Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 1, 2013

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Resource Prosecutor

Sharla Jackson
Domestic Violence, Sexual Assault, and Crimes Against Children Resource Prosecutor

Todd Hayes
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Lalaine Briones
State Prosecutor

THIS WEEK:

Perjured Testimony

Coggins v. State, S13A1134 (10/21/13)

Appellant was convicted of malice murder and felony murder. Appellant argued that the trial court erred in admitting the perjured testimony of the two inmates who claimed that he confessed to them that he had killed the victim. The Court noted that O.C.G.A. § 17-1-4 mandates the setting aside of a verdict or judgment obtained or entered as a result of perjury when the judgment could not have been obtained without the perjured evidence and the perjurer has been duly convicted of perjury. But, the Court found, there was no evidence that the two inmates were convicted of perjury.

Moreover, the Court found, appellant made no showing that any perjury actually occurred at trial. Specifically, in support of his claim that the prosecution knowingly elicited perjured testimony at trial, appellant only presented (1) the testimony of a third inmate at the motion for new trial hearing who claimed that the two inmates who testified at trial were lying; and (2) his own theory that the inmates who testified at trial must have been conspiring together to provide false testimony. The Court held that matters of credibility and theoretical possibilities were for the trial court to resolve based on the evidence presented at the motion for new trial hearing, and because evidence supported the trial court's findings, the Court agreed with the trial court's legal conclusion that appellant did not establish that the State knowingly used perjured testimony.

Restitution; Statute of Limitations

Vaughn v. State, A13A1285 (10/21/13)

Appellant pled guilty to one count of theft by deception and restitution was awarded to his former employer. Appellant argued that the restitution as ordered included amounts taken outside of the dates charged in the accusation and beyond the civil statute of limitations and that the trial court did not follow the mandate of O.C.G.A. § 17-14-10. The record showed that appellant was charged with theft by deception "between the dates of the 12th day of January, 2008 and the 10th day of January, 2010." The amount reportedly taken during that period was approximately $57,000. The restitution order, however, required appellant to repay $260,637.02 based on his and a co-defendant's theft of funds over a nearly 12-year period from May 1998 through February 2010.

The Court noted that the State has the burden of demonstrating the amount of loss sustained by the victim by a preponderance of the evidence, O.C.G.A. § 17-14-7(b), and the amount of restitution ordered should not exceed the victim's damages. As charged, the accusation fell within the four-year statute of limitation for prosecution of theft by deception and was the basis upon which appellant

was sentenced. O.C.G.A. § 17-3-1(c). Had the State charged appellant with theft by deception for the entire 12-year period for which restitution was ordered, it would have been required to allege in the accusation an exception to the statute of limitation in each count of the indictment to which it applied. The State did not do so in this case, and there was no evidence that any of the exceptions applied. Moreover, the Court determined, even though appellant pled guilty, the entry of a guilty plea did not waive any statute of limitation defense. In so holding, the Court overruled *Beall v. State*, 252 Ga.App. 138, 139 (2) (2001) to the extent that it holds that "entry of a guilty plea waives statute of limitation defenses."

Here, the Court found, appellant's plea agreement contained no language that indicated that he was waiving his statute of limitation defense. Instead, appellant explicitly argued at the restitution hearing that the trial court could not assess him damages outside of the statute of limitation. Because the trial court ordered restitution beyond the period encompassed by the accusation and the civil statute of limitations, the Court reversed and remanded the case.

Defense of Habitation

Neverson v. State, A13A0823 (10/25/13)

Appellant was convicted of voluntary manslaughter as a lesser included offense of malice murder, felony murder, aggravated assault and possession of a knife during the commission of a crime. The evidence showed that appellant and others played cards on the porch outside her apartment. The victim had been visiting and drinking at an apartment above appellant's and he and some others from that apartment came to appellant's porch and were allowed to join the card game. The victim became upset when he thought someone had taken his cell phone. The victim's friends attempted to get him to leave, but he refused and he and appellant's boyfriend began fighting. Although her boyfriend appeared to be winning the fight and did not need any help, appellant went inside her apartment, came back out with a knife, and stabbed the victim in the chest, inflicting a seven-inch gaping wound. The victim immediately fell to the ground, but appellant continued to punch and hit him until she was pulled off.

Appellant argued that the trial court erred by failing to give her requested charge on the defense of habitation. The Court noted, however, that although appellant requested a general charge on justification pursuant to O.C.G.A. § 16-3-20, as well as a more specific charge on use of force in defense of self or others, she did not in fact specifically request a charge on the defense of habitation. Thus, the Court reviewed this enumeration of error under the plain error standard which requires the Court to apply a four-part test. First, there must have been an error or defect that had not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must have been clear and obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means that she must demonstrated that it affected the outcome of the trial court proceedings. Finally, if the above three prongs were satisfied, the Court has the discretion to remedy the error only if the error seriously affected the fairness, integrity or public reputation of judicial proceedings.

The Court noted that under O.C.G.A. § 16-3-23, the defense of habitation is available to prevent or terminate an unlawful entry into or attack upon a habitation. Where there is no evidence that the victim was attempting to enter or attack the habitation at the time of the injury, the defense of habitation is not available. In other words, the defense of habitation is not available when the victim is a guest in the home.

Accordingly, the Court found, appellant failed to establish the essential element of unlawful entry or attack upon her habitation so as to warrant the giving of a defense of habitation charge because the victim neither entered her home unlawfully nor attacked her home. Rather, the victim was on her porch by permission, and the evidence, which showed that his friends attempted to get him to leave but that he refused, did not support appellant's theory that he left and then made an illegal re-entry to the premises. Nor did the testimony support her argument that there was an attack on her home. Finally, appellant did not argue defense of habitation at trial. Rather, her defense was that she was defending herself or others from the victim at the time that she stabbed him and the trial court thoroughly and repeatedly charged the jury on the defense appellant urged at trial. Accordingly, the trial court did not err in failing to give a charge on the defense of habitation.

Jury Charges; Lesser Included Offenses

Bellamy v. State, A13A1479 (10/24/13)

Appellant was convicted of robbery and simple assault. She argued that the trial court erred in refusing to give her requested charge on theft by taking as a lesser included offense to robbery. The evidence presented by the state showed that appellant and her co-defendant cornered the victim as he sat in a parked vehicle, demanded money from him, dragged him out of the vehicle, hit him, took his wallet out of his jacket pocket, took money out of the wallet, and fled. The victim was left lying on the sidewalk, distraught and injured. However, the evidence presented by appellant and her co-defendant presented a different story and based on that evidence, appellant argued that the charge was required. The Court disagreed.

Where a case contains some evidence, no matter how slight, to show that the defendant committed a lesser offense, then the trial court should charge the jury on that offense. But, where uncontradicted evidence in the record shows completion only of the greater offense, it is unnecessary for the trial court to charge on the lesser offense. Accordingly, when a defendant admits or does not dispute the facts authorizing his conviction for the greater offense, the trial court's refusal to charge on the lesser included offense is not error.

Here, the Court found, appellant's co-defendant testified in his own defense, but admitted to facts establishing that he committed the greater offense of robbery. Also, the Court found, appellant in her testimony admitted to facts establishing that she was a party to that crime. Accordingly, the trial court did not err in denying her request for a charge on the lesser offense.

Confessions; Bruton

Lane v. State, A13A1357, A13A1358 (10/23/13)

Appellants Merkeith Lane and Dominique Lane were convicted of armed robbery, burglary and other related crimes arising from two separate crimes they committed with three others on the same

night. Merkeith contended that the trial court erred in not suppressing his statements under O.C.G.A. § 24-3-50 because they were induced by hope of benefit. Specifically, he argued that an investigator offered an impermissible hope of benefit when he explained: "Come sentencing time, the district attorney says, Your Honor, we talked to this young man and he had an opportunity to work something out without all the expenses of a jury trial in this county, and now we've had two jury trials. We would like to see him receive the maximum on each count but to run consecutive rather than concurrent. And that means when one sentence is complete, then the next one starts. And I feel like on this case I wouldn't be a bit surprised if the district attorney is going to want to go consecutive unless somebody decides to…the ones that decide to help theirself, they're going to get a break." The investigator also referenced a conversation that he had with the district attorney's office in which "[t]hey said, if Merkeith wants to get straight, if he wants to tell the truth, listen to him. If he don't, we'll deal with it." The record showed that after these exhortations, Merkeith again denied knowledge about the armed robberies. But after some further discussion about how the district attorney may favor the persons who "get straight" before trial, Merkeith began confessing to the armed robberies.

The Court noted that to make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury. The fact that a confession has been made under a spiritual exhortation, a promise of secrecy, or a promise of collateral benefit shall not exclude it. The "slightest hope of benefit" refers to promises related to reduced criminal punishment, a shorter sentence, lesser charges, or no charges at all.

Here, the Court found, the statements made by the investigator did not contain an explicit or implicit offer for a reduced sentence such that they would constitute an impermissible hope of benefit. To the contrary, the investigator's explanation of consecutive versus concurrent sentences and the options available to the district attorney's office merely emphasized the seriousness of the charges. And the investigator made it clear that the district attorney's office would listen if Merkeith wanted to "tell the truth" and that the district attorney would "deal with it" if Merkeith continued to deny the charges. This amounted to no more than a permissible admonition to tell the truth. Moreover, the investigator did not tell Merkeith that he would receive a reduced sentence if he confessed. Merely telling a defendant that his or her cooperation will be made known to the prosecution does not constitute the 'hope of benefit' sufficient to render a statement inadmissible under O.C.G.A. § 24-3-50. Accordingly, after examining the totality of the circumstances, the Court concluded that the trial court did not err in denying Merkeith's motion to exclude his statement pursuant to former O.C.G.A. § 24-3-50.

Dominique Lane argued that that the trial court erred in allowing the investigator to testify about Merkeith's custodial statements in violation of *Bruton*. Specifically, the investigator was allowed to testify that Merkeith confessed that he, B. M. (a juvenile co-defendant who testified for the State), and "others" went to commit the armed robberies, but the trial court instructed the jury that they were to only consider such statements against the maker and not any co-defendant. Dominique contended that the substitution of the names of the defendants with "other" or "others" violated *Bruton* and its progeny.

The Court noted that since *Bruton* was issued, the United States Supreme Court and our Supreme Court have considered the extent that custodial statements by non-testifying co-defendants must be redacted to exclude the name of the defendant in order to pass constitutional muster. Our courts have held that unless the statement is otherwise directly admissible against the defendant, the Confrontation Clause is violated by the admission of a non-testifying co-defendant's statement which inculpates the defendant by referring to the defendant's name or existence, regardless of the existence of limiting instructions and of whether the incriminated defendant has made an interlocking incriminating statement. A co-defendant's statement meets the Confrontation Clause's standard for admissibility when it does not refer to the existence of the defendant and is accompanied by instructions limiting its use to the case against the confessing co-defendant. The fact that the jury might infer from the contents of the co-defendant's statement in conjunction with other evidence, that the defendant was involved does not make the admission of the co-defendant's statement a violation of the Confrontation Clause. Statements which, despite redaction, refer directly to a person whom the jury may infer to be the defendant run afoul of the confrontation clause. Thus, both the defendant's name and existence must be eliminated from the non-testifying co-defendant's statement.

Here, the investigator was allowed to testify to the existence of the "others" involved in the armed robberies, and given the evidence that five men committed the armed robberies, with four of them on trial and B. M. as a witness, the jury reasonably could have concluded that the "others" referred to Dominique and his co-defendants. Because Dominique did not have an opportunity to cross-examine Merkeith, his Sixth Amendment rights were violated. However, a *Bruton* violation does not require reversal if the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the statement was harmless error. And here, the Court found, Dominique failed to show harm resulting from this testimony given the other overwhelming evidence of his guilt. Accomplice B. M. testified that Dominique was involved in the armed robberies; a victim, who was a cousin of appellants and knew them his whole life, positively identified Dominique as participating in the first armed robbery; and Dominique admitted being with B. M. sometime during the night or early morning hours when these incidents took place.

Speedy Trial

Cawley v. State, A13A2238 (10/25/13)

Appellant appealed from the trial court's order denying his motion to dismiss on the ground that his constitutional right to a speedy trial was violated. A speedy trial is guaranteed to a criminal defendant by the Sixth Amendment to the United States Constitution and the Georgia Constitution. The framework for determining constitutional speedy trial claims requires the trial court to apply a two-tier analysis. Under the first tier, the trial court considered whether the delay was long enough to be presumptively prejudicial, and if so, then it considers under

the second tier whether the delay constituted a speedy trial violation. In determining whether the delay violates the defendant's speedy trial right, the trial court must consider (1) whether the delay was uncommonly long; (2) the reasons and responsibilities for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) the prejudice to the defendant.

The record reflected that on February 19, 2009, appellant was arrested for DUI and speeding. On, April 22, 2009, appellant was arraigned, pled not guilty, and requested a jury trial. The case was placed on the June 20, 2011 trial calendar, but the State requested and received a continuance because the arresting officer was not available. The case was next placed on the September 12, 2011 trial calendar, but appellant failed to appear. A special bench warrant was issued, and he was instructed to appear in court on September 21, 2011, which he did. That same day, the trial court ordered appellant's case to be placed on a trial calendar for January 2013. Nevertheless, the case was not called for trial at that time.

On March 1, 2013, appellant filed his motion to dismiss. Following a hearing, the trial court entered a written order summarily denying the motion on May 10, 2013. The Court granted appellant's application for interlocutory appeal. The Court found that because the trial court's summary order contained no findings of fact or conclusions of law, the order must be vacated and the case remanded for the entry of a proper order. Furthermore, the Court cautioned, "the speedy trial clock is still ticking, and the trial court's analysis on remand should take into account that the length of the pretrial delay continues to run until entry of a . . . written order applying the [proper constitutional] framework."