Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 6, 2018

THIS WEEK:

Right to Trial by Jury; Procedural Defaults

Price v. State, A18A0631 (5/14/18)

Appellant was charged with one count of child molestation and one count of sexual battery against the child victim. Appellant, through his counsel, pled guilty to the sexual battery and not guilty to the child molestation. After a bench trial, the court found appellant guilty of child molestation and merged the sexual battery into the molestation conviction.

Appellant argued that the State failed to show he made a knowing and voluntary waiver of his right to a jury trial. The Court stated that a criminal defendant must personally and intelligently participate in the waiver of the constitutional right to a trial by jury. When the purported waiver of this right is questioned, the State bears the burden of showing that the waiver was made both intelligently and knowingly, either (1) by showing on the record that the defendant was cognizant of the right being waived; or (2) by filling a silent or incomplete record through the use of extrinsic evidence which affirmatively shows that the waiver was knowingly and voluntarily made.

Here, the record showed that in February 2017, appellant's trial counsel filed a motion representing that appellant had waived his constitutional right to a jury trial. On May 22, 2017, counsel again represented, in appellant's presence, and both in writing and on the record, that appellant had waived the right, with appellant himself signing the writing and raising no objection to counsel's representation on his behalf. At no point, however, did appellant or his counsel make any representation as to whether these waivers were knowing and voluntary, and the trial court never made any factual determination on the issue. Thus, the Court found, the record did not affirmatively show that appellant made the decision to waive his right to a jury trial, or at least that he agreed with that decision. Accordingly, the Court vacated his conviction, and remanded to the trial court for an evidentiary hearing on this issue. If the trial court determines from the evidence adduced at the hearing that appellant personally participated in the decision to waive a jury trial, then his conviction and sentence may be reinstated, and appellant will be entitled to file a new appeal as to this issue. If the trial court finds insufficient evidence that appellant made a knowing and voluntary waiver, then the court must reverse appellant's conviction and conduct a new trial.

Appellant also raised claims of ineffective assistance of counsel on appeal. However, the Court found, the record showed that after appellate counsel had appeared in the case, and before the deadline for filing a motion for new trial, appellate counsel filed a notice of appeal in which he asserted that he would raise the issue of effectiveness on appeal. But,

appellate counsel never filed a motion for new trial which was required in order to obtain an evidentiary hearing on the matter.

It is axiomatic that a claim of ineffectiveness of trial counsel must be asserted at the earliest practicable moment. This rule requires that the claim be raised before appeal if the opportunity to do so is available; that the ability to raise the issue on motion for new trial represents such an opportunity; and that the failure to seize that opportunity is a procedural bar to raising the issue at a later time. Thus, the Court held, when appellate counsel, having made an appearance in the case before the deadline for filing either a motion for new trial or a notice of appeal, failed to raise the matter of trial counsel's ineffectiveness in the trial court, appellate counsel failed to do so "at the earliest practicable moment" such that consideration of that matter was barred on appeal.

Search & Seizure; Video Evidence

State v. Dykes, A18A0613 (5/14/18)

Dykes was charged with being a habitual violator, DUI (less safe), failure to maintain lane, and giving false information to a law-enforcement officer. The trial court granted his motion to suppress and the State appealed.

The State argued that the trial court erred in granting Dykes's motion to suppress because the court's finding that he did not commit the traffic violation of failure to maintain lane was clearly erroneous. The Court disagreed. During the hearing on the motion to suppress, the arresting officer repeatedly testified that the sole reason he initiated the traffic stop was because he observed Dykes's vehicle cross over the center white line into the right lane of the road and then back into the left lane in violation of OCGA § 40-6-48 (i.e., failure to maintain lane). This alleged traffic violation was recorded by a camera on the patrol car's dashboard (the "dash-cam video"), and it was played for the trial court during the hearing. Dykes argued that the video did not show him crossing the center line, and the trial court agreed, noting that it could not see the car crossing over the line in the video.

Nevertheless, the State contended, the trial court's finding in this regard was erroneous because the dash-cam video, along with the officer's testimony, conclusively established that Dykes's tires touched the white dashed line and then returned to his lane of travel. As to the officer's testimony, the State contended that his credibility was "never called into question" and that he was an experienced and well-trained traffic officer. But, the Court stated, this argument ignores the rule that a trial court on a motion to suppress is "not required to accept the testimony of any witness, even if that testimony is uncontradicted." And here, based on its own independent review of the dash-cam video, the trial court apparently did not believe the officer's testimony that Dykes violated OCGA § 40-6-48.

Furthermore, the Court found, it disagreed with the State that the dash-cam video conclusively established that the trial court's finding that Dykes's car did not cross over the center lane of the road was clearly erroneous. The Court noted that the video was dark and of poor quality and it was simply impossible to discern whether Dykes committed the traffic violation at issue. In fact, during the suppression hearing, the arresting officer even apologized to the court for "the lack of quality on the video." When, as here, the dash-cam video is inconclusive, the Court must review this evidence in the light most favorable to the trial court's findings and judgment. Thus, the Court deferred to the trial court's finding that Dykes did not commit the traffic violation that was the sole basis for the traffic stop. And for a traffic stop to be valid, an officer must identify specific and articulable facts that provide a reasonable suspicion that the individual being stopped is engaged in criminal activity. Thus, because the trial court's conclusion that Dykes did not commit a traffic violation was not clearly erroneous, the officer lacked reasonable suspicion to stop Dykes, and the court properly granted his motion to suppress.

The State also argued that the trial court erroneously dismissed the case sua sponte without calling the case to trial or inquiring whether the State had any additional evidence. But, the Court stated, the State failed to identify any admissible evidence that it would have presented if given the opportunity to do so. Moreover, the Court noted, its independent review of the record likewise failed to show any evidence that the State could have presented to prove the charges against Dykes. Indeed, all of the evidence relevant to Dykes's charged offenses was obtained solely as the result of the traffic stop.

National Precursor Log Exchange Records; Sufficiency of the Evidence

Cummings v. State, A18A0400 (5/14/18)

Appellant was convicted of manufacturing methamphetamine, trafficking methamphetamine, manufacturing methamphetamine in the presence of a child, and misdemeanor possession of marijuana.

She contended that the trial court erred by permitting the State to introduce National Precursor Log Exchange (NPLEx) Records showing purchases of pseudoephedrine by appellant and her co-conspirator over her objection under Rule 403 that the prejudicial effect of such evidence outweighed its probative value. The Court disagreed.

The Court noted that the State obtained and introduced certain records from NPLEx of pseudoephedrine purchases made by appellant and the man with whom she shared the residence. The Court found that the NPLEx records were probative of the fact that both appellant and her co-conspirator had, on numerous prior occasions, purchased pseudoephedrine, which the evidence established is a key precursor in the manufacture of methamphetamine. Additionally, several of the records pertaining to appellant's purchases showed that she had listed as her home address the address of the residence where the methamphetamine and evidence of methamphetamine production were found. As the issue of where appellant resided was a contested issue in the case, this evidence was clearly probative of appellant's living habits and her connection with that address.

Nevertheless appellant argued, the prejudicial effect of the records derives from the fact that her last purchase of pseudoephedrine reflected in the records was eight months prior to the date the residence was searched. She argued that there was no logical connection between the purchases of pseudoephedrine shown in the NPLEx records and manufacturing of methamphetamine on or about the date listed in the indictment because the State's expert had testified that precursors used in the manufacture of methamphetamine are generally used quickly after being obtained. However, the Court found, that argument goes to the weight the jury could assign to

the NPLEx records, which appellant was free to challenge through cross-examination of the State's witness and her closing argument. Thus, the Court held, in light of the highly deferential posture it assumes in reviewing the trial court's rulings under Rule 403, there was no abuse of the trial court's discretion in admitting evidence of these records over appellant' objection.

Appellant also contended that the evidence was insufficient to support her conviction for possession of marijuana. The Court agreed. Although marijuana was found in the residence when it was searched, appellant was not present at the time. Moreover, the evidence established that she shared the residence with her co-conspirator and that at least one other man had been living there leading up to the search of the residence. Where the sole evidence that the defendant possessed contraband arises from the inference that the owner or tenant of the dwelling possesses its contents, positive evidence that another person had the access necessary to place the contraband will dissolve the inference. As the State did not present evidence that the marijuana found in the search had ever been in the possession or control of appellant, and because other people had access to the residence where the marijuana was found, the State did not present sufficient evidence to support appellant's conviction for possession of marijuana.

Best Evidence Rule; Destruction of Evidence

Ceballos v. State, A18A0597 (5/14/18)

Appellant was convicted of giving a false name to a law enforcement officer. The relevant evidence, briefly stated, showed that officers were investigating a motorbike crash. While looking for potential witnesses, Officer Scott asked appellant his name, and requested that he write his date of birth and name in Scott's field notepad. At the time of trial, Scott no longer had the notebook, but he remembered that the last name "was too jumbled" for them to read, and they "assumed it was Gonzales or a variation of the spelling of that name." According to another officer who spoke to appellant, the last name was "almost illegible. It most certainly did not look like 'Ceballos.' … It looked like 'Gonzales' or something along those lines." The defendant did legibly write his correct date of birth.

Appellant first argued that the court admitted the evidence in violation of the Best Evidence Rule. The Court noted that although appellant did not object on these grounds, the Court could review whether the trial court committed plain error in admitting the evidence. And here, the Court found, appellant was unable to show that the trial court erred by admitting this evidence under the new Evidence Code, much less that a legal error was "clear or obvious, rather than subject to reasonable dispute." Thus, under OCGA § 24-10-1004 (1), an original recording or photograph is not required at trial and secondary evidence of its contents is admissible if "all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." Here, it was undisputed that the officer lost, misplaced, or destroyed the notebook, but there is no evidence and appellant failed to even allege, that the State intentionally destroyed it in bad faith. As a result, the testimony regarding the contents of the lost or destroyed notebook was admissible under the plain language of OCGA § 24-10-1004 (1).

Appellant also contended that the State violated his constitutional rights by failing to preserve the notebook, which he contends was exculpatory. However, the Court stated, pretermitting whether the defendant waived this argument by failing to renew it at the close of the State's case or the evidence, it presented no basis for reversal. The State's duty to preserve evidence which may be exculpatory arises from the Due Process Clause of the U.S. Constitution. A bad faith failure to preserve material evidence is a denial of due process. The issue usually arises where the State has actual physical possession of evidence and fails to preserve it.

Here, appellant failed to show a due process deprivation. In dealing with the failure of the State to preserve evidence that might have exonerated the defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence. But here, there was no evidence that police or the State acted in bad faith in connection with the failure to preserve the evidence. Thus, pretermitting whether the writings in the notebook were "constitutionally material," the defendant's due process argument was without merit.

Juvenile Proceedings; Sufficiency of Delinquency Petitions

In re C. W., A18A0364 (5/15/18)

C. W. was arrested on January 25, 2017, and placed in detention. A delinquency petition was filed on January 31, 2017, alleging delinquent acts which, had C. W. been an adult, would constitute the crimes of attempted aggravated sodomy (Count 1); attempted sodomy (Count 2); sexual battery (Count 3); and two counts of simple battery (Counts 4 & 5); Counts 1 and 2 referred only to the "victim," while the remaining counts referred to the victim by name. An amended delinquency petition was filed on February 1, 2017, adding an additional count of simple battery against a different victim, who was referred to by name (Count 6).

An adjudicatory hearing was held on February 3, 2017. After the witnesses were sworn but before the State could call its first witness, C. W.'s counsel made a motion to dismiss Counts 1 and 2 of the delinquency petition, arguing that those counts were fatally defective because they did not name the victim of the alleged acts of delinquency, violating the juvenile's due process rights. The juvenile court granted the motion, finding that C. W.'s due process rights were violated because Counts 1 and 2 failed to provide sufficient information for him to prepare his defense. The juvenile court also rejected the State's argument that the motion should be denied because it was not in writing and untimely. Pursuant to OCGA § 5-7-1 (a), the State appealed.

The Court stated that it is settled law that an allegation that the accused has committed a crime against a particular person that does not contain the name of the victim is considered deficient and subject to challenge. But contrary to C. W.'s argument, in the context of criminal adult proceedings, this type of challenge is considered a challenge to the form, not the substance, of the indictment because it is a demand for more information or specificity so that the accused can properly prepare his or her defense, not a challenge that the indictment fails because it is lacking an essential element of the charged offense. Accordingly, it is in the nature of a special, rather than a general demurrer. And while a general demurrer may be made at any time, a special demurrer or

motion seeking this type of information may be waived if not timely made and in writing.

Thus, the Court stated, the question then is how a juvenile must challenge the sufficiency of a delinquency petition on the basis that the identity of the victim of a crime against a person was not disclosed. Although the Juvenile Code does not set out a specific procedure for filing a motion in the nature of a special demurrer, Uniform Juvenile Court Rule 7.9 sets out the time for filing pretrial motions as follows: "All other pretrial motions must be made in writing and filed not later than three (3) days, excluding weekends and holidays, before the adjudicatory hearing unless otherwise permitted by the court." Further, the Uniform Juvenile Court Rules contemplate the need to amend pleadings before the adjudicatory hearing, and specifically provide that "[u]pon the motion of any party," the juvenile court will hold a pretrial conference to consider "[t]he necessity or desirability of amendments to the pleadings." Uniform Juvenile Court Rule 7.5. Accordingly, the Court held, the motion to dismiss in this case, which was made orally and after the first witness was sworn at the adjudicatory hearing, was untimely and not in the proper form.

Furthermore, the Court stated, although the strict time limitations for holding the adjudicatory hearing might pose difficulties in meeting these requirements in some circumstances, potentially raising due process concerns, none of those circumstances were present here. Although the petition was amended to add an additional count several days before the hearing, the victim was named in that count and C. W. did not move to dismiss the added count. Moreover, the name of the victim of Counts 1 and 2 was disclosed at the detention hearing on January 27, 2017. And lastly, it appears that C. W.'s attorney intentionally waited until jeopardy had attached and the State could not amend the delinquency petition before moving to dismiss. Under these circumstances, C. W. waived his right to be adjudicated on a delinquency petition "perfect in form," and the juvenile court's order dismissing Counts 1 and 2 of the petition was reversed.

Juror Misconduct; Cellphone Use during Deliberations

Edge v. State, A18A0424 (5/18/2018)

Appellant was convicted of one count of Peeping Tom. The evidence showed that appellant lived next door to the home of the victims. He contended that juror misconduct contributed to the verdict. Specifically, that jurors used cell phones to obtain information during deliberations. The Court agreed and reversed.

The Court stated that when a jury is selected and sworn to try the criminally accused, the law contemplates that no outside influence shall be brought to bear on the minds of the jury, and that nothing shall occur outside of the trial which shall disturb their minds in any way. A juror introducing extrajudicial evidence essentially becomes an unsworn witness against the defendant in violation of the Sixth Amendment. And where, as here, misconduct of a juror or of the jury is shown, the presumption is that the defendant has been injured, and the onus is upon the State to remove this presumption by proper proof. That is, the burden is on the prosecution to prove beyond a reasonable doubt that no harm has occurred. A jury verdict will not be upset solely because of juror misconduct, however, unless such conduct was so prejudicial that the verdict must be deemed inherently lacking in due process. Put another way, a new trial will not be granted unless there is a reasonable possibility that the improper information collected by jurors contributed to the conviction.

Here, the Court found, to remove the presumption of prejudice that arose as a result of juror misconduct, the State introduced testimony from three of the jurors at the new trial hearing. Those jurors testified that two or three other unnamed jurors used their cell phones to attempt to see the distances and lines of sight between the homes in the neighborhood, and that one was actually successful in doing so. However, the juror who successfully pulled up the information on the distances between the properties did not testify at the new trial hearing, and it was unknown whether the information affected his decision to convict. Nor was it known whether this information affected the decision of those other jurors with whom this information was shared. Finally, it was not known whether this information, which was sought to determine the weight and credibility of the key testimony, was viewed before or after the jury asked the trial court whether it could render a hung verdict. Thus, the Court held, with respect to those jurors who either obtained or viewed the information on the distance and, relatedly, line-of-sight between the properties, a reasonable possibility existed that the information could have contributed to appellant's conviction.

In so holding however, the Court stated, "To be clear, we are not suggesting that in every case where juror misconduct is alleged, the State is under an obligation to call each individual juror. Rather, because the State did not call the juror known to have engaged in the misconduct in question, the State did not provide sufficient proof to overcome the presumption of harm beyond a reasonable doubt."