

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 10, 2016

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THIS WEEK:

- **Hearsay; Necessity Exception**
- **Jury Instructions; Plain Error**
- **Motions to Withdraw Guilty Plea; Jurisdiction**
- **Sentencing; Merger**
- **Rule of Sequestration; Ineffective Assistance of Counsel**
- **Conflicts of Interest; Mistrials**

Hearsay; Necessity Exception

Williams v. State, S16A0357 (6/6/16)

Appellant was convicted of malice murder against Barnett, aggravated assault (family violence) against Dubose and possession of a firearm during the commission of a felony. The evidence showed that appellant accused Dubose, his girlfriend and mother of his children, of stealing a lottery ticket of his, allegedly worth millions, and of hiring a hitman to kill him. The aggravated assault occurred while trying to force her to identify the hitman. Following this incident, appellant went to a party, which began in the early afternoon. At the party, he was seen talking to Barnett and Williams, Barnett's cousin. Barnett and Williams left the party at one point. As the two were travelling, Barnett stated to Williams that appellant kept asking him questions about whether he was "messing around with" appellant's girlfriend and that appellant "made him feel weird" to the point that Barnett "didn't feel safe around him." Later that day, appellant shot and killed Barnett.

Appellant contended that the trial court erred in allowing Williams to testify about the

statements Barnett made to him about appellant. The Court found that the statements were undisputedly hearsay, but were admitted by the trial court under the necessity exception to the hearsay rule under the former Evidence Code. To be admissible under necessity exception, three factors must be shown: (1) the declarant was unavailable; (2) the declarant's statement was relevant to a material fact and was more probative as to that fact than other evidence that may be procured and offered; and (3) the statement exhibited particularized guarantees of trustworthiness.

Appellant contended that the second and third parts of the test were not satisfied. The Court disagreed. As to the second part of the test, the Court found that Barnett's statement was relevant to the material fact of appellant's motive for shooting Barnett – his belief that Barnett was involved with his girlfriend, Dubose. And the statement was more probative on this point than other available evidence, as it was the only evidence that provided a link between appellant's belief that someone was plotting with Dubose to kill him and his decision to kill Barnett. There was no indication that the State could have procured other evidence on this point; the testimony at trial indicated that no witness heard the relevant portion of the conversation between appellant and Barnett at the party.

As to the third part of the test, the Court found that the statements bore significant indicia of trustworthiness because Williams testified that Barnett was his cousin for whom he had "close feelings"; Barnett had no apparent motive to fabricate the statement; Barnett made the statement to Williams shortly after the conversation between Barnett and appellant; and the statement aligned with Dubose's testimony

about appellant's paranoid allegations. Although appellant argued that Williams did not tell the police about this statement until more than 18 months after the murder, when he was facing criminal charges, the Court stated that this one point was not controlling, and considering all the circumstances, the trial court did not abuse its discretion in admitting the testimony.

Jury Instructions; Plain Error

State v. Alvarez, S16A0397 (6/6/16)

Alvarez was convicted of malice murder and other offenses. At trial, Alvarez made a written request for a jury charge on justification, but the trial court did not give the charge. Alvarez did not object to the failure to give this instruction. Nevertheless, he raised the issue in his motion for a new trial and the trial court granted Alvarez the motion, finding that it committed plain error in failing to so instruct the jury. The State appealed.

In considering whether plain error is shown, the Court stated that reversal is authorized only if all four prongs of the standard adopted in *State v. Kelly*, 290 Ga. 29 (2011) are met: the instruction was erroneous, the error was obvious, the instruction likely affected the outcome of the proceedings, and the error seriously affects the fairness, integrity or public reputation of the judicial proceedings. The Court found that the failure to give the requested instruction on Alvarez's affirmative defense of justification was erroneous here because evidence was presented to support the defense and the charge requested was a correct statement of the law. Second, given the longstanding rule regarding the State's burden of disproving a defendant's affirmative defense in these circumstances, the error was obvious. Moreover, the failure to give this instruction was all the more harmful in this case since, during the State's closing argument, the prosecutor implied Alvarez had a duty to present certain testimony if it would have confirmed his justification defense. Third, sufficient evidence was presented from which a jury could find justification, and in fact, justification was the critical disputed issue at trial. Thus, under these circumstances, the Court found, the failure to instruct the jury on the State's burden to disprove that defense likely affected the outcome and fairness of the proceeding, and consequently, the trial court did not err in finding this failure to instruct was plain error.

In so holding, the Court rejected the State's argument that because the instruction, taken as a whole, properly instructed the jury on the burden of proof and that Alvarez had a right to use force in a reasonable manner to defend himself, plain error was not established. The plain error was established by the court's failure to instruct the jury that the State had the burden of disproving the justification defense.

Motions to Withdraw Guilty Plea; Jurisdiction

Humphrey v. State, S16A0197 (6/6/16)

In July of 1998, appellant pled guilty to murder and was sentenced to life, with the trial court specifying that he would not be eligible for parole until serving 25 years of his sentence. In *Humphrey v. State*, 297 Ga. 349, ("Humphrey I"), the Court reversed and remanded, holding that the sentencing court had lacked the authority to impose limitations on parole eligibility that conflicted with those prescribed by statute, and thus concluding that "[t]hat provision of the sentence – but only that provision – must be vacated." Appellant almost immediately filed a motion to withdraw his guilty plea which the trial court denied.

Pursuant to O.C.G.A. § 17-7-93(b), a criminal defendant is permitted as a matter of right to withdrawal of his guilty plea at any time before the trial court orally pronounces a defendant's sentence. Once the sentence has been pronounced, the defendant loses the absolute right to withdraw his plea, though he may still seek to withdraw, within the trial court's discretion, where "necessary to correct a manifest injustice" pursuant to USCR 33.12 (A). And, such a motion must be filed within the term of court in which the defendant was sentenced under the plea, as the trial court lacks jurisdiction to entertain a motion to withdraw filed beyond the term of sentencing.

Here, appellant argued, the effect of *Humphrey I* was to invalidate his sentence, thereby restoring his status to that of a defendant who has pled guilty but not yet been sentenced and, in turn, restoring his absolute right to withdraw his plea under O.C.G.A. § 17-7-93(b), without regard to the expiration of the term of his sentencing. His position was based on the premise that, where a sentence entered on a plea is later adjudged to be void, it is as if no sentence has been entered at all, and the defendant stands in the same position as if he had pled guilty and not

yet been sentenced. But, the Court stated, assuming, without deciding, that his premise was sound, it was inapplicable in any event because *Humphrey I* invalidated only a discrete provision of appellant's sentence, expressly leaving all other provisions of his sentence intact and his plea thereon ineligible for withdrawal at this late stage. Accordingly, the Court held, appellant had no right to withdraw his plea; his out-of-term motion to withdraw was thus untimely; and the trial court therefore lacked jurisdiction to entertain the motion.

Sentencing; Merger

Regent v. State, S15G1829 (6/6/16)

Appellant pled guilty to one count of aggravated assault and one count of aggravated battery arising out of an incident in which he twice, in quick succession, slashed his girlfriend's throat. The Court of Appeals affirmed appellant's conviction and sentence for each offense, see *Regent v. State*, 333 Ga. App. 350 (2015), and the Court granted certiorari to review the Court of Appeals' conclusion that appellant's convictions did not merge.

First, the Court found, although appellant was charged as if he committed two distinct crimes, the offenses arose out of the same criminal transaction. Thus, the Court stated, it must determine whether appellant's separate conviction and sentence for each offense was proper. Under *Drinkard v. Walker*, 281 Ga. 211 (2006), the "required evidence test" is utilized to determine whether multiple convictions are precluded because one of the crimes was established by proof of the same or less than all the facts that were required to establish the other crime. Here, the Court noted, the Court of Appeals correctly concluded that the two offenses do not merge under the *Drinkard* test.

However, the Court stated, the merger of the two offenses may still be required by Georgia's other statutory definitions of included offenses. O.C.G.A. § 16-1-6(2) provides that one crime is included in another if that crime differs from the other only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission. And here, the Court found, the offenses, which were based on the single criminal act of appellant cutting the victim's throat with a knife, only differed with respect to the seriousness of the injury or risk of injury suffered by the victim; while the

aggravated assault count requires proof that appellant cut the victim's throat with a knife, a weapon likely to result in serious bodily injury, the aggravated battery count requires proof of actual "bodily harm by serious disfigurement" that resulted from appellant having slashed the victim's throat with a knife. Accordingly, the Court concluded, as charged here, aggravated assault was included in aggravated battery and the two offenses should have merged.

Rule of Sequestration; Ineffective Assistance of Counsel

Davis v. State, S16A0103 (6/6/16)

Appellant was convicted of felony murder and first degree cruelty to children. The evidence showed that while the 13-month-old victim was in appellant's care, she suffered serious injuries. The State called three experts to testify that the injuries that led to her death resulted from very recent impact or back-and-forth movement and not from earlier accidental falls, as suggested by appellant's evidence. Appellant also presented the testimony of Dr. Ophoven, who opined that prior accidental falls could have resulted in the victim's injuries and death. In rebuttal, the State called forensic pathologist Dr. Jamie Downs, who testified that the victim's injuries occurred less than a day before her death based upon their severity and lack of healing and could not have resulted from an earlier fall.

Appellant contended that his counsel provided ineffective assistance by failing to properly invoke the so-called "rule of sequestration" in regard to his expert witness, Dr. Ophoven, and the State's rebuttal expert, Dr. Downs. The record showed that by agreement of the parties, Dr. Ophoven, a resident of Canada, testified through video recording, made on the first day of the trial and after the jury had been excused for the day. The recording was played for the jury on the third day of trial. At some point before Dr. Ophoven's testimony was played for the jury, the prosecution gave a copy of the recording to Dr. Downs, who testified in rebuttal right after the jury watched Dr. Ophoven's testimony. The rule of sequestration had not been invoked by either party or by the court up to that point in the trial, although with the exception of Dr. Downs, the parties had honored the rule. After Dr. Downs was qualified as an expert, but before he offered his opinions, appellant's counsel objected that the rule had been violated.

The trial court overruled the objection. The record further showed that Dr. Ophoven had not provided a written report and that the State had made numerous attempts to contact her, but without success.

The Court noted that the trial took place after Georgia's new Evidence Code took effect. The new Rule relating to sequestration ("exclusion") is found in O.C.G.A. § 24-6-615 and differs significantly from the text of the sequestration provision of the old Evidence Code. The Court found that under Eleventh Circuit precedent, the purpose of the sequestration rule is to prevent the shaping of testimony by one witness to match that of another, and to discourage fabrication and collusion. The reasons for sequestration apply not only to a witness who is present in court to hear the testimony of other witnesses, but also – as essentially occurred here – to a witness's being given a transcript of another witness's trial testimony to review.

But, the Court stated, there are exceptions to the sequestration rule. O.C.G.A. § 24-6-615(3) and Federal Rule of Evidence 615 (c) preclude trial courts from excluding a witness whose presence a party shows is "essential" to presenting that party's case. The trial court has broad discretion in deciding whether a witness comes within this exception. Experts are not automatically excepted from sequestration as "essential". Concerns underlying sequestration are generally overcome where an expert witness will give only or primarily opinion rather than factual testimony and may appropriately base that opinion on the testimony of other witnesses. This view partially rests on the recognition that O.C.G.A. § 24-7-703, like Federal Rule of Evidence 703, allows expert witnesses to base their opinions on facts or data "perceived by . . . the expert at . . . the hearing." In fact, the Court stated, "having the expert attend the relevant parts of the trial may render unnecessary the lengthy, convoluted, and typically argumentative hypothetical questions that lawyers would otherwise utilize." Moreover, the Court found, the reasons for sequestration may be even less applicable to rebuttal testimony by experts.

Finally, the Court noted, if the Rule is violated, the trial court may, in its discretion, respond in at least three ways: (1) it may cite the guilty party for contempt; (2) it may allow opposing counsel to cross-examine the witnesses as to the nature of the violation; or (3) where counsel or the witness violate[s] the rule

intentionally, the court may strike testimony already given or disallow further testimony.

After summarizing the new law on sequestration, the Court found that the trial court did not abuse its broad discretion in allowing Dr. Downs to testify in rebuttal of Dr. Ophoven based in part on his review of her recorded testimony. Dr. Downs was entitled to know of her opinions and the bases for them, and where the defense had not provided an expert report and the court could find that the defense had rebuffed the State's efforts to contact her before trial, that information was reasonably conveyed to Dr. Downs by means of the recording rather than through a summary by someone who had viewed the recording or through hypothetical questions. Accordingly, even if appellant's counsel had invoked the rule of sequestration earlier in the trial, the court would not have abused its discretion in excepting Dr. Downs from the rule to the limited extent that he was excepted. Appellant therefore failed to show that his trial counsel acted deficiently in this respect, and that, but for counsel's actions, the outcome of the trial would have been different.

In so holding, the Court noted that neither party addressed new Rule 615 or cited any cases interpreting it or the parallel provision of the Federal Rule of Evidence. The Court concluded with the statement, "We trust that this shortcoming will not be repeated in future cases coming to this Court."

Conflicts of Interest; Mistrials

Edwards v. State, A16A0532 (3/30/16)

Appellant appealed from the trial court's denial of his plea in bar in which he contended that the constitutional prohibition against double jeopardy precluded retrial after his first trial for rape and child molestation ended in a mistrial. The record showed that after a jury was impaneled and sworn, but before any evidence was presented, appellant's defense counsel and the prosecutor brought to the trial court's attention that, during the trial of the case, they expected defense counsel would have an actual or a potential conflict of interest. Specifically, the State expected to call the victim's mother as a witness in the trial to refute appellant's defense. Defense counsel had previously represented the mother on an unrelated matter. Without revealing any confidential information, defense counsel informed the court that, "[i]f

someone knew [the confidential information he had acquired from the victim's mother] and wanted to use it, it would certainly be very strong impeachment material." Defense counsel conferred with appellant and appellant agreed to waive the conflict. Nevertheless, over appellant's objection, the trial court found that this would not cure the conflict and declared a mistrial and disqualified appellant's defense counsel. Thereafter, appellant filed his plea in bar which the court denied.

The Court stated that where jeopardy has attached and the trial judge declares a mistrial prior to verdict over the defendant's objection, the Double Jeopardy Clause bars a retrial unless there was a manifest necessity for the mistrial. The existence of "manifest necessity" is determined by weighing the defendant's right to have his trial completed before the first trier of fact against the interest of the public in having fair trials designed to end in just judgments. The trial court is not required to explicitly find "manifest necessity," or to set forth all the factors which informed its exercise of discretion, but the record must show that the trial court actually exercised its discretion to declare a mistrial.

The Court found that pursuant to the relevant ethical rules, the trial court did not abuse its discretion by refusing to accept the attempted waiver of the conflict and by disqualifying defense counsel. The record showed that the attempted waiver of the conflict was ineffective because it failed to comply with the requirements in Georgia Rules of Professional Conduct Rule 1.7 (b). To waive the conflict created by defense counsel's divided loyalties to his former and current clients required the informed consent of both the former client (the victim's mother) and the current client (appellant). Here, there was no consent from the victim's mother. Moreover, the Court found, the consent obtained from appellant was not "informed consent" pursuant to the requirements in subsection Rule 1.7 (b) (1)-(3), which require that consent be confirmed in writing, after consultation with the lawyer, after receiving in writing reasonable and adequate information about the material risks of and available alternatives to the representation, and after being given the opportunity to consult with independent counsel. Although the record showed that appellant consulted with his defense counsel about the conflict prior to the trial court's ruling, nothing was presented to the court prior to the ruling showing that appellant consented

in writing, received the required information in writing about risks and alternatives, or had the opportunity to consult with independent counsel. And the Court found, evidence that, during appellant's initial consultation with his public defender defense counsel, he consulted with another public defender from the same office, did not satisfy the requirement for an opportunity to consult with independent counsel. Furthermore, the written waiver filed by appellant over five months after the trial court rejected the oral waiver and disqualified defense counsel was untimely and failed to satisfy the requirements of Rule 1.7 (b).

Thus, the Court found, the record showed at least a serious potential for a conflict of interest, which ethically barred defense counsel from representing appellant at the trial. Appellant's attempted waiver of the conflict was ineffective under the relevant ethical rules, so the trial court did not abuse its discretion by refusing the waiver and disqualifying defense counsel. In the absence of an effective waiver of the right to conflict-free representation, allowing the trial to proceed to verdict would have created a serious potential for error sufficient to allow appellant to obtain reversal of any guilty verdict by claiming on appeal that he was prejudiced by the conflict. Therefore, the Court concluded, because a trial under these circumstances would have been inconsistent with the public interest in a fair trial, conducted in accordance with ethical standards, designed to end in a just judgment, the trial court did not abuse its discretion by holding that "manifest necessity" existed for the mistrial. Accordingly, the trial court did not err by denying appellant's subsequent plea in bar.