspiracy to redirect government contracts and misappropriate government property. This case has a long history, but essentially, Crawford took a plea deal and testified against appellants at trial. Reid and Pope thereafter filed timely motions for new trials, but Pope later withdrew his motion and filed a notice of appeal. Almost a year later, the trial court judge identified certain parts of Lewis’s testimony that was lacking in credibility, and because the trial court deemed the testimony material, held that she “[could not] presume that [the testimony] did not impact the jury’s verdict as to [Reid and Pope].” She thereafter granted Reid’s motion for new trial and sua sponte granted Pope a new trial “in the interests of justice.” Notably, Pope had withdrawn his notice of appeal only a few hours before the trial court entered its order.

The State appealed and the Court reversed. Georgia law authorizes the trial court to independently assess a witness’s credibility and grant a new trial if the court determines that the verdict of the jury “is . . . contrary to evidence and the principles of justice and equity,” O.C.G.A. § 5-5-20, or if it is “decidedly and strongly against the weight of the evidence.” O.C.G.A. § 5-5-21. When properly raised in a timely motion, these grounds for a new trial, commonly

known as the general grounds, require the trial judge to exercise a broad discretion to sit as a thirteenth juror. In so doing, the trial court has an affirmative duty not only to assess witness credibility, but also to consider conflicts in the evidence and to weigh the evidence as a whole in order to determine whether the verdict is so decidedly against the weight of the evidence and/or the principles of justice and equity so as to warrant the Court setting it aside. Furthermore, under O.C.G.A. § 5-5-40(h), if a trial court grants a new trial on its own motion, it must do so within 30 days from entry of the underlying judgment. Moreover, outside of that statutorily defined 30-day window, a trial court considering a timely motion for new trial is confined to the grounds raised in the motion itself.

As to Reid, the Court stated that while the trial court exercised its discretion as the thirteenth juror to assess the credibility of at least one witness, it otherwise failed to properly fulfill its affirmative statutory duty to independently weigh the trial evidence as required by O.C.G.A. § 5-5-20 and § 5-5-21. This conclusion was evidenced by the fact that the judge ordered a new trial based upon her inability to “presume that [Lewis’s untruthful testimony] did not impact the jury’s verdict[.]” . But, the Court stated, the impact that Lewis’s testimony may have had on the jury’s evaluation of the evidence was not the proper inquiry under the general grounds. Rather, after assessing Lewis’s credibility and identifying the offending testimony, it was incumbent upon the trial court to then examine and weigh the remaining evidence and independently consider whether the jury’s verdict was “contrary to [the] evidence and the principles of justice and equity,” O.C.G.A. § 5-5-20, or was “decidedly and strongly against the weight of the evidence.” O.C.G.A. § 5-5-21. Accordingly, the Court vacated the trial court’s order and remanded for proper consideration of the general grounds, as well as the remaining arguments contained in Reid’s motion for new trial.

As to Pope, the Court found that the trial court lacked the authority to reverse his judgment of conviction. The record was undisputed that Pope did not have a motion for new trial pending at the time the trial court entered its order, which occurred nearly a year after the entry of judgment. Because the trial court’s sua sponte grant of a new trial fell

outside of the 30-day window prescribed by the statute, it was erroneous as a matter of law.

Motions to Suppress; Wiretaps

Estrada-Nava v. State, A14A1822; A14A1958; A14A2004 (3/19/15)

Appellants were convicted of trafficking in cocaine based in part on evidence obtained from a wiretap of a cell phone of one of the appellants. They contended that the trial court erred in admitting evidence obtained from the wiretap because the superior court’s order granting the wiretap warrant authorized the warrant to be executed outside of its judicial circuit, in contravention of *Luangkhhot v. State*, 292 Ga. 423 (2013). The Court noted that some of the appellants filed motions to suppress arguing that the wiretap authorizations had expired, the intercepted calls exceeded those allowed by any warrant, and the intercepted calls were not properly minimized. None of them, however, filed motions to suppress on the grounds that the wiretap evidence should be suppressed under *Luangkhhot* because the superior court lacked authority to issue a wiretap warrant that was executed outside its judicial circuit.

Under O.C.G.A. § 17-5-30(b), a motion to suppress must “be in writing and state facts showing that the search and seizure were unlawful.” Compliance with O.C.G.A. § 17-5-30(b) is required because evidence exclusion is an extreme sanction and one not favored in the law. On a motion to suppress, the State is entitled to proper notice of the issue raised or it will be deemed waived. In other words, the suppression 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. Therefore, the Court held, since none of the appellants filed a motion to suppress arguing that the superior court lacked authority to issue the wiretap warrants in this case, they waived this entire issue. According, they presented nothing for the Court to review, and the Court upheld the denial of their motions to suppress.