Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 13, 2012

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THIS WEEK:

• **Expert Opinion; Ineffective Assistance of Counsel**

• **Indictment; Burglary**

• **Demonstrative Evidence; Refreshing Recollection**

• **Sentencing; Recidivist**

• **Search & Seizure; Impoundment & Inventory**

• **Confrontation Right; Res Gestae**

• **Confession; Hope of Benefit**

• **Sequestration**

Expert Opinion; Ineffective Assistance of Counsel

Elrod v. State, A12A0721 (6/28/2012)

Appellant was convicted of cruelty to a child in the first degree. He alleged that the trial court erred by overruling his objection to portions of the testimony of one of the State's expert witnesses. The Court affirmed the judgment of conviction but remanded the case to the trial court for a hearing on appellant's ineffective assistance of counsel claim because trial counsel did not file a motion for new trial, but instead filed a notice of appeal and appellate counsel subsequently filed an entry of appearance; thus, the appeal was appellant's first opportunity to raise an ineffective assistance of trial counsel claim.

"Generally, when the appeal presents the first opportunity to raise an ineffective assistance claim, we remand the case to the trial court for an evidentiary hearing on the issue." The Court stated that appellant's argument that he was prejudiced by trial counsel's failure to call an expert could not be decided as a matter of law based on the existing record.

Regarding appellant's objection to statements made by the State's expert witness, the record showed the following: On January 18, 2011, appellant and his girlfriend put one of his girlfriend's children, L. M., in the crib for a nap. The mattress for the crib was set at the highest level, which setting allowed L. M. to stand with the crib railing only reaching his chest. The girlfriend then went upstairs to take a shower, and when she returned approximately 15 minutes later, she found L. M. sitting upright on the couch with appellant. Appellant claimed that he was in the adjacent room when he heard L. M. cry out, and when he went to check on the child, he found L. M. had fallen out of the crib, with his leg lodged in the crib railing and his face on the cement floor. She did not see any noticeable injuries on L. M. at the time, although he indicated that his leg was uncomfortable and seemed less active than usual.

A doctor from Children's Healthcare of Atlanta conducted an examination of L. M. and observed numerous facial, chest, and abdominal bruises, many of which were inconsistent with normal accidental toddler bruising. The doctor also conducted separate interviews with appellant and his girlfriend in order to obtain their recollections of the event, and she noticed several inconsistencies in the details provided by each of them. In her opinion, she concluded that L. M.'s injuries had resulted from physical abuse and also noted that her review of L. M.'s x-rays revealed a healing left fibula fracture as well. At trial, the doctor was introduced as an expert witness and testified as to the examinations she performed and the

conclusions she reached. She also was asked to consider a hypothetical scenario resembling the version of events provided by appellant in order to judge the likelihood of L. M.'s accidental injuries in such a scenario. At trial, photographs taken of appellant's house and of the crib from which L. M. allegedly fell were admitted. During re-direct examination of the doctor, the State asked her to "imagine" the placement of L. M.'s foot and ankle through the rail, in the position provided by appellant in his version of the incident, and the child's face on the concrete floor. Appellant objected on the grounds that the doctor had not viewed the actual scene and that the photographs did not accurately depict the crib at the time of the incident. The trial court overruled the objection, and the doctor went on to testify that in her opinion, the child's injuries were inconsistent with appellant's version of events.

The Court stated that it is well-settled that "an expert witness may testify about opinions based on facts within . . . her personal knowledge or facts admitted into evidence at trial and presented to the expert in the form of hypothetical questions." And "where an expert bases [her] opinion on facts within the bounds of evidence . . . the testimony is admissible notwithstanding the fact that the expert never went to the scene at all. . . ." Thus the Court held that because the hypothetical was supported by the evidence, the trial court did not err by allowing the doctor to respond to the hypothetical.

Indictment; Burglary

Jackson v. State, A12A0654 (7/3/2012)

Appellant was found guilty of two counts of aggravated assault, two counts of aggravated battery, and burglary. Appellant argued that the burglary count of the indictment was fatally defective. The Court affirmed.

Specifically appellant maintained that the burglary count of the indictment was defective because the offense was misnamed as "aggravated battery." According to appellant, the mislabeling of the offense as "aggravated battery" in the body of the indictment required the trial court to grant his motion to quash Count 5. The Court disagreed. The Court noted that "[a]n accused may challenge the sufficiency of an indictment by filing a general or special demurrer. A general demurrer challenges the sufficiency of the substance of the indictment, whereas a special demurrer challenges the sufficiency of the form of the indictment." State v. Corhen, 306 Ga. App. 495, (2010). Under OCGA § 17-7-110, a special demurrer must be filed within ten days after the arraignment, unless the trial court extends the time for filing. But "[a] general demurrer, in which a defendant contends that the charging instrument fails altogether to charge him with a crime, may be raised at any time" before the trial court. While appellant did not file a timely special demurrer and thus waived his right to a perfect indictment, his motion to quash the indictment was construed as a timely general demurrer. In determining the sufficiency of an indictment to withstand a general demurrer, the following test is applied: If all the facts which the indictment charges can be admitted, and still the accused be innocent, the indictment is bad; but if, taking the facts alleged as premised, the guilt of the accused follows as a legal conclusion, the indictment is good. An indictment which charges the offense in the language of the defining statute and describes the acts constituting the offense sufficiently to put the defendant on notice of the offense with which he is charged survives a general demurrer. The Court found that although the offense was mislabeled as "aggravated battery" in the body of Count 5, "it is immaterial what the offense is called, if the averments of the presentment are such as to describe an offense against the laws of the [S]tate. It is not the name given to the bill which characterizes it, but the description in the averments of the indictment." The averment portion of Count 5, which described the offense that had been committed by appellant, followed the language of the burglary statute and fully apprised him of the offense charged. Furthermore, the subject heading of Count 5 (although misspelled) clearly referred to the offense as burglary, and the heading was followed by a citation to the burglary statute itself. Hence, Count 5 charged the offense in the language of the defining statute and described the acts constituting the offense sufficiently to put appellant on notice that he was being charged with burglary.

Demonstrative Evidence; Refreshing Recollection

Ashmid v. State, A12A0381 (7/2/2012)

Appellant was convicted on one count of child molestation. He contended that the trial court improperly allowed the State to refresh the victim's recollection with an anatomical picture of a naked female child after the victim repeatedly answered that appellant hurt her on the leg, the arm, and nowhere else. However, the Court found, although appellant asserted that the State improperly refreshed the victim's memory, over objection, by asking the child to identify various body parts before again asking where appellant hurt her—resulting in a reply that appellant had hurt her "pee-pee"—the record reflected that the diagram was used not to refresh the child's memory but as demonstrative evidence. The Court noted that there was a bench conference at the request of appellant's counsel after the State showed him a diagram of what he described as "a naked body that has a very pronounced vaginal area that [the State] was going to take to the child." The State responded as follows: "What [the victim] refers to as a knee or a leg, as she said, if that's the case, then . . . I'm going up there with this knowing what she said and . . . trying to get it out to the jury. She may very well point to the leg. It's a picture of the whole body. There's nothing pronounced on it."

The Court found that despite appellant's contention that this incident amounted to an improper instance of refreshing a witness's recollection, it was clear from the record that the diagram was instead used as relevant demonstrative evidence. And "[a]ny evidence is relevant which logically tends to prove or disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant." Additionally, "the trial court has wide discretion in determining relevancy and materiality, and furthermore, where the relevancy or competency is doubtful, the evidence should be admitted, and its weight left to the determination of the jury." Because the victim was four years old when she testified at trial, her ability to properly identify body parts and indicate which parts were involved in the alleged molestation would be relevant to the jury's determination of appellant's guilt. Accordingly, the trial court did not abuse its discretion.

Sentencing; Recidivist

Ray v. State, A12A0166 (6/28/2012)

Appellant was convicted of possession

of cocaine with intent to distribute, possession of a firearm during the commission of a crime, giving a false name, obstruction of an officer, false statement or writing, fleeing or attempting to elude a police officer, driving without insurance, operating a vehicle without a current decal, improper lane change, and improper lane usage. The trial court entered an order of nolle prosequi on a charge of possession of a firearm by a convicted felon, and appellant was found not guilty of driving without a license. Appellant

filed a "Motion to Vacate Void Sentence," the denial of which appellant, pro se, appealed. Appellant contended that the trial court improperly sentenced him on the drug charge to serve 35 years without parole as a recidivist under OCGA § 17-10-7 (c). The Court affirmed.

The Court stated that a sentence is void if it imposes punishment not permitted by law. Thus, a sentence is void if it imposes a period of confinement or fine greater than the statutory maximum for the offense or if it imposes punishment for both a greater offense and a lesser included offense for the same act. On appeal from the denial of a motion to vacate void sentence, an appellate court will not consider issues which go to the validity of the defendant's conviction, but only those that go to the validity of his sentence.

Appellant argued that his sentence was void because during the sentencing hearing the trial court considered a prior burglary conviction that had previously been admitted as similar transaction evidence at trial, and that the State's use of the prior burglary conviction in the guilt-innocence phase violated the dual use restrictions set forth in King v. State, 169 Ga. App. 444 (1984). No trial transcript containing the court's sentencing was provided to the Court for review; however, the Court stated that it was clear from the record that the possession of a firearm by a convicted felon charge was nolle prossed and thus the prior burglary conviction was not used as a basis for a criminal conviction and for sentencing purposes.

The Court stated that in King, it held that the State cannot use a prior felony conviction to convict a convicted felon for being in possession of a firearm, and then use the same prior conviction to enhance the sentence to the maximum punishment for the offense under the recidivist statute. Here, the possession of a firearm by a convicted felon was nolle prossed and the court used the burglary conviction and two other prior felony convictions to enhance appellant's punishment at sentencing. The Court found that the trial court did not use the prior felony conviction both to support a conviction on the firearm possession charge and to enhance appellant's sentence, but only the latter. Thus, the Court held that the trial court did not err by considering that conviction in imposing punishment under OCGA § 17-10-7 (c), and by denying appellant's motion to vacate the sentence.

Search & Seizure; Impoundment & Inventory

Capellan v. State, A12A0106 (6/28/2012)

Appellant was convicted of trafficking in marijuana, possession of marijuana with intent to distribute, and giving a false name and date of birth. Appellant sought review of the trial court's denial of his motion to suppress and the Court reversed. The record revealed that an officer patrolling on I-85 noticed a flatbed wrecker carrying a van run onto the shoulder of the road "across the fog line approximately three times." The officer also noticed that the wrecker's New Jersey license plate was illegible because of "grease or dirt or some kind of black smudges all over the tag." The officer stopped the wrecker and asked the driver, appellant, for his driver's license. When appellant stated that he did not have his driver's license, the officer asked him for his name and date of birth. When the officer called police dispatch to inquire about appellant's license, the name and date of birth given by appellant came back as "not on file." Appellant then told a second officer on the scene that his driver's license was behind the seat of his wrecker and that it might be suspended. Appellant was then arrested for giving a false name and date of birth. When the first officer went into the cabin of the wrecker to look for appellant's license, he smelled "a fairly strong odor of raw or green marijuana." This officer testified that he was trained in marijuana recognition. The officer did not "locate any marijuana," but did locate a valid Florida driver's license and a suspended New Jersey driver's license, showing appellant's real name and date of birth. The officer testified and the video recording revealed that after appellant was secured in the back of the police vehicle, he began "inventorying" the wrecker and the van. The officer retrieved the keyless entry for the van from the key ring in the ignition of the wrecker, unlocked it, and opened the cargo area of the van. In the back of the van, the officer found two large duffel bags containing clear plastic bags of approximately 29 pounds of marijuana.

Appellant argued that the trial court erred in denying his motion to suppress because the State failed to show that the search of the locked van and the duffel bag were lawful. Specifically, he argued that there was no evidence of a police department policy with respect to the opening of closed containers- here the locked van and duffel bags- encountered during the inventory search and no other exceptions to the warrant requirement exist. The State, on the other hand, asserted that the police conduct in having a lawful basis for impounding the wrecker (and the van it was carrying) was reasonable and that the marijuana in the van would have been inevitably discovered during a subsequent inventory search of the van following impoundment. Thus, impoundment, inventory, and inevitable discovery are inextricably tied here.

The first step in the Court's analysis required it to determine whether the "impoundment was reasonably necessary under the circumstances." The Court noted, "Cases supporting the State's right to impound a vehicle incident to the arrest of a person in control of it are founded on a doctrine of necessity." The record showed that appellant was the sole occupant of an out-of-state vehicle governed by the Department of Transportation and required a special commercial driver's license (CDL) to drive. The wrecker was parked on an exit ramp of an interstate highway at night. The officer acknowledged that he did not offer appellant an opportunity to make his own arrangements to remove the wrecker from the side of the highway ramp, explaining "I knew nobody would have been able to get here for a reasonable amount of time from where he was from." The Court found that based upon information available to the officer on the scene that the officer's decision to impound the wrecker was entirely reasonable.

Next the Court determined whether the officer's search of the van was a valid inventory search. The United States Supreme Court has held that an inventory search may be

"reasonable" under the Fourth Amendment even though it is not conducted pursuant to a warrant based upon probable cause. In this respect, an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence, but instead the policy or practice governing inventory searches should be designed to produce an inventory. Appellant argued that the inventory search of the locked van and the duffle bags inside it was not proper in the absence of evidence of the police department's policy on inventory searches. The record contained no evidence about the police department's policy or procedures on inventory searches. Rather, both officers simply testified that their searches of the wrecker, van, and its contents were inventory searches pursuant to the impoundment. The Court stated that the police department may well have had such a reasonable inventory procedure, but, there was no evidence in the record to establish the existence of such a policy or procedure. Without evidence of such policy, the Court found it was difficult, if not impossible, to conclude that the inventory was conducted pursuant to such policy and not simply a "rummaging" to discover incriminating evidence. The Court therefore held that the inventory search was unreasonable under the Fourth Amendment. Furthermore, the Court found that the State's assertion that the search should be upheld under the doctrine of inevitable discovery was also unreasonable based upon the lack of evidence about the police department's inventory policy. The Court was therefore constrained to reverse.

Confrontation Right; Res Gestae

Milford v. State, S12A1283 (7/2/2012)

Appellant was convicted of felony murder and armed robbery. Appellant asserted the trial court violated his constitutional right to confront witnesses by admitting statements made by the victim to the responding officer. The Court affirmed.

The Court found in reviewing the record that on the night of the crimes appellant and his accomplice approached the victim and robbed him at gunpoint for his bicycle. After taking the bicycle, appellant saw the victim talking on his cell phone. Believing the victim was calling the police, appellant chased him down and shot him in the throat. A responding officer found the victim bleeding profusely. The victim told the officer that he had been approached by two individuals who took his bicycle at gunpoint and then shot him in the throat. Appellant and his accomplice returned to the scene of the crime approximately 15 minutes later. They were recognized by numerous witnesses and apprehended by police. The victim succumbed to his injury and died several months later.

Appellant claimed that the trial court violated his constitutional right to confront witnesses by permitting the responding officer to testify as to what the victim told him when he arrived at the scene. The Court found that the trial court did not err in admitting the now-deceased victim's statements because the statements were made to meet an ongoing emergency and were therefore non-testimonial in nature. The Court noted that appellant and his accomplice were armed and dangerous having just shot the victim in the throat. Thus, the statements elicited by the officer from the victim were necessary to apprehend two dangerous armed criminals on the loose. Once a determination is made that a statement is non-testimonial, "'normal rules regarding the admission of hearsay apply.'" Because the victim's statements were derived solely from his personal observations, were made within minutes of the crime and were free of all suspicion, the victim's statements were admissible under the res gestae exception to the hearsay rule. OCGA § 24-3-3.

Confession; Hope of Benefit

Pulley v. State, S12A0786 (7/2/2012)

Appellant was found guilty of malice murder, theft by taking a motor vehicle, and felony theft by taking. Appellant contended that the statements he made during interrogation following his arrest were induced by a promise of benefit and thus the trial court erred in finding that his inculpatory statements in his interview with police were voluntary. According to OCGA § 24-3-50, "[t]o make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or the remotest fear of injury." "Generally, the reward of a lighter sentence for confessing is the 'hope of benefit' to which the statute refers." Taylor v. State, 274 Ga. 269, (2001). First, appellant highlighted statements made by a police chief from Mississippi who told appellant that his only chance was to "cut a deal" with the district attorney which could mean "life versus 20 years," that he had helped reduce other people's sentences, that he was trying to do that for him, and that appellant may be able to get out in a few short years. The Court noted that without context, these statements by the police chief would seem to constitute the impermissible hope of benefit. However, the "trial court determines the admissibility of a defendant's statement under the preponderance of the evidence standard considering the totality of the circumstances." Further the Court stated that the fact "that a law enforcement officer promises something to a person suspected of a crime in exchange for the person's speaking about the crime does not automatically render inadmissible any statement obtained as a result of that promise." Thus, the voluntariness of a statement does not depend solely upon whether it was made in response to promises, rather, the court must determine voluntariness by judging the totality of the circumstances and the key inquiry is whether the alleged promise actually induced the statement that appellant sought to suppress.

The record showed, after the statements were made by the police chief, the detective specifically informed appellant that he was not there to give him any deals, that he could make no promises with regard to his sentence, and that the district attorney who would be in charge of the case is in Georgia, not Mississippi. Thus, the detective immediately informed appellant that any promises made by the police chief were not valid. Moreover, appellant did not make his inculpatory statements until a significant time after the police chief made his assertions that he could help him get a shorter sentence, and during this time, the detective repeatedly informed appellant that they could make no promises to him. In fact, before appellant made any inculpatory statements, he specifically told his interviewers that he did not care if they were going to help him or not, he was going to tell them what happened anyway. The Court found that this statement by appellant not only showed that he did not rely on any inducements of a lighter sentence but also revealed that he believed that such promises by the police chief were not truthful and were simply a tactic by the police to get him to talk, a belief that appellant admitted to having dur-

ing his testimony at trial. Therefore, although the statements made by the police chief may constitute an improper hope of benefit, "they, nevertheless, when viewed in the totality of the circumstances, did not actually induce [appellant's] confession." Therefore, the Court held appellant's contention was without merit.

Sequestration

Holloman v. State, S12A0958 (7/2/2012)

Appellant was convicted of felony murder while in the commission of aggravated assault. He contended that the trial court erred by permitting the State to have the investigating agent from the Georgia Bureau of Investigation remain in the courtroom at counsel table during the entire trial, and thereby, violated the rule of sequestration. The Court disagreed and noted that the State requested that the agent be excused from the rule because he was the lead agent on the case and was needed to help "keep everything straight." In the situation in which the State maintains that it needs the presence of the primary investigator for the orderly presentation of the case, excepting the investigator from the rule of sequestration is within the discretion of the trial court. Moreover, in the present case, the prosecutor elaborated that the agent was needed because of the seriousness of the case and the fact that there were expected to be more than 40 witnesses and numerous exhibits introduced into evidence. Thus, the Court held there was no abuse of the trial court's discretion.