

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 10, 2011

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THIS WEEK:

- **Exclusionary Rule; Probation Revocation**
- **Speedy Trial**
- **Prosecutorial Misconduct; Juvenile Hearing**
- **VGCSA; OCGA § 16-13-42**
- **Character Evidence**
- **Closing Argument; Jury Charges**
- **Batson Challenges**
- **Jury Charges**

Exclusionary Rule; Probation Revocation

State v. Thackston, S10G1337 (5/31/11)

The State filed a petition for certiorari which the Court granted to determine whether the exclusionary rule applies in probation revocation proceedings. The Court held that it did not. The Court explained that the exclusionary rule is a judicially created remedy adopted to protect Fourth Amendment rights by deterring illegal searches and seizures. In deciding when to extend the exclusionary rule to contexts other than criminal trials, the U.S. Supreme Court has adopted a balancing test to weigh the likelihood of deterrence against the costs of withholding information in the truth-seeking process. Here, the context to which appellant sought to apply the exclusionary rule was probation revocation hearings, the purpose of which is to determine whether the probationer has complied with the conditions of his probation and the outcome of which significantly informs the State whether the probationer is ready or capable of rehabilitation by integration into society.

The Court agreed with the rationale of *Pennsylvania Board of Probation and Parole v. Scott*, 524 U. S. 357 (1988) and *United States v. Winsett*, 518 F2d 51 (9th Cir. 1975), finding it extremely important to the state probation system that all reliable evidence relevant to the probationer's conduct be available during revocation proceedings. At the same time, the Court found the exclusionary rule's deterrence benefits did not outweigh the costs to the truth-seeking objective which is paramount in the probation system.

The Court further held that, under the proper balancing test, neither the federal nor state constitutions nor statutes required application of the exclusionary rule in state probation revocation proceedings. Georgia thus joined the majority of jurisdictions which have decided not to extend the exclusionary rule beyond the trial setting. To the extent the Court of Appeals' decision in *Amiss v. State*, 135 Ga. App. 784 (1975) was contrary to the Court's ruling, it was overruled.

Speedy Trial

Fallen v. State, S11A0384 (5/31/11)

Appellant appealed the trial court's pre-trial order denying his motion to dismiss the charges against him for a constitutional speedy trial violation. In examining an alleged denial of the constitutional right to a speedy trial, courts must balance the following factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514 (1972).

The Court first held that the three year delay from appellant's arrest to his trial was presumptively prejudicial. Next, the Court found that there was no evidence that the State

caused the delay intentionally, so, at most, the State was negligent in bringing appellant to trial. Third, the Court found that appellant had waited almost three years after his arrest to assert his right to a speedy trial, and the trial court did not abuse its discretion in weighting this factor heavily against him. Lastly, the Court held that appellant failed to show that he was prejudiced by the delay. Accordingly, the Court affirmed the ruling of the trial court.

Prosecutorial Misconduct; Juvenile Hearing

Kitchens v. State, S11A0311 (5/31/11)

Appellant argued that he was entitled to a new trial because of prosecutorial misconduct. The Court disagreed. While the trial court determined there was prosecutorial misconduct because the DA's office had access to the jail's telephone monitoring system without ensuring the blockage of inmate communications with their attorneys, it also determined that the prosecutor did not listen to any of appellant's telephone conversations. Based on these facts and the absence of any evidence of specific harm or prejudice to the defendant, the Court found that the trial court did not err when it denied appellant's motion for new trial.

Appellant also argued that the trial court erred by allowing the jury to hear testimony about a juvenile court disposition over defense counsel's objection. OCGA §15-11-79.1 provides in pertinent part, "[t]he disposition of a child ...may not be used against such child in any proceeding in any court other than for a proceeding for delinquency or unruliness..." At trial, the State proffered similar transaction evidence of an incident that occurred when appellant was a juvenile. In that incident, appellant shot a man four times. The prior shooting victim testified that he believed appellant was the man who shot him because appellant had pled guilty at a hearing. Appellant's counsel objected to this testimony and requested a mistrial.

After determining that the State had not intentionally elicited the witness's testimony and also that the victim did not have any first hand knowledge of the juvenile hearing, the trial court denied defense counsel's motion for mistrial. The trial court did, however, offer to give a curative instruction to the jury, but defense counsel refused the instruction. The Court held that in this case, the trial court did not abuse its discretion, especially because

defense counsel had refused the curative instruction. Therefore, the Court affirmed.

VGCSA; OCGA § 16-13-42

Chua v. State, S11A0051 (5/31/11)

Appellant, a doctor, was convicted of felony murder and violating the Georgia Controlled Substances Act. The victim, appellant's patient, died of drug intoxication brought about by a combination of morphine, oxycodone, and methadone. Appellant wrote the victim's prescriptions for these, and other drugs. At the time of his death, the victim lived in appellant's home, where appellant discovered the body.

Appellant argued that the evidence was insufficient to authorize the jury to find him guilty of keeping a dwelling for the purpose of using controlled substances in violation of OCGA § 16-13-42 (a) (5).

The Court explained that in order to support appellant's conviction, the evidence had to show that one of his *purposes* for maintaining the structure was the keeping of the controlled substance. In other words, the mere possession of limited quantities of a controlled substance within the residence or structure was insufficient. Second, the Court stated that the evidence had to be sufficient to support a finding of more than a single, isolated instance of the proscribed activity. However, depending on the unique facts and circumstances of a case, evidence found on only one occasion could be sufficient to show a crime of a continuing nature.

The Court found that in this case, the only evidence of the offense was that the building in question was appellant's home; there was no evidence that one of appellant's *purposes* for maintaining the home was to provide the victim a place to use and keep controlled substances. The Court held that while the jury could infer that controlled substances had been kept and used there on more than one occasion by the victim, without a showing of purpose, a guilty verdict was not authorized. Accordingly, the Court vacated appellant's conviction on that count.

Character Evidence

Boring v. State, S11A0536 (5/31/11)

Appellant was convicted of murdering her mother and sentenced to life imprisonment

plus a consecutive five-year term for firearm possession. Appellant argued that the trial court committed reversible error by allowing the State to present irrelevant and highly prejudicial character evidence concerning appellant's Gothic lifestyle in an attempt to characterize it as evidence of "satanic influences." The Court agreed, finding that this evidence was clearly meant to support the State's portrayal of appellant as a deviant capable of murdering her mother, in the absence of any other evidence suggesting she had a violent or angry nature.

The Court noted that on numerous occasions it had affirmed the admission of evidence regarding a defendant's affiliation with controversial organizations or belief in unpopular ideologies. However, in all of those instances, the evidence was *directly* relevant to a contested issue in the case such as motive, identity, or intent.

In this case, by contrast, appellant's alleged "gothic"/satanic beliefs bore no specific nexus with the crime. In addition, nothing in the evidence adduced at trial explicitly linked appellant to any such ideology; rather, that link was forged only via the State's opening statement and closing argument, which itself was improper.

The Court concluded that "the [evidence in question] was employed simply because the jury would find these beliefs morally reprehensible." *Dawson v. Delaware*, 503 U.S. 159, 167 (1992). Therefore, the Court ruled that the trial court had abused its discretion in admitting the evidence. Moreover, because the evidence was highly inflammatory and the evidence of appellant's guilt was entirely circumstantial and not overwhelming, the Court held that the error could have contributed to the jury's verdict. Accordingly, the Court reversed appellant's conviction.

Closing Argument; Jury Charges

Johnson v. State, A11A0205 (5/24/11)

Appellant, who represented himself at trial, appealed after a jury found him guilty of armed robbery, hijacking a motor vehicle, kidnapping, false imprisonment, and possession of a firearm during the commission of a crime. He argued that the trial court erred in limiting closing argument to one hour and it erred in its jury charge on hijacking a motor

vehicle. The record showed that at the end of the trial appellant was allowed to give a closing argument to the jury, but the court limited his argument to an hour. Appellant contended that because armed robbery is a capital felony in Georgia, under OCGA § 17-8-73 he should have been allowed a two-hour closing argument. Appellant was unable to remember what he would have said to the jury had he been granted more time, but claimed that he wanted to argue additional points but did not have enough time. The Court found that his right to a closing argument was not abridged because he was allowed to give an argument even though it was limited in time. Since appellant could not articulate any argument that he would have made were he given more time, he did not make any showing that a longer time limit on his argument would have reasonably increased the probability that the jury would have come to a different verdict. Therefore, the Court held that the trial court correctly denied his motion for new trial on these grounds.

Appellant also contended that the court gave an instruction to the jury that could have allowed the jury to find him guilty of the crime of hijacking in a manner not charged in the indictment. “[I]f a trial court gives a jury charge on an entire Code section that specifies that a crime may be committed by more than one method, and if the indictment alleges that the defendant committed the crime by only one method, the deviation violates due process, unless: (a) a limiting instruction is given; or (b) under the evidence, there is no reasonable possibility that the jury convicted the defendant of the commission of the crime in a manner not charged in the indictment.” The Court found that given the clear, undisputed evidence in the case, there was no reasonable probability that the jury convicted appellant of hijacking a motor vehicle in a manner not alleged in the indictment. The trial court therefore did not err in its charge to the jury.

Batson Challenges

Bryant v. State, A11A0496 (5/23/11)

A jury convicted appellant of aggravated assault, criminal damage to property in the second degree, and battery. Appellant contended, among other things, that the trial court erred in denying his challenge to the State’s use of its peremptory strikes against prospective African-

American jurors. Appellant asserted that the State had exercised its peremptory strikes in a racially discriminatory manner by striking five of the six prospective African-American jurors while not striking similarly situated prospective white jurors. He contended that the State was acting in a discriminatory manner under the test established in *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny. The Court noted that an evaluation of this challenge requires a three-step test: “(1) the opponent of a peremptory challenge must make a prima facie showing of racial discrimination; (2) the proponent of the strike must then provide a race-neutral explanation for the strike; and (3) the court must decide whether the opponent of the strike has proven discriminatory intent. The findings of the trial court are entitled to great deference, and should not be disturbed unless clearly erroneous.” The State provided explanations of why the African-American jurors were stricken, the trial court found the State’s proffered explanations to be race-neutral and concluded that appellant had failed to show that the State had acted with discriminatory intent in exercising its strikes. After review, the Court here agreed with the trial court. Consequently, the judgment was affirmed.

Jury Charges

Roberts v. State, A11A0437 (5/26/11)

Following a jury trial, appellant was convicted of one count of burglary for burglarizing a tool-supply store. Appellant contended that the trial court erred in defining the term “entry” in response to the jury’s request. Specifically, he argued that in defining “entry” the court confused the jury as to the elements of burglary. The record showed that while in deliberation, the jury sent a note to the trial court asking for a definition of the term “entry.” After conferring with counsel, the court responded to the jury as follows: “This is the first definition of enter in Black’s Law Dictionary, [N]inth Edition: ‘To come or go into.’ Now, in that same edition, entry is ‘the act of entering real property.’ So that is the definition.” Appellant did not object at the time, but argued on appeal that the court’s definition was harmful as a matter of law because it implied that his entry onto the property of the tool-supply store, rather than entry into the building, was sufficient to support a burglary conviction. The Court found

that it was clear that no harm occurred because the trial court charged the jury on the burglary statute and its requirement of proof that the defendant enter “the building or dwelling place of another.” Accordingly, the trial court’s definition of “entry” did not, in the context of the charge as a whole, prejudice appellant and therefore did not constitute reversible error.