

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 29, 2011

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THIS WEEK:

- **Aggravated Assault, Voluntary Manslaughter**
- **Statute of Limitations**
- **Sentencing**
- **Right to Remain Silent**
- **Impeachment; Prior Consistent Statements**
- **Due Process; Lost Evidence**
- **Sufficiency of Indictment; Victim Testimony**

Aggravated Assault, Voluntary Manslaughter

Gresham v. State, S11A0382 (4/18/2011)

Appellant was convicted of malice murder and possession of a weapon during the commission of a crime after the shooting death of his wife. The trial court sentenced appellant to life in prison for malice murder, twenty years consecutive for aggravated assault, and five years consecutive on the weapons possession count.

Appellant contended that the trial court erred in refusing to charge the jury on voluntary manslaughter. Appellant testified that he and his wife were arguing about money and when she verbally provoked him he “snapped,” which he asserted could be considered voluntary manslaughter. The Court held that the trial court did not err in refusing the voluntary manslaughter charge. Words alone are not sufficient provocation for a killing to be considered voluntary manslaughter, which under OCGA § 16-5-2 (a) is defined as a killing that occurs “solely as the result of a sudden, violent,

and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person.”

However, the Court agreed with appellant’s other contention, that the trial court should not have sentenced appellant on the aggravated assault counts in addition to the malice murder count. When valid guilty verdicts are returned on both alternative counts of malice and felony murder, the alternative felony murder count is vacated by operation under OCGA § 16-1-7. Thus, there is no felony murder count into which the underlying felony can merge, since the felony murder conviction has been statutorily vacated. Since the aggravated assault and the murder occurred simultaneously, the evidence used to prove the aggravated assault was established by the same but not all of the facts required to prove malice murder, and the conviction and sentence for the aggravated assault count must be vacated. Therefore, the Court affirmed the trial court’s convictions of malice murder and possession of a weapon during the commission of a crime, but vacated the aggravated assault conviction.

Statute of Limitations

Lee v. State, S10G1815 (4/18/2011)

Appellant was convicted of pimping and keeping a place of prostitution, crimes which the State charged she committed from on or about June 30, 2006 through on or about July 11, 2006. At the trial, appellant raised the statute of limitations defense, arguing that the charges could not be brought because under OCGA § 17-3-1 (d), “[p]rosecutions for misdemeanors must be commenced within two years after the commission of the crime,” and the prosecution had made the amended charges more than two years after the commis-

sion of the crimes. The trial court ruled that the statute of limitations had not expired, but it gave instructions to the jury saying that “If you find from the evidence that the accusation in this case was not filed within two years after the offense was committed, it would be your duty to acquit this defendant.” The jury then found appellant guilty and she was sentenced for both crimes. The Court of Appeals later reversed the pimping conviction in agreement with appellant’s statute of limitations defense.

The Supreme Court affirmed the reversal of the pimping conviction but reversed the keeping a place of prostitution conviction. The Court agreed with the argument made by appellant that there was insufficient evidence given to the trial court jury to qualify them to rule on the statute of limitations issue. It held that the Court of Appeals erred in ignoring the State’s failure to provide evidence of when the prosecution was commenced so that the jury could make a qualified decision. Accordingly, the Court held that the jury was not authorized to find that the crimes occurred within the applicable statute of limitations as set out in OCGA § 17-3-1, and the conviction was reversed.

Sentencing

Bass v. State, S11A0158 (4/18/2011)

Appellant pled guilty to aggravated assault and escape, and he was sentenced to ten years on probation for the escape charge. Appellant filed a petition for habeas corpus raising various claims, including a claim that the sentence for escape was invalid because it was outside the statutory range. The habeas court denied the petition and appellant applied to the Supreme Court of Georgia for a certificate of probable cause to appeal. The Court granted appellant’s application.

The Court held that because appellant was charged with escape from lawful custody *prior to conviction* of any offense, the maximum sentence was five years. OCGA § 16-10-52 (b) (2). It followed that the sentence imposed on appellant, ten years on probation, was illegal and void. Moreover, because an illegal sentence is tantamount to no sentence, a defendant’s acquiescence to such a sentence, either through plea negotiations or a failure to object, cannot render the sentence valid. Therefore, the Court ruled, the habeas court erred in failing to rule accordingly.

Right to Remain Silent

McClarlin v. State, S11A0493 (4/18/2011)

Appellant was convicted of murder and various other offenses. Appellant argued that the prosecution violated his right to remain silent. The record showed that during the trial the prosecutor asked an investigating officer on the stand if there came a time when appellant requested to terminate the interview, and the witness replied in the affirmative. Defense counsel objected and moved for a mistrial, arguing that the question and response constituted an improper comment on appellant’s right to remain silent. The Court found that informing the jury of a defendant’s termination of a custodial interview and invocation of the right to counsel is not a constitutionally improper comment. Later in the trial, the prosecutor summarized to the jury that the appellant had ended his interview by requesting his right to an attorney, and appellant argued that the prosecutor’s statement was another improper comment. The Court found that since appellant’s attorney did not raise any objections to the prosecutors statement at the time the statement was made, appellant waived his right to object to the statement according to *Mullins v. State*, 270 Ga. 450 (1999). Accordingly, the Court found no error in the prosecutor’s statements and no merit in other contentions held by appellant.

Impeachment; Prior Consistent Statements

Colzie v. State, S11A0425 (4/18/2011)

Appellant was convicted of malice murder, attempted armed robbery, and possession of a firearm during the commission of a felony. Appellant first argued that the trial court erred by excluding the testimony of his investigator that one of the State’s witnesses had pending felony charges. The Court reminded appellant that a witness cannot be impeached unless he has been convicted of a crime, but a criminal defendant does have the right to cross-examine a witness concerning pending criminal charges against the witness for purposes of exposing a witness’ motivation in testifying, e.g., bias, partiality, or agreement between the government and the witness. However, because defense counsel never attempted to cross-examine the witness in this manner, the Court rejected appellant’s contention.

Appellant also argued that the trial court erred by permitting the lead detective to testify to the contents of an out-of-court statement given to him by the same witness. Appellant claimed that the detective’s testimony constituted improper bolstering because the witness’s statements were not admissible as prior consistent statements.

At trial, the State had asked the detective to repeat the witness’s out-of-court statements, effectively summarizing much of the interview. The State argued that the prior statements were properly admitted because the witness’s credibility had been attacked. On cross-examination, defense counsel asked the witness whether he had admitted one week earlier that he could not describe the shooter. The witness denied having made such a statement. “Thus, the suggestion was that witness’s inculpatory trial testimony lacked veracity and had been fabricated since his interview with appellant’s attorney. To be admissible to refute the allegation of recent fabrication, improper influence, or improper motive, the prior statement must predate the alleged fabrication, influence, or motive. Because here, the alleged recent fabrication occurred after the witness made the prior consistent statements to the detective, the Court ruled that the trial court did not err in allowing the detective to testify regarding the witness’s prior statements.

Due Process; Lost Evidence

Johnson v. State, S11A0390 (4/18/2011)

Appellant was found guilty of malice murder and sentenced to life imprisonment. He argued that the trial court erred by admitting into evidence photographs of a baseball cap allegedly worn by him on the night of the crime because its loss deprived the defense of the opportunity to inspect and examine the cap for hair fiber, DNA, gunshot residue, or blood spatter and made it impossible to discredit testimony concerning ownership or possession of the cap.

However, citing its recent decisions in *State v. Mizell*, 288 Ga. 474 (2010) and *State v. Miller*, 287 Ga. 748 (2010) the Court stated that 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.” The Court ruled that here, there was no apparent reason for the police to think that the cap would tend to exonerate rather than further inculpate appellant. Therefore, the lost cap was not constitutionally material. Moreover, even if the cap was constitutionally material, the failure to preserve this potentially useful evidence does not violate due process unless a criminal defendant can show bad faith on the part of the police. Since there was no evidence that the State had acted in bad faith, the Court ruled that appellant’s due process rights had not been violated.

Sufficiency of Indictment; Victim Testimony

Pulliam v. State, A11A0564 (4/15/2011)

Appellant was convicted of leaving the scene of an accident which resulted in serious injury (a felony under OCGA § 40-6-70 (b)) and leaving the scene of an accident resulting in damage to a vehicle (a misdemeanor under OCGA § 40-6-70 (c) (1)). Appellant argued that the trial court erred in denying his motion in limine seeking to exclude the victim’s testimony as to the injuries received in the accident, on the grounds that as a layman, he was not competent to give a medical opinion. The victim had testified that when appellant’s truck hit his car, the door panel hit him in the side and that he was “gasping for air because [he] was having trouble breathing.” He was transported directly to the hospital from the accident scene, and he was in the ICU for four days. The victim further testified, “I had several rib fractures. I had a pulmonary contusion which is a punctured lung. And I had problems with my hip at the time. I spent eight months in the bed.” The Court found that although a lay witness is not competent to give what amounts to a medical opinion relative to his injuries or the effect thereof, victims are competent to testify as to the injuries they suffered during an assault. Therefore, the Court ruled, the trial court did not err in permitting victim to testify as injuries.

Appellant also argued that the trial court erred in denying his pre-trial demurrer to the felony count of the indictment, which he contended was fatally defective in failing to

provide a description of the victim’s injuries and in failing to allege that the accident was the “proximate cause” of his injuries. However, the Court found that the felony count was sufficient because the allegation in the indictment that this was “an accident *resulting in* serious injury to [victim]” adequately asserted proximate cause, and the allegation of “serious injury to [victim]” sufficiently stated the offense in the terms and language of the statute. The indictment was sufficient to put appellant on notice of the crime with which he was charged; and he could not admit the facts as charged in the indictment and still be innocent of violating OCGA § 40-6-270. Therefore, the Court ruled, the trial court did not err in denying appellant’s demurrer to the indictment.