

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 9, 2010

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THIS WEEK:

- **Aggravated Stalking**
- **Probation; Sex Offender Registration**
- **Guilty Pleas; Immigration Status**
- **Felony Murder**
- **Evidence Tampering; Ineffective Assistance of Counsel**
- **Indigent Defense; Constitutional Speedy Trial**
- **Statement; Miranda**
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Aggravated Stalking

State v. Burke, S09G1254

Burke was convicted of aggravated stalking based on a single contact that he made with Elaine Bolton in violation of an earlier protective order. The Court of Appeals reversed his conviction. The Supreme Court granted the State's petition for writ of certiorari and affirmed. Under OCGA § 16-5-91 (a), "[a] person commits the offense of aggravated stalking when such person, in violation of a . . . permanent protective order, . . . follows, places under surveillance, or contacts another person at or about a place or places without the

consent of the other person for the purpose of harassing and intimidating the other person." Under OCGA § 16-5-90 (a) (1), "the term harassing and intimidating" means a knowing and willful course of conduct directed at a specific person which causes emotional distress by placing such person in reasonable fear for such person's safety . . . by establishing a *pattern* of harassing and intimidating behavior, and which serves no legitimate purpose." Thus, the Court held, "[b]ased on the plain terms of the stalking statutes, a single violation of a protective order, by itself, does not amount to aggravated stalking."

Probation; Sex Offender Registration

Hollie v. State, S09G1578

Appellant was convicted of aggravated child molestation, aggravated sexual battery and four counts of child molestation arising out of events that occurred in 2005. He was sentenced in February 2007 under the version of OCGA § 16-6-4 then in effect to 30 years, to serve 15 in confinement. Additionally, the sentence provided as a special probation term that he must register as a sex offender as required by OCGA § 42-1-12.

He contended that the trial court erred in forcing him to register as a special condition of probation. The Court disagreed. Trial courts have broad discretion under the State's probation statutes and may generally impose any reasonable condition of probation in the absence of express authority to the contrary. OCGA § 42-1-12 contains no language expressly prohibiting a superior court from imposing sex offender registration as a probation condition. The Court also refused to interpret OCGA § 42-8-35 as being exclusive in its provisions but

rather recognized that the trial court has broad discretion to impose appropriate conditions not specifically listed therein.

Appellant also contended that because registration as a sex offender is for a lifetime, the designation of sex offender registration as a special condition of probation exceeds the maximum penalty for his conviction. The Court held that while his lifetime registration is required by the sex offender registration statute, the period of time to which he is subject to registration as a special condition of probation, however, is governed by OCGA § 42-8-34 (c). Thus, sex offender registration as a special condition of probation does not exceed the maximum penalty for his conviction inasmuch as his obligation to comply with the registration requirements after the completion of his sentence would be governed solely by OCGA § 42-1-12. Moreover, “current law does not deem registration as a sexual offender to be punishment.”

Guilty Pleas; Immigration Status

Smith v. State, S09G1700

Appellant plead guilty but mentally ill to several child molestation offenses. He asserted that he was not a United States citizen, that the trial court violated OCGA § 17-7-93 (c) and Uniform Superior Court Rule 33.8 (C) (2) by failing to advise him on the record that his guilty plea may have an impact on his immigration status, and that his plea counsel was constitutionally ineffective in advising him that a guilty plea cannot be appealed. The trial court summarily denied the motion, and the Court of Appeals affirmed, holding that “the effect of a guilty plea on a resident alien’s immigration status is a ‘collateral consequence’ of the plea, and a guilty plea will not be set aside because the defendant was not advised of such a possible collateral consequence.” After the Court of Appeals decision, the U. S. Supreme Court decided *Padilla v. Kentucky*, 558 U.S. ___, 130 SC 1473, 176 LE2d 284 (2010).

In a lengthy opinion, the Court held that the Court of Appeals was correct in determining that immigration status is a collateral consequence for Fifth Amendment due process rights governing whether a plea was voluntarily and intelligently entered. *Padilla* was decided not under the Fifth Amendment, but rather under the Sixth Amendment’s right

to effective assistance of counsel. In other words, direct and collateral consequences relate to the trial court’s duty to ensure that guilty pleas are knowingly and voluntarily entered as a matter of Fifth Amendment due process, while ineffective assistance of counsel relates to the defense lawyer’s duty pursuant to the Sixth Amendment. While the two may overlap, they are not identical. The Court was unwilling to say that for Fifth Amendment purposes, immigration status was a direct consequence, stating that were they to do so, where would the line then be drawn (citing may potential “direct” consequence)? The Court stated that it would not go down that “slippery slope.”

Nevertheless, Appellant argued, OCGA § 17-7-93 (c) renders immigration risks a statutorily imposed direct consequence of a guilty plea, particularly given the statute’s use of language suggestive of the constitutional concept that a guilty plea must be entered voluntarily and knowingly. The Court disagreed. What is required to make a guilty plea constitutional is a matter of constitutional, not statutory, law. Thus, although the legislature may have intended to further protect a defendant’s right to voluntarily enter a guilty plea, the legislature cannot by statute alone add to what is constitutionally required of the trial court.

However, that did not end the analysis. The State conceded that the trial court did not comply with § 17-7-93 (c) and Rule 33.8 (C) (2). But, in such circumstances, a defendant is not automatically entitled to relief. Before sentence is imposed, a defendant has an absolute right to withdraw a guilty plea. After that point, even if the record does not adequately demonstrate compliance with one of Rule 33’s provisions, the defendant must “prove[] that withdrawal [of the guilty plea] is necessary to correct a manifest injustice,” as provided by Rule 33.12. The Court held that withdrawal of a guilty plea after sentencing based on a violation of OCGA § 17-7-93 (c) does not specify a different remedy for violations. To show that a manifest injustice resulted in this context, the defendant will need to establish, at a minimum, three facts: 1) his guilty plea actually may have an impact on his or her immigration status; 2) he was not aware of the potential impact of the guilty plea on his immigration status from some source other than the trial court for otherwise, the trial court’s omission of the § 17-7-93 (c) and Rule 33.8 (C)

(2) advice would have made no difference to the decision to enter the plea; and 3) he would not have pled guilty even if he knew about the risks to his immigration status.

Here, although the State conceded that the trial court did not comply with § 17-7-93 (c) and Rule 33.8 (C) (2), appellant could not, on the face of the current record, show harm, or “manifest injustice,” as a result. Consequently, he was not entitled to a direct appeal, timely or out-of-time, and his plea counsel could not have been ineffective in failing to advise him to appeal. For relief, the Court held, appellant must turn to habeas corpus. In that context, he could not raise a claim based on violation of the statute or rule, but he may seek to raise the parallel ineffective assistance of counsel claim recognized in *Padilla*.

Felony Murder

State v. Jackson, S10A0070

Jackson and Smith were charged with felony murder. The evidence would show that the two conspired with Daniels to rob a drug dealer at gunpoint. The victim, however, also turned out to be armed, and he shot and killed Daniels in self-defense. The trial court granted the defendants’ motions to dismiss citing *State v. Crane*, 247 Ga. 779 (1981). The *Crane* Court held that the word “causes” in the felony murder statute requires not proximate causation, but that the death be “caused directly” by one of the parties to the underlying felony. The State appealed, urging the Court to overturn *Crane*.

A divided Court stated that “[t]his should be an easy case for a Georgia appellate court” but for the decision in *Crane*. The question presented was what the term “causes” means as used in the felony murder statute. The Court stated that in cases both before and after *Crane*, the Court interpreted that term to require “proximate causation.” The Court then engaged in a lengthy and historical analysis of causation and the *Crane* decision. In the end, the Court stated as follows: “[W]e hereby overrule *State v. Crane*, [cite] and our subsequent cases relying upon *Crane*. We hold that the felony murder statute requires only that the defendant’s felonious conduct proximately cause the death of another person.” The Court then reversed the order of the trial court and remanded the case for a jury to decide the causation question at trial.

Evidence Tampering; Ineffective Assistance of Counsel

White v. State, S10A0580

Appellant was convicted of malice murder, concealing the death of the victim and for tampering with evidence. He was sentenced to life plus 13 years. He argued that the trial court erred in sentencing him to three years for felony tampering with evidence. The evidence showed that after appellant killed the victim in her bedroom, he cleaned up the room and took other steps to conceal the crime. Under OCGA § 16-10-94 (a), “[a] person commits the offense of tampering with evidence when, with the intent to prevent the apprehension . . . of any person or to obstruct the prosecution . . . of any person, he knowingly destroys, alters, conceals, or disguises physical evidence. . . .” The Court held that because appellant tampered with evidence in his own case and not to prevent the apprehension or prosecution of anyone other than himself, he was guilty of misdemeanor tampering and therefore could not receive a three-year sentence for commission of the crime.

Appellant contended that his trial counsel was operating under an actual conflict of interest while representing appellant. Specifically, appellant contended that counsel purportedly failed to follow appellant’s wish to enter a guilty plea to murder and receive a sentence of life imprisonment because the Office of Public Defender which employed trial counsel had a policy that precluded attorneys from entering a guilty plea that would result in a life sentence. As a result of going to trial, appellant received a sentence of life imprisonment plus thirteen years. The Court agreed that appellant demonstrated an actual conflict of interest by establishing that counsel’s duty of loyalty to her client was in conflict with her duty of loyalty to her employer, and that counsel’s performance was adversely affected thereby in that counsel declined to pursue appellant’s desire to enter a guilty plea in exchange for a sentence of life imprisonment. In this case, however, counsel’s actual conflict did not render the verdict unreliable since appellant wished to plead guilty and the jury trial resulted in a guilty verdict. The prejudicial effect of counsel’s conflict in this case was limited to the thirteen additional years appellant was sentenced to serve following the jury’s verdicts that he would not have

had to serve had he entered the guilty plea he would have entered but for counsel’s actual conflict of interest. The trial court offered to reduce appellant’s sentence to life following the hearing on the motion for new trial, but appellate counsel refused, seeking instead a new trial. But, the Court held, the grant of a new trial was not an available option since the circumstances of the actual conflict established in this case were not of the magnitude that renders the likelihood of an unreliable verdict so high that prejudice should be presumed under *Strickland v. Washington*. Since appellant had not established an actual conflict of interest that would entitle him to a new trial and declined the remedy available to him, the trial court did not err in holding that appellant did not establish he received ineffective assistance of counsel

Indigent Defense; Constitutional Speedy Trial

Phan v. State, S10A0374

Appellant, citing *Vermont v. Brillon*, __U.S.__ (III) (C), 129 SC 1283, 173 LE2d 231 (2009), moved to dismiss his indictment, arguing there has been a “systemic breakdown in the public defender system” caused by a lack of funding. The record showed that appellant, who is Vietnamese, allegedly executed another Vietnamese man and his two-year-old son. He also allegedly shot in a similar manner, the wife and mother, respectively, of the two deceased victims. The living victim returned to Vietnam. The detectives interviewed her over the telephone and when she identified appellant as the killer, he was arrested and the State sought the death penalty. Because appellant is indigent, the Georgia Public Defender Standards Counsel (GPDSC) retained two private attorneys to represent him. One had been paid only through August 30, 2008, and the other apparently had not been paid at all. In 2006, defense counsel petitioned the GPDSC for funds to travel to Vietnam to investigate appellant’s case for both facts and mitigation evidence. The GPDSC did not provide funds for this trip. Based on this lack of funding, appellant filed a motion to dismiss the charges against him, and he also claimed that his right to a speedy trial had been violated. Both motions were based on the notion that budgetary shortfalls and the lack of funding have caused a systemic breakdown

of the public defender system.

The Court held that to adequately address these contentions, the trial court must first thoroughly assess whether there has been an actual breakdown in the entire public defender system prohibiting appellant from receiving counsel within the framework of the facts of this specific case. The trial court’s assessment should include an analysis of alternative sources of funding and alternative representation if necessary under the circumstances of this particular case. If the trial court determines that *no* alternatives are available and that a systemic breakdown of the entire public defender system has actually occurred, this determination must then be factored into a constitutional speedy trial analysis for under the four-part balancing test of *Barker v. Wingo*. Within the *Barker* parameters, evidence of a systemic breakdown of the public defender system impacting a particular defendant should be considered under the reasons for delay. But, the Court stated, even in the context of a systemic breakdown, the remaining three *Barker* factors (the length of delay, assertion of the right, and prejudice to the defendant) must also be considered. Since the trial court’s order did not fully address options, if any, for appellant’s representation, and it did not employ *Barker*’s balancing test, the case was remanded for further proceedings consistent with the opinion.

Statement; Miranda

Barnes v. State, S10A0323

Appellant was convicted of malice murder and other crimes. He contended that the trial court erred in admitting statements he made to police because he was given only a “cursory” reading of the *Miranda* warnings and was interrogated without first being given an opportunity to reflect upon, and invoke, his rights. The Court disagreed. When a defendant is read and understands his *Miranda* rights, he must invoke them clearly and unambiguously. A defendant does not invoke his *Miranda* rights by remaining silent.

Appellant also contended that his statement, “if you’re not going to talk real talk, then we shouldn’t talk” was an unequivocal and unambiguous invocation of his right to remain silent. The Court again disagreed. It found that the statement was conditional, ambiguous, and lacked sufficient clarity to lead a

reasonable police officer to understand that he was exercising his right to remain silent.

Felony Murder; Severance

Westmoreland v. State, S10A0365, S10A0367

Appellants, Westmoreland and Williams, were convicted of burglary, attempt to elude, felony murder and other crimes. The evidence showed that the two burglarized a couple of homes and then attempted to elude the police. As a result, the vehicle driven by Westmoreland (Williams was the passenger) collided with another vehicle, killing the driver and seriously injuring a passenger. Westmoreland contended that the evidence was insufficient to prove felony murder because the death of the victim was not committed “in the commission” of the burglary, but after the burglary was completed and he was attempting to flee. The Court held that a homicide is within the *res gestae* of the underlying felony for the purpose of the felony murder rule if it is committed while fleeing the scene of the crime. The underlying felony continues during the escape phase of the felony if there is continuous pursuit immediately organized, and the felony terminates at the point the perpetrator has arrived at a place of seeming security or when the perpetrator is no longer pursued by the authorities. Here, based on the evidence, the murder was within the *res gestae* of the burglary. Westmoreland also argued that the evidence was insufficient to support his convictions because the vehicle pursuit in this case violated the County Police Department policy and was an intervening cause of the collision. The Court held that under OCGA § 40-6-6 (d) (2), when a law enforcement officer is pursuing a fleeing suspect in another vehicle and the suspect injures or kills any person during the pursuit, the officer’s pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death unless the law enforcement officer acted with reckless disregard for proper law enforcement procedures. And even where such reckless disregard exists, it shall not in and of itself establish causation.

Williams argued that his motion to sever his trial from Westmoreland should have been granted. At the hearing on that motion, Williams argued that “he would like the opportunity” to call Westmoreland to exculpate him in the burglaries, and it was Williams’ “belief” that Westmoreland would not testify in a joint

trial. In order to be entitled to a severance on the ground that a co-defendant would give exculpatory evidence in a separate trial the movant must demonstrate: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the co-defendant will in fact testify if the cases are severed. Given such a showing, the court should then (1) examine the significance of the testimony in relation to the defendant’s theory of defense; (2) assess the extent of prejudice caused by the absence of the testimony; (3) pay close attention to judicial administration and economy; and (4) give weight to the timeliness of the motion.

The Court noted that although Williams’ counsel alluded to an affidavit from Westmoreland that would exculpate Williams in the burglary charges, none was proffered to the court at that time. Thus, other than bare conclusory assertions, Williams proffered no evidence at the pretrial hearing, at trial, or on motion for new trial demonstrating that Westmoreland would in fact testify at a separate trial. Moreover, the jury would not have been confused by the number of defendants. In addition, almost all evidence admissible against Westmoreland was also admissible against Williams. Therefore, there was little likelihood that the jury would confuse the evidence against each defendant. Finally, the defenses were not antagonistic: Westmoreland sought acquittal of the greater offenses and Williams claimed that he merely went along for the ride. Thus, the trial court did not abuse its discretion in denying Williams’ severance motion.

Statements; Clergy-Parishioner Privilege

Willis v. State, S10A0393

Appellant was convicted of the robbery and burglary of one victim as well as the kidnapping, armed robbery, and murder of another victim. Additionally, evidence of the murder of a third victim was admitted as a similar transaction. Appellant contended that his written confession to the murders of the second and third victims was inadmissible pursuant to the clergy-parishioner privilege of OCGA § 24-9-22. This statute provides that “[e]very communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any...minister... priestrabbi, or to any

Christian or Jewish minister, by whatever name called, shall be deemed privileged. No such minister, priest, or rabbi shall disclose any communications made to him by any such person professing religious faith, seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, or rabbi be competent or compellable to testify with reference to any such communication in any court.” The record showed that appellant, while in jail, initially told the prison chaplain that he wished to confess. The chaplain testified that he instructed Willis that “[i]f you want to do a confession, you don’t do it to the chaplains. You do it to the proper authorities. . . . And I asked [appellant], I go, is this what you want to do? And he said, yes.” The chaplain further testified that he never told appellant that he had to give any confession to police against his wishes. To the contrary, the chaplain testified that a law enforcement officer was brought to the room to take a confession *at Willis’ request*. After the police officer entered the room, he asked appellant if he wanted to confess, and he confirmed that he did. The law enforcement officer then informed him that, if he did confess, the confession would be forwarded to the detective who was handling his case. With all of this information, appellant made his confession, knowing that it would be handed over to law enforcement in the case against him. The Court held that under these circumstances, the clergy-parishioner privilege was not applicable because appellant knowingly gave the confession to law enforcement, not privately to the chaplain. The chaplain did not disclose the confession to police. To the contrary, appellant did so himself. Moreover, even if there were any clergy privilege at play in this case, it was repeatedly waived. The chaplain testified that he sought out law enforcement at appellant’s request, and both the chaplain and the officer who took the confession first made certain that appellant understood what he was doing and that he wanted to do it..

Victim’s Violent Acts; Right to Testify on One’s One Behalf

Spencer v. State, S10A0453

Appellant was convicted of felony murder and other crimes arising out of the shooting death of a rival drug dealer. He contended that under *Chandler v. State*, 261 Ga. 402

(1991), the trial court erred by failing to hold a pretrial hearing. In *Chandler*, the Court held that evidence of a victim's specific violent acts against third parties may be admissible where a defendant claims justification (self-defense). Uniform Superior Court Rule 31.1 was amended and Rule 31.6 was enacted to codify the procedures that now govern the admissibility of *Chandler* evidence. Among other things, the defendant has the burden of showing the admissibility of *Chandler* evidence. To meet that burden, the defendant must, at a minimum, (1) follow the procedural requirements for introducing the evidence, (2) establish the existence of prior violent acts by competent evidence, and (3) make a prima facie showing of justification.

The Court held that Rules 31.1 and 31.6 require detailed pre-trial notice of the defendant's intention to present *Chandler* evidence (and of the State's intention to offer any rebuttal evidence), in order to prevent trial by ambush. But, *Chandler* did not require that the trial court hold a hearing on the issue before trial begins. Rule 31.6 (B) requires the trial court to conduct a hearing on *Chandler* evidence outside the jury's presence, during which the judge "may receive evidence on any issue of fact necessary to determine the request." Nevertheless, the rule expressly leaves the timing of that hearing to the discretion of the court, stating that "[t]he judge shall hold a hearing at such time as may be appropriate."

Appellant also contended that the trial court erred in failing to ascertain on the record whether he wanted to testify in his own defense. The record showed that near the end of the State's case-in-chief, the trial court advised appellant, on the record, that the decision to testify was his alone and that he should consult with his counsel before making his decision. At defense counsel's request, appellant was given overnight access to his attorneys to confer about the decision. He then did not testify at trial. During the motion for new trial hearing, defense counsel confirmed that the right to testify had been explained to appellant and he had decided not to testify.

Appellant argued that trial courts should be required to make on-the-record waivers to ensure that a defendant's decision to waive the right to testify is knowing and voluntary and that, at a minimum, defense counsel should place on the record a statement of the fact that

the defendant has been fully informed of the consequences of not testifying. However, the Court held, under Georgia law, the trial court had no duty to ascertain on the record whether appellant wanted to testify or to advise him regarding the consequences of his decision. Although it is the "better practice" for trial courts routinely to inquire whether a non-testifying defendant desires to waive his right to testify, in order to avoid such post-conviction challenges, the Court has declined to mandate that trial courts engage in an on-the-record colloquy with criminal defendants about their decision not to testify. "Requiring trial courts to inject themselves into the discussions between non-testifying defendants and their counsel about whether or not to take the stand would be inappropriate."

Mistrial

Bellew v. State, A10A0022

Appellant was indicted and tried for aggravated assault with intent to rob, aggravated assault with a deadly weapon, and two weapons possession charges. The victim was an attorney who was accosted in his backyard by a man pointing a shotgun at him and demanding money. After the State rested it was brought to the court's attention that a juror might have been talking about the case with his estranged wife. The victim had represented the wife against the juror in a divorce proceeding some years earlier. The juror was called before the court and denied having negative feelings toward the victim, but admitted that he had discussed the merits of the case with his wife. Over defendant's objection, the trial court asked each juror whether he or she had discussed the case or the evidence or heard anyone else do so. The trial court declared a mistrial after finding that, although none of the jurors admitted to personally discussing the case, several jurors overheard other jurors discussing the case in violation of the court's order. In addition, the court found that defendant had consented to the mistrial.

Appellant argued that the trial court relied on hearsay evidence from the jurors in granting a mistrial, without a showing of manifest necessity. The Court found that the decision to grant a mistrial must be based on the surrounding circumstances in their totality, and the trial court was able to determine potential prejudice based on the jurors' responses as a

whole. Appellant also argued that he did not consent to the mistrial, but the Court found that he consented by implication, as he twice had the opportunity to voice his objection and failed to do so. The trial court specifically asked him whether he joined the State's motion for mistrial, and defendant avoided a "yes" or "no" answer, responding only that he wanted the court to consider granting him bond.

Vehicular Homicide, Evidence: Similar Transaction

Taylor v. State, A10A0534

Appellant was found guilty of two counts of vehicular homicide. The evidence showed that he hit another vehicle on I-75 while attempting to pass it at 90 m.p.h., causing the vehicle to overturn and the driver and passenger to die. Appellant argued on appeal that the trial court erred in admitting several traffic offenses as similar transactions, arguing that the other crimes evidence was improper, unnecessary, and prejudicial. The State had offered evidence of two citations for speeding, and another for failing to stop at a stop sign located at the end of an interstate exit ramp. The court found that the evidence was introduced to prove Taylor's bent of mind and course of conduct in driving recklessly. Bent of mind and course of conduct are proper purposes for introducing similar transaction evidence, and such evidence is admissible "when there exists some logical connection between the similar transaction evidence and the charged offense so that the similar transaction evidence tends to establish the charged offense." Since defendant contested the issue of recklessness, the evidence was relevant and not unnecessary.