Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 20, 2017

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THIS WEEK:

- **Ineffective Assistance of Counsel; Co-Conspirator Statements**
- **Voir Dire; Juror Bias**
- **Judicial Commentary; OCGA § 17-8-57**
- **Right to Appointment of Appellate Counsel**
- **DUI; Williams**
- **Search & Seizure**
- **Sexual Prior Bad Acts; OCGA § 24-4-403**

Ineffective Assistance of Counsel; Co-Conspirator Statements

Dublin v. State, S17A0822 (9/13/17)

Appellant was convicted of felony murder and other crimes The evidence showed that appellant and co-defendants Mitchell and Reynolds, killed Slack during the armed robbery of him. Appellant argued that his trial counsel was ineffective for failing to object to the testimony of two witnesses. The first witness testified that she overheard appellant, Mitchell, and Reynolds planning a robbery the night of the shooting and that the following day she overheard appellant, Mitchell, and Reynolds discussing Slack's death, and encouraging each other "not to say anything." The second witness testified that she overheard the men discussing possible alibis the day after the shooting. Appellant argued that the testimony of neither witness fell under the hearsay exception because the State failed to establish a conspiracy between him and his co-defendants independent of the alleged co-conspirator declarations. The Court disagreed.

Under OCGA § 24-8-801 (d) (2) (E), a statement by a defendant's co-conspirator made "during the course and in furtherance of the conspiracy, including a statement made during the concealment phase of a conspiracy[,]" is not excluded by the hearsay rule when offered against the defendant. A conspiracy need not be charged in order for the exception to apply. For evidence to be admissible under this rule, the State must prove the existence of a conspiracy by a preponderance of the evidence. In determining the existence of a conspiracy, the trial court may consider both the co-conspirator's statements and independent external evidence, although the co-conspirator's statement alone does not suffice. In considering whether a conspiracy was established for purposes of the rule, it is not required that the conspiracy be proven prior to the admission of the evidence in question, but only that the conspiracy be proven at trial. And here, the Court found, the State established by a preponderance of evidence that appellant, Reynolds, and Mitchell conspired to rob Slack, and so appellant's argument failed.

Quoting *Lilly v. Virginia*, 527 U.S. 116, 138 (119 SCt 1887, 144 LE2d 117) (1999), appellant argued that the testimony of the two witnesses was inadmissible as unreliable because the women did not specify who said what in the conversations they purportedly overheard and therefore lacked sufficient indicia of reliability. However, the Court stated, to the extent that any of the *Lilly* analysis has survived after *Crawford* and its progeny, its requirement of reliability certainly does not apply to nontestimonial statements such as those made in furtherance of a conspiracy. Accordingly, the Court held, because appellant's arguments as to the admissibility of

testimony was unavailing, his ineffectiveness claim based on trial counsel's failure to object to that testimony failed.

Voir Dire; Juror Bias

Anderson v. State, S17A0894 (9/13/17)

Appellant was convicted of felony murder and other crimes relating to the shooting of Burch. The evidence, briefly stated, showed that appellant’s daughter-in-law, Brittany Anderson, who was involved in a divorce proceeding with appellant's son, Edwin Anderson, Jr. Appellant drove to the home of Burch, who was romantically involved with Brittany. Appellant shot Burch in the abdomen with a rifle at very close range. Appellant contended that he just wanted to use the rife to scare Burch, but Burch grabbed the barrel and during the struggle, the rifle fired, killing Burch.

Appellant argued that the trial court erred in denying his motion for new trial because during voir dire one of the jurors (hereinafter “H”), improperly concealed his connection to the case and his favorable bias toward the victim. The Court stated that under *Glover v. State*, 274 Ga. 213, 214 (2) (2001), a defendant is entitled to a new trial based on juror misconduct if the defendant is able to demonstrate that (1) the juror failed to answer honestly a material question on voir dire and (2) a correct response would have provided a valid basis for a challenge for cause. And here, the Court found, the answers H. gave during voir dire regarding his friendship with the victim’s family, the Chief ADA, the police chief and the sheriff were consistent with the testimony he gave at the hearing on the motion for new trial, except that at the motion hearing H. gave additional details in response to additional questions the parties asked him. Appellant thus failed to demonstrate that H. failed to give honest answers to the questions he was asked regarding his knowledge about or acquaintance with persons identified to him in voir dire.

Nevertheless, appellant contended that H. gave untruthful answers about his occupation. The Court disagreed. H. answered on voir dire that he was employed by the local funeral home which handled the arrangements for Burch's funeral, and that he had conversations with both the Burch and Anderson families associated with his duties at the funeral home. He mentioned that he was referred to as a mortician. No follow up questions were asked with respect to these disclosures. At the motion for new trial hearing, however, H. disclosed in response to more detailed questioning that he embalmed Burch's body, and confirmed that at that time he had the opportunity partially to inspect and view the gunshot wound and abrasions on the body. Appellant argued that as the decedent's embalmer, he would have been qualified to testify that the victim had sustained a gunshot wound. But, the Court stated, that the victim had died from a gunshot wound was an undisputed fact, and H. was not identified as a potential witness prior to trial. Consequently, H. was not a known prospective witness who was subject to being excused for cause upon a proper motion.

Relying on *Lively v. State*, 262 Ga. 510, 511 (1) (1992), appellant argued that a close relationship between a juror and the victim and the victim's family prevents the juror from rendering an impartial verdict despite the juror's testimony that he could be a fair and impartial juror. But, the Court found, the degree of the juror's involvement with the victim in *Lively* was distinguishable from the juror's involvement in this case. Thus, H. testified at the motion for new trial hearing that he greeted the Burch family when they arrived at the funeral home to make funeral arrangements and that he hugged them and expressed condolences for their loss, but this conduct did not rise to the level of connection with the victim and her family as that involved in the *Lively* case. Moreover, the Court noted, H. did not attend the victim's funeral.

Appellant further contended that because H. disclosed during voir dire that he was acquainted with, or even friends with, several persons who were scheduled to testify at trial, this prevented him from being an unbiased juror. Specifically, H.’s testimony at the motion for new trial that if asked, he would testify to the good character and truthfulness of the chief of police, who was the first law enforcement officer to arrive at the scene of the shooting and who testified at trial about what he observed. Appellant argued this demonstrated juror bias in that H. was predisposed to believe this State's witness. However, the Court stated, the chief of police offered no expert testimony and the testimony about his first-hand observations involved no disputed issues. H. testified similarly when asked whether he could testify to the good character and truthfulness of another person who was identified prior to trial as a potential witness but who was not called. Neither party asked such questions of H. during voir dire. Accordingly, the Court found, appellant failed to demonstrate that H. answered voir dire questions dishonestly

Finally, appellant argued that H. improperly failed to disclose the "whole truth" as to his role in the victim's funeral arrangements, but, the Court noted, appellant provided no authority for a requirement of a juror to give anything other than truthful answers to voir dire questions, and he failed to demonstrate that this juror gave responses that were untruthful or unresponsive. Pretermitting the issue of whether juror misconduct might be shown if a juror provided technically truthful, but misleading, information on voir dire regarding an issue that might be prejudicial to the defendant, that was not what happened here. At the commencement of voir dire, the jurors were asked to raise their right hand and swear they would "give true answers" to the questions asked regarding their qualifications as jurors in the case. After H. disclosed his employment, counsel for the State and the defendant were permitted to pose additional questions. It was at that point that H. volunteered that the funeral home where he was employed handled the arrangements for the victim's funeral. Reference to H.'s employment at the funeral home was made several more times during voir dire, but neither party asked what role, if any, H. played in the handling of the victim's funeral arrangements. Therefore, appellant failed to demonstrate this juror improperly concealed any facts surrounding his involvement with the victim's body or that he was prejudiced by the juror's involvement.

Judicial Commentary; OCGA § 17-8-57

Daniels v. State, S17A0931, S17A0932 (9/13/17)

Appellants, Daniels and Thomas, were convicted for felony murder, violations of the Street Gang Terrorism and Prevention Act, and other offenses. Appellant contended that former OCGA § 17-8-57 was violated when the trial judge gave an audible grunt, and tossed a pen down on the bench. The Court noted that although the trial transcript did not report these actions, outside the jury's presence, the trial judge conceded that he had acted in this manner, and did so after Thomas

had testified in his own behalf, and rested his case, despite the fact that Thomas's counsel had just informed the court that he had three alibi witnesses outside the courtroom "if we have to call them." Counsel's statement regarding alibi witnesses took place during a sidebar conference after the State had objected to counsel's attempt to have Thomas testify regarding a purported transcript of a preliminary hearing; after counsel's statement that alibi witnesses were prepared to testify, the court stated, "[l] et's get away from the transcript, then."

Thomas argued that this action was taken by the jury to be a comment upon the evidence. However, the Court found, the trial transcript, together with the ensuing discussion between counsel and the court regarding the incident, which was conducted outside the jury's presence, showed that Thomas had already left the witness stand when the court inquired who would be the defense's next witness, and it was then that counsel stated that Thomas rested; it was uncontroverted that any expression of displeasure by the court took place at this point. Accordingly, the record did not support Thomas's contention that the incident "intimated to the jury" that Thomas's testimony "was other than truthful [and] had to be taken by the jury as a derogatory remark" on Thomas's credibility.

Right to Appointment of Appellate Counsel

Platt v. State, A17A1106 (8/30/17)

Pursuant to a negotiated plea on two separate indictments, appellant was sentenced to serve thirteen years of imprisonment. He then filed a timely motion to withdraw his plea alleging ineffective assistance of counsel. The trial court scheduled a hearing on the motion and appointed counsel to represent appellant in the matter. Appellant's newly appointed counsel then filed an amended motion to withdraw appellant's guilty plea, abandoning the ineffective-assistance-of-counsel claim and arguing that the plea was involuntary because the State advised appellant that he faced a sentencing range that was much higher than the one he actually faced. Nevertheless, following a hearing, the trial court denied appellant's motion.

Appellant then filed a pro se brief, contending that he was entitled to counsel before the Court. The Court agreed. In the context of an indigent defendant's right to counsel in plea-withdrawal proceedings before the trial court, an appellate court should consider whether the absence of counsel was prejudicial to the defendant. And here, appellant was represented by counsel in his plea-withdrawal proceedings before the trial court, he did not allege that his counsel below was ineffective, and his appeal addressed the merits of the only claim that his trial counsel preserved for appeal. Indeed, on appeal, appellant is limited to reasserting arguments that were raised before and ruled upon by the trial court. And this was exactly what he did. Nevertheless, the Court stated, even if appellant's appellate brief was sufficient to allow it to review that claim on the merits, the Supreme Court of Georgia has cautioned that the vast majority of courts that have addressed the denial of the right to counsel at a critical stage in a criminal proceeding have reversed and remanded to the trial court with instructions to appoint counsel. The Supreme Court has also explained that when a defendant claims his guilty plea was not knowingly and voluntarily entered, a harmless-error analysis in the context of the denial of that defendant's right to counsel is inappropriate. Thus, the Court held, like those majority of cases holding that reversal and remand is the appropriate remedy for violations of this constitutional right, the Court remanded the case for the trial court to consider whether appellant satisfies the indigency requirement such that appointment of appellate counsel is warranted, and if so, appoint counsel to represent him on appeal.

DUI; Williams

State v. Osterloh, A17A1199 (8/30/17)

Osterloh was charged with two counts of DUI, reckless driving, failure to maintain lane, and operating a motor vehicle too fast for conditions. Osterloh filed a motion to suppress the results of the State-administered blood test, arguing, inter alia, that he did not voluntarily consent to the blood draw. The trial court agreed and the State appealed.

The evidence, briefly stated, showed that Osteloh's vehicle skidded off the roadway after his vehicle was struck by another vehicle. He lost consciousness during the accident and awoke on the side of the road, with his head outside of the passenger window. After several minutes of conversation with the responding officer, Osterloh suddenly started screaming and ran toward the road, seemingly attempting to flag down a passing vehicle. Osterloh then became uncooperative, and refused to stand where the officer asked him to stand, instead standing near the roadway, with his arms spread open. The officer then told Osterloh to place his hands behind his back and get down on the ground, and four officers pinned him to the ground, where he was handcuffed. Once he was forced to the ground, Osterloh began speaking and yelling in gibberish, which officers described as "speaking in tongues" or in a never-before-heard foreign language. This continued for several minutes. The officers told Osterloh to calm down, but he seemed unable to respond to their requests.

After Osterloh stopped yelling, the officers rolled him onto his side so that he could breath. First responders checked Osterloh's vital signs and determined that he was breathing normally, but his pupils were dilated. The officer then placed Osterloh under arrest and read Georgia's implied-consent notice for drivers over the age of 21. Osterloh interrupted the officer and said, "I ain't going to trial fucking dumb ass. What you read that for?" The officer then asked if Osterloh would submit to a State-administered blood test, and Osterloh replied, "yeah." During the reading of the notice, at least one officer and sometimes two officers were holding Osterloh to the ground, and Osterloh was heaving and possibly vomiting. And in fact, while he was on the ground, Osterloh vomited a purple liquid. After the reading of the implied-consent notice, Osterloh remained pinned to the ground for approximately 15 minutes, occasionally shouting in gibberish, until an ambulance arrived to transport him to the hospital. At no point did Osterloh indicate that he did not wish to submit to the blood test.

The State contended that the trial court erred in granting Osterloh's motion to suppress the results of the blood test, arguing that video evidence showed that Osterloh was fully capable of understanding and responding to the officer's questions and requests, including the implied-consent warning, and that Osterloh voluntarily consented to the blood test. The Court disagreed. The Court found that there was no evidence as to Osterloh's age, level of education, or intelligence. And there was also no evidence that Osterloh was threatened or subjected to a lengthy detention. Furthermore, the evidence was clear that Osterloh responded

affirmatively to the deputy's request following the implied-consent warning.

However, the Court found, there was also uncontradicted evidence that Osterloh had been in an accident, in which he sustained injuries, including a head injury so serious that he had to be placed into a medically induced coma and spend three days in the intensive care unit. And even if there was no evidence Osterloh's injuries made him incapable of freely and voluntarily consenting to a blood draw, given the evidence of Osterloh's significant injuries, it was the State's burden to prove that Osterloh gave his consent freely and voluntarily.

The Court also found that the State's argument that Osterloh was relaxed and calm at the time of the implied-consent notice, was belied by the video evidence. While Osterloh appeared to comprehend and respond to questions at the beginning of his encounter with the officer, he was largely incoherent after he attempted to enter the roadway and was forced to the ground. And the video showed that, throughout the reading of the implied-consent notice, Osterloh was handcuffed and held to the ground by one or two officers. During this time, although Osterloh sometimes responded to the officer's statements and questions, at other times he was babbling, retching, and yelling.

Finally, and most importantly, the Court added, nothing prevents the State from obtaining a warrant to draw a suspect's blood in situations such as this, in which the voluntariness of a suspect's consent is difficult to determine. And while obtaining a warrant no doubt imposes more of a burden on law-enforcement officers than simply reading the implied-consent notice, in those DUI "investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." Accordingly, the Court affirmed the grant of Osterloh's motion to suppress.

Search & Seizure

Heitkamp v. State, A17A0816 (8/31/17)

Appellant was charged with one count each of possession of more than one ounce of marijuana, possession of marijuana with intent to distribute, possession of a controlled substance, theft by receiving, and two counts of possession of methamphetamine. The evidence, briefly stated, showed that Hall, a maintenance man at an apartment complex, called 911 to report suspected drug activity concerning a particular car parked in the complex. The responding officers ran the tag and it came back as stolen. Hall gave the officers a description of the person driving the vehicle and pointed out the 3800 building as where he had seen the man going. The officers knocked on doors and eventually knocked on appellant's door. When appellant opened the door, they saw a man named Barfield, who matched the description given by Hall. Barfield moved further into the apartment and away from the officers' view. The officers entered the apartment to arrest Barfield. While in the apartment, they noticed drugs in plain view. A search warrant was then obtained.

Appellant argued that the trial court erred by denying his motion to suppress because the officers did not have probable cause to arrest Barfield and, thus, the warrantless entry of the apartment was not justified. Specifically, he contended, at best, the information the officers had at that moment gave rise only to a mere suspicion or possibility that Barfield had committed a crime. The Court agreed.

The only information officers had that connected Barfield to the stolen car was a phone call from Hall, the apartment's maintenance man, that he suspected drug activity due to foot traffic to and from a certain car parked in the apartment complex's parking lot and Hall's "vague description" of the occupant in the car, describing him as a "white male, wearing jeans, no shirt and tattoos." Although Hall noted that he believed the man had gone into the 3800 building, Hall did not provide police with a description of the male's age, hair, or the location of his tattoos. Officers began knocking on doors of the 3800 building, and another resident informed them that the resident had noticed a tattooed white male walking a tan dog in front of the building earlier that day. When the officers knocked on Barfield's apartment door, appellant opened the door and Barfield retreated further into the apartment upon seeing the officers.

The Court found that the officers did not testify that they knew Hall or that he had a reputation for being truthful and reliable. However, even if Hall were determined to be a reliable source, he provided the officers only with a "vague description" of the man he saw inside the vehicle; a description that could describe any number of occupants of that apartment complex - a tattooed, white male wearing jeans. Although the State argued that probable cause existed because Barfield fled further into the apartment upon sight of the officers, flight alone is insufficient to warrant a forcible stop of an individual. Further, mere presence in an area of suspected crime is not enough to support a reasonable, particularized suspicion that the person is committing a crime. Thus, the Court concluded, the officers did not have probable cause to conclude that Barfield was the occupant of the stolen car or had committed any other crime before they entered the apartment and saw the contraband. Although Hall's tip certainly warranted police investigation, further observation and corroboration was required to connect Barfield to the stolen car before officers had probable cause to arrest him. Accordingly, the Court held, the warrantless intrusion into the apartment violated appellant's Fourth Amendment rights, and the trial court erred by denying the motion to suppress.

Sexual Prior Bad Acts; OCGA § 24-4-403

Jackson v. State, A17A0844 (9/5/17)

Appellant was indicted for child molestation and criminal attempt to commit child molestation. The State sought to introduce two prior uncharged acts of child molestation. The trial court found that the acts were admissible under OCGA §§ 24-4-413 and 24-4-414. However, the court rejected appellant's claim that the evidence was inadmissible pursuant to the balancing test under OCGA § 24-4-403, finding that applying the balancing test would "add a requirement to Rules 413 and 414 that does not otherwise exist" within the text of the the statute.

The Court granted interlocutory review on the sole issue of whether the trial court must conduct the balancing test set forth in OCGA § 24-4-403 when considering the admissibility of prior sexual offenses under OCGA § 24-4-414. The Court noted that OCGA § 24-4-414 (a) states that "[i]n a criminal proceeding in which the defendant is accused of an offense of child molestation, evidence of the accused's commission of another offense of child molestation *shall* be admissible and may be considered for its bearing on any matter to which it is relevant." (emphasis supplied). This provision supersedes that of OCGA § 24-4-404 (b) in

child molestation cases. The State argued, and the trial court found, that the use of the word "shall" in Georgia's Rule 414 meant that qualifying evidence was to be admitted regardless of any Rule 4034 considerations.

The Court disagreed. Relying on *State v. McPherson*, 341 Ga. App. 871 (2017), the Court stated that evidence admissible under OCGA § 24-4-414 (a) may be excluded under Rule 403 if the trial court concludes that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. Despite the difference in word choice between the two Rules, the meaning of Georgia's Rule 414 is the same as Federal Rule 414. Rule 414's provision that prior act evidence "shall be admissible" does not mean, as the State suggested, that qualifying evidence *must* be admitted. Rather, "admissible" merely means that the evidence is *capable* of being legally admitted — that is, that it may be admitted.

Thus, the Court held, the trial court must give appellant an opportunity to show whether the prior act evidence sought to be introduced by the State would confuse the issues, mislead the jury, waste time, or be cumulative of other evidence, or that the probative value of the evidence would otherwise be substantially outweighed by its prejudicial impact. Its failure to do so was an abuse of discretion, and therefore, the Court vacated the trial court's order and remanded the case to apply the balancing test set forth in Rule 403 in deciding whether to admit the prior acts under OCGA § 24-4-414.