

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 12, 2012

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THIS WEEK:

- **Golden Rule**
- **Jury Array**
- **Severance; Search & Seizure**
- **Mistrial; Plea in Bar**
- **Probation Revocation; Sentencing**
- **Ineffective Assistance of Counsel**



Golden Rule

Fisher v. State, A12A0976 (10/3/2012)

The appellant was convicted of numerous charges, including armed robbery, aggravated assault, false imprisonment, kidnapping, theft by taking and possession of a firearm during the commission of a crime. Appellant argued that the prosecutor made an improper “golden rule” argument.

A prohibited “golden rule” argument is one which, either directly or by implication, tells the jurors that they should place themselves in the position of the victim in rendering a verdict. The record showed that during closing argument, the prosecutor described what the victims must have felt during the robbery, the shooting and the kidnapping. The prosecutor then stated: “what we can do is make sure that the people, each and every one of them that participated in that, are responsible for what happened because let me tell you[,] that could have been you, that could have been me, and that could have been our children that walked into that store.” Defense counsel objected and moved for a mistrial. The trial court denied the motion for mistrial but

gave curative instructions. The Court noted that whether to grant a mistrial for improper argument is a matter within the discretion of the trial court, and even when an objection to improper argument is sustained but a mistrial is denied, other action, including the giving of curative instructions, is not mandatory. Here, the trial court did give curative instructions; therefore, the Court found that the trial court did not abuse its discretion in denying the motion for mistrial.

Jury Array

Lynch v. State, A12A0977 (10/3/2012)

The appellant was convicted of numerous charges, including armed robbery, aggravated assault, false imprisonment, kidnapping, theft by taking and possession of a firearm during the commission of a crime.

The appellant argued that the trial court erred in denying his challenge to the array of the jury panels. The record showed that after the third panel of jurors was brought into the courtroom, counsel challenged the array of the jurors, stating that “there were only four black jurors brought up before this panel... and none of them were of the age group or the gender of these defendants.” In reviewing appellant’s challenge, the Court noted that while traverse jury lists must consist of a representative and fair cross-section of the community to the fullest extent possible, the same is not true of an array. Provided that persons are not systematically excluded on the basis of race or other cognizable grouping, and provided that the jurors comprising a panel are randomly selected from a representative pool, the selection process is not inherently defective. Furthermore, the Court noted that the

defendant has the burden of proving purposeful discrimination in the jury array but in this case the appellant did not point to any evidence that jurors were systematically excluded on the basis of race or other cognizable grouping. Moreover, the Court stated, appellant failed to produce evidence that jurors comprising the panel were not randomly selected from a representative pool. Thus, the Court held that the denial of appellant's challenge to the array of the jury panel was proper.

Severance; Search & Seizure

Jadooram v. State, A12A0978 (10/3/2012)

The appellant was convicted along with two co-defendants of numerous charges, including armed robbery, aggravated assault, false imprisonment, kidnapping, theft by taking and possession of a firearm during the commission of a crime.

Appellant argued that the trial court erred in refusing his motion to sever his case from that of his co-defendants. He argued that there was no common scheme or plan and therefore his motion should have been granted. The Court disagreed and emphasized that the crimes that were the basis of the trial in this case were two armed robberies of convenience stores, using masks and occurring just hours apart. Moreover, the Court noted that appellant failed to show "clear prejudice" from the refusal to sever, but argued only that there was a substantial likelihood that the jury would confuse or misapply the evidence in a joint trial. Accordingly, the Court concluded that the trial court did not err in denying the motion to sever.

Appellant also asserted that the trial court erred in denying his motion to suppress the gun and the mask found in a black bag under a neighbor's storage building and a dismantled shotgun broken into three pieces found in a drainage ditch in an overgrown area some 54 yards from appellant's residence. Appellant pointed out that the search warrant did not have his correct address listed on it and thus the trial court suppressed all evidence found at that address. However, the trial court did not suppress the mask and gun found in the black bag or the shotgun found in the drainage ditch, concluding that appellant had no expectation of privacy in the neighbor's shed or in the drainage ditch. The Court found that the

trial court properly held that nothing found in appellant's house pursuant to the invalid search warrant led officers to the bag or the gun, and therefore the items were not fruit of the poisonous tree. The Court also addressed counsel's argument that the search of the residence established that appellant "had at least some presence at that residence." Specifically, the Court stated that officers already knew that appellant lived there and accordingly, appellant did not show that the bag and gun were discovered as a result of any evidence found in the house and later suppressed.

Further, regarding appellant's motion to suppress the gun found in a neighbor's outbuilding, the Court held that appellant could not show that he had any expectation of privacy in the neighbor's outbuilding. As to the gun found in the drainage ditch, the Court held that "a defendant who abandons seized property lacks standing to challenge the validity of the search and seizure." Thus, the Court held that the trial court properly admitted the gun, mask, and dismantled shotgun as there was no expectation of privacy regarding where the items were located and further that there was no evidence that the items were recovered as a result of the improper search warrant of appellant's home.

Mistrial; Plea in Bar

Kesler v. State, A12A1097 (10/3/2012)

Appellant and his co-defendant were indicted for trafficking in cocaine and possession of hydrocodone, a controlled substance. Before trial, the court granted appellant's motion in limine to exclude hearsay evidence identifying appellant as a suspect, specifically ruling that the investigating officers could not testify that they told the confidential informant to call "Kevin" [appellant's first name]. But the second witness did so anyway, and the trial court granted appellant's motion for a mistrial. Appellant then filed a plea in bar, arguing that he should not be retried because, by eliciting the prohibited information, the State either intended to cause a mistrial or committed "such a gross and obvious error that it should be equated with an intent to cause a mistrial." At a hearing on the motion, the officer who caused the mistrial testified that he was not sure if he could use the name, and "never got clarification" about it before he testified,

but then admitted that initially he had been instructed not to use the name "Kevin." He understood that the State was going to go back into the courtroom and ask the trial court to reconsider its ruling, but no one told him the outcome of that request for reconsideration, so he was confused about his instructions. He admitted, however, that no one ever told him to say the name "Kevin."

The Court noted that in the trial court's order denying the motion, appellant did not object when the State asked similar questions of the first officer, who testified that the CI called a "specific individual." "Therefore," the Court continued, "the State's use of the same line of questioning, without objection from [appellant], shows that there was no intent by the State to goad or force [appellant] into requesting a mistrial." Accordingly, the Court found no error in the trial court's denial of appellant's plea in bar.

Probation Revocation; Sentencing

Henley v. State, A12A1542 (10/3/2012)

Appellant challenged an order revoking his probation based on new offenses. He contended that the State failed to provide sufficient admissible evidence that he possessed controlled substances or drug-related objects, and that the trial court erroneously revoked more than two years of probation pursuant to O.C.G.A. § 42-8-34.1. The Court reversed the judgment and remanded the case for resentencing.

The record showed that appellant pleaded guilty to robbery and was sentenced to a term of probation for 11 years, 11 months, and 11 days. In March 2010, while on probation, appellant was stopped at a police roadblock. After appellant was unable to produce a license and gave a false name to the inquiring officer, he was arrested, his vehicle was searched pursuant to the owner's consent, and police found a number of unidentified pills as well as two pipes that appeared to be used for smoking controlled substances. The State petitioned for revocation of appellant's probation and appellant admitted giving a false name, having a suspended license, and committing technical probation violations. Based on the evidence from the hearing, the trial court revoked four years of appellant's probation based on eight violations.

However, appellant asserted, the State failed to provide sufficient admissible evidence to support the trial court's findings that he possessed oxycodone and codeine, which was the basis for two new felony offenses supporting the revocation. In reviewing the record, the Court found that as ruled by the trial court and conceded by the State on appeal, the testifying officer failed to give a proper foundation for his identification of the pills and there was no evidence of lab results for testing the pills. Therefore, the Court noted that there was no admissible evidence that the pills were actually contraband. Furthermore, the Court found that the trial court relied upon inadmissible hearsay that appellant told an officer that there was contraband in the vehicle and where to find it.

Accordingly, the Court found that the trial court erred by basing its revocation decision on the two new felony counts of possession of controlled substance and therefore, the only violation alleged and proved fell under O.C.G.A. § 16-13-32.2, which makes possession of a drug-related object a misdemeanor. Thus, the Court found that the only offenses supported by the record were the drug-related objects misdemeanor offense and the non-violent misdemeanor offenses of giving a false name, driving with a suspended license and the technical violation. Accordingly, the Court held that the trial court was not authorized to revoke more than two years of appellant's outstanding probation.

Ineffective Assistance of Counsel

State v. Crapp, A12A1344 (10/2/2012)

Appellant was convicted of armed robbery, kidnapping, and entering a victim's automobile with the intent to commit kidnapping. The trial court granted appellant's motion for new trial, finding that appellant had been denied the effective assistance of counsel because defense counsel did not corroborate appellant's defense with evidence that he possessed. The State appealed, arguing that appellant did receive the effective assistance of counsel. The Court held that the trial court did not err in concluding that counsel's performance was deficient and likely affected the outcome of the trial.

In reviewing the record, the Court noted that this case was a pure credibility contest

between a witness and appellant. The Court explained that in such cases, defense counsel's failure to introduce available evidence that corroborates a defendant's testimony supports a finding that counsel's performance was deficient. Thus, the trial court did not err in concluding that trial counsel's performance was deficient. The Court further noted that, in close cases, where the evidence presented by the State is thin, mistakes made by trial counsel take on greater significance. The Court found that the evidence against appellant was not overwhelming, resting largely upon the identification testimony of one witness. Therefore, the Court found, a reasonable probability existed that the presence of the corroborating evidence, which defense counsel possessed but failed to present at trial, would have affected the result.