

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 10, 2015

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Chuck Olson
General Counsel

Lalaine Briones
State Prosecution Support Director

Sharla Jackson
Domestic Violence, Sexual Assault,
and Crimes Against Children
Resource Prosecutor

Todd Hayes
Sr. Traffic Safety Resource Prosecutor

Joseph L. Stone
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Leah Hightower
State Prosecutor

Kenneth Hutcherson
State Prosecutor

Nedal S. Shawkat
State Prosecutor

Robert W. Smith, Jr.
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

- **Statements; *Massiah***
- **Split Sentences; O.C.G.A. § 17-10-6.2(b)**
- **Sentences; First Offenders**
- **Motions for Mistrial; Due Process**

Statements; Massiah

Rai v. State, S15A0243 (7/6/15)

Appellant was convicted of murder, burglary and related offenses. The evidence showed that appellant hired another to kill his daughter-in-law because she was African-American and had married and had a daughter with his son. At trial, the State presented the testimony of Walmer, who for several weeks shared a cell with appellant in the county jail. Walmer testified that appellant had made several racist remarks while in jail and had inquired of Walmer how his father would feel if Walmer dated someone of another race. Appellant contended that Walmer's testimony regarding appellant's jailhouse statements should have been suppressed. Specifically, appellant contended that Walmer was acting as an agent of the State in his jailhouse interactions with appellant and that, therefore, the statements appellant made in Walmer's presence constituted the fruits of an uncounseled interrogation under *Massiah v. United States*, 377 U. S. 201 (1964) and its progeny. The Court disagreed.

Under *Massiah*, the right to counsel is violated by the admission of incriminating statements which a government agent deliberately elicits after indictment and in the absence of counsel. A jailhouse informant may be considered a government

agent in this context where he was acting under the instructions of the government. Specifically, an informant may be classified as a government agent only if there is both (1) an agreement between the informant and government authorities to exchange incriminating information for payment, lenient treatment, or some other benefit and (2) some action by the informant designed deliberately to elicit incriminating information. Thus, an inmate who acts upon the expectation of an unpromised reward does not thereby become an agent for the state.

Here, the Court found, Walmer—who had been arrested for forgery and check fraud, had pled guilty, and was subject to an arrest warrant in Florida in connection with other crimes—approached law enforcement officials at his extradition hearing with information about appellant, with whom Walmer had been sharing a jail cell. In an interview with detectives, Walmer recounted various remarks appellant had made about his case, about African-Americans, and about inter-racial dating. Though Walmer did inquire about the status of some cash that police had seized from him at the time of his arrest, the detectives made no promises and offered no special assistance in this regard. In addition, the detectives counseled Walmer specifically not to question appellant about his case upon Walmer's return to the jail. More than a week later, after Walmer's extradition to Florida, Walmer contacted officials by phone with additional information he had obtained from appellant. All three detectives who interviewed Walmer testified unequivocally that Walmer himself initiated all contacts with them; that they did not instruct Walmer to get information

from appellant or request that he do so; and that they made no promises and offered no benefits in exchange for information regarding appellant. Thus, the Court found, the trial court properly determined that Walmer's contacts with appellant did not give rise to a Sixth Amendment violation. In so holding, the Court found that Walmer's inquiries regarding the status of his seized property reflected, at most, the expectation of an unpromised reward, which does not by itself transform a jailhouse informant into a government agent in this context.

Split Sentences; O.C.G.A. § 17-10-6.2(b)

Spargo v. State, A15A1236 (5/29/15)

In 2008, appellant entered a negotiated plea of guilty to two counts of child molestation. The court sentenced him to serve 20 years' imprisonment, consecutively, as to each count. In 2014, appellant filed in a "motion to vacate void sentence," alleging that a person convicted of a sexual offense must receive a split sentence with at least one year of probation. The trial court denied appellant's motion.

The Court stated that in *Clark v. State*, 328 Ga. App. 268 (2014), it considered the limitations imposed by O.C.G.A. § 17-10-6.2(b) on punishments authorized by law for sexual offenses and found that the statute expressly and unambiguously requires that the trial court issue a "split sentence" that includes the minimum term of imprisonment and at least one year of probation. Thus, for a first conviction for child molestation, a trial court must impose a "split sentence" that includes at least five years of imprisonment and at least one year of probation, for a total of no more than twenty years. As a result, a sentence for a first child molestation conviction of twenty years to serve in prison without probation was void. Thus, as the State conceded, binding precedent supported appellant's argument, and therefore, his sentence was vacated and the case remanded for resentencing.

Sentences; First Offenders

State v. Spain, A15A0697 (6/2/15)

In 2011, Spain was convicted by a jury of entering an automobile with intent to commit theft. Although she was eligible to be treated as a "first offender," she declined to request

such a sentence from the trial court. Almost two years later, Spain moved the trial court to modify her sentence and grant her first-offender status. The trial court granted the motion, and the State appealed, arguing that the court lacked jurisdiction to retroactively resentence Spain as a first offender.

Referring to O.C.G.A. § 42-8-60(a)(1)-(2), the Court stated that by the plain terms of the statute, a trial court is only authorized to grant first-offender treatment "before a defendant has been adjudicated guilty and sentenced. Thus, while the decision of whether or not to sentence a defendant as a first offender lies entirely within the discretion of the trial court, that discretion disappears entirely once a defendant has been adjudicated guilty and sentenced. And here, the Court found, the trial court resentenced Spain as a first offender long after entering its final judgment on her felony conviction and sentencing her accordingly. As a result, the trial court was not at liberty to "unwind the clock" and modify the final judgment of conviction and sentence in order to grant first offender treatment. Therefore, its attempt to do so was a mere nullity. Accordingly, the Court reversed the trial court's judgment granting Spain's motion to modify her sentence, and vacated her first-offender sentence, with the result being that her original sentence was rendered in full force and effect.

Motions for Mistrial; Due Process

Wynn v. State, A15A0009 (6/8/15)

Appellant was convicted of armed robbery and possession of a firearm during the commission of a crime. He contended that the trial court erred in denying his motions for mistrial after witnesses for the State improperly injected bad character evidence three times, and erred in denying his motion for new trial on that and due process grounds. The record showed in the first incident, the lead detective testified on redirect that an officer from a neighboring county had been investigating appellant for another crime. The second incident occurred when a city police officer testified that after appellant was arrested, he waived his *Miranda* rights and said the police were "always accusing him of committing crimes because of his past criminal history." The trial court denied both motions for mistrial and

gave extensive curative instructions covering both incidents. The third motion for mistrial occurred after another city police officer, who was explaining his role in the similar transaction investigation, said, "I had a prior case with [appellant] where he was involved in a theft in the city."

The trial court denied the motion for mistrial regarding the first incident because the evidence was cumulative of other evidence admitted. As to the second incident, the trial court found that the statement was not directly responsive to the question asked and because the officer was describing appellant's voluntary, admissible statement. And, as to the third incident, the court again gave curative instructions and reiterated the limited purpose of similar transaction testimony.

The Court noted that whether to grant a motion for mistrial is within the trial court's sound discretion, and the trial court's exercise of that discretion will not be disturbed on appeal unless a mistrial is essential to preserve the defendant's right to a fair trial. When determining whether the trial court abused its discretion, the Court must consider the statement itself, other evidence against the accused, and the actions of the trial court and counsel dealing with the impropriety. Here, the Court concluded, considering all of these factors, the trial court did not abuse its discretion in denying appellant's motion for mistrial.

Nevertheless, appellant contended, these and other bad character references during the trial violated his due process right to a fair trial. Specifically, appellant noted some incidences during the introduction of similar transaction evidence and evidence surrounding his arrest. But, the Court found, considering the trial court's instructions to the jury, including the curative instructions and instructions regarding similar transactions, the fact that evidence related to the events leading to appellant's arrest was properly before the jury, and the overwhelming evidence of appellant's guilt, his right to due process was not violated by the admission of bad character evidence.