Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 19, 2014

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THIS WEEK:

Motions for New Trial

Wiggins v. State, A14A0785 (11/18/14)

Appellant was convicted of sexual exploitation of children, aggravated sodomy, child molestation, and cruelty to children in the first degree. She argued that the trial court's standard of review was erroneous on her challenge to the verdict on the general grounds. Specifically, her initial motion for new trial asserted the general grounds that the verdict was "decidedly and strongly against the weight of the evidence" and that it was "contrary to the law and principles of justice and equity." She also argued that the evidence against her was insufficient to sustain the convictions. In its order denying her motion for a new trial, the trial court applied only the *Jackson v. Virginia* standard in rejecting her assertions even though the trial court cited to O.C.G.A. §§ 5-5-20 and 5-5-21.

The Court stated that even when the evidence is legally sufficient to sustain a conviction, a trial judge may grant a new trial if the verdict of the jury is "contrary to . . . the principles of justice and equity," O.C.G.A. § 5-5-20, or if the verdict is "decidedly and strongly against the weight of the evidence." O.C.G.A. § 5-5-21. When properly raised in a timely motion, these grounds for a new trial, commonly known as the "general grounds," require the trial judge to exercise a broad discretion to sit as a "thirteenth juror." The Court noted that appellant's trial was conducted by a different judge who reviewed appellant's motion for a new trial. But, while the discretion of the second judge in weighing the evidence is "narrower in scope" than the presiding judge's would be, after a thorough review of the case, even a successor judge may exercise significant discretion to grant a new trial on the general grounds. Because there was no evidence that the successor judge exercised discretion, weighed the evidence, and determined as the "thirteenth juror" whether the verdict was against the great weight of the evidence or offended the principles of justice and equity, the Court vacated the judgment and remand the case to the trial court for consideration of the motion for new trial under the appropriate discretionary standard. In so holding, the Court rejected the State's assertion that the bare citation to O.C.G.A. §§ 5-5-20 and 5-5-21 was an express indication that it reviewed the evidence under the discretionary standards of those statutes.

Juveniles; Probation Revocation

In the Interest of R. M., A14A0860 (11/18/14)

A juvenile Court revoked appellant's probation and committed him to the Georgia Department of Juvenile Justice for 60 months, at least 18 of which were to be served in confinement at a youth development center. He argued that the State did not file a proper revocation petition. Specifically, that the petition must contain the same contents as a delinquency petition as set forth in former

O.C.G.A. § 15-11-38.1 and Uniform Juvenile Code Rule 3.8, and the State must follow the same statutory steps that are required to initiate a delinquency proceeding under former O.C.G.A. § 15-11-39. The Court disagreed.

Here, the Court found, the State denominated its filing as "State's Motion to Revoke Probation and Petition to Seek Relief under O.C.G.A. § 15-11-40." The State's petition met the requirements of former O.C.G.A. § 15-11-40(c) and (d), and that is all that was required. In so holding, the Court found that the specific requirements of the juvenile probation revocation statute prevail over the more general requirements of a petition for an adjudication of delinquency or unruliness, and the juvenile court had subject matter jurisdiction over the revocation proceedings. Accordingly, the juvenile court did not err in finding that, as a matter of law, the State had filed a sufficient petition to revoke appellant's probation pursuant to former O.C.G.A. § 15-11-40(b).

Search & Seizure; Implied Consent

State v. Padgett, A14A1002 (11/18/14)

Padgett was charged with DUI (less safe) and DUI (per se). The State contended that the trial court erred by excluding the results of a blood test performed by a hospital because the chemical analysis of the blood failed to comply with O.C.G.A. § 40-6-392(a)(1)(A). The evidence showed that Padgett was taken by ambulance to a hospital after wrecking his motorcycle. An officer read him his implied consent warnings and Padgett consented. At the officer's direction, Padgett's blood was drawn by a registered nurse at the hospital, but the officer did not retain the sample for testing or request that it be sent to the State crime lab. Instead, the blood sample was tested by the hospital, and the result was entered into Padgett's medical record. Thereafter, the officer obtained a search warrant for Padgett's medical record.

The Court found that the test was not performed in accordance with the dictates of O.C.G.A. § 40-6-392(a). Here, it was undisputed that the blood analysis at issue was performed at the request of a law enforcement officer for the purpose of a DUI investigation pursuant to consent gained after an implied consent warning. Thus, the test was State-administered for purposes of O.C.G.A. § 40-6-392(a), and the State had the burden of showing that it met the statutory requirements, which it conceded it could not do.

Nevertheless, the State contended, even if the test did not comply with the statutory requirements, it was otherwise admissible through the inevitable discovery doctrine because the officer later obtained a warrant for Padgett's medical record, which contained the test result. The Court disagreed. Even if the police were entitled to discover the result of the blood test by lawfully obtaining a warrant for Padgett's medical record, this did not change the fact that the result in the medical record was from a procedure that failed to comply with O.C.G.A. § 40-6-392(a), which governs the admissibility of State-administered blood alcohol tests. Thus, the presence of a warrant did not cure the improper testing procedure that occurred in this case. Accordingly, the inevitable discovery doctrine did not provide an avenue for admission.

Forfeiture by Wrongdoing

Brittain v. State, A14A1145 (11/17/14)

Appellant was convicted of aggravated assault, kidnaping, and burglary. Briefly stated, the evidence showed that in May of 2007, appellant entered the home of the victim, kidnapped her and threatened to kill her. In June of 2008, the victim disappeared under mysterious circumstances and there was evidence of foul play. Prior to trial, the State filed a motion seeking to permit the admission of law enforcement's videotaped interviews with of the victim pursuant to the doctrine of forfeiture by wrongdoing. And following a hearing on this motion, the trial court determined that the State had shown by a preponderance of the evidence that appellant procured the victim's unavailability to testify at trial and ruled that the testimonial evidence would be admissible. Appellant argued that this was a violation of his right to confrontation and that it was inadmissible hearsay.

First, the Court addressed the alleged 6th Amendment violation. Citing *Giles v. California*, 554 U.S. 353 (2008), the Court stated that notwithstanding a criminal defendant's Sixth Amendment right to confront the witnesses against him, the common-law doctrine of forfeiture by wrongdoing permits the introduction of statements made by a witness who has been "detained" or "kept away"' by the "means" or "procurement" of the defendant. The Court also noted that although the US Supreme Court has not established a standard of review upon which to demonstrate forfeiture by wrongdoing, both federal and state courts tend to hold the Government to a preponderance-of-the-evidence standard. Thus, the Court found, it would use that standard in this case. And here, the Court found, the trial court was presented with ample evidence to support its finding by a preponderance of the evidence, and that finding was not clearly erroneous. As such, appellant failed to establish any violation of his Confrontation Clause rights.

Next, the Court addressed appellant's hearsay arguments. The Court noted that this case was tried prior to the effective date of the new Evidence Code. Thus, assuming, without deciding, that the trial court admitted testimonial and non-testimonial hearsay under the forfeiture-by-wrongdoing doctrine and that the prior evidence code would not have permitted admission of hearsay evidence under a forfeiture-by-wrongdoing exception, any error in the admission of same did not justify reversal because the same evidence would be admissible at a second trial. Specifically, O.C.G.A. § 24-8-804(b)(5) codified the forfeiture-by-wrongdoing exception for hearsay evidence, providing that "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" shall not be excluded by the hearsay rule if the declarant is unavailable as a witness. And, because O.C.G.A. § 24-8-804(b)(5) is a procedural statute, it would apply to a retrial if the Court reversed this case.

Jurisdiction; Supersedeas

Tolbert v. Toole, S14A1158 (12/11/14)

Appellant was convicted of armed robbery, aggravated battery, aggravated sodomy, and other crimes. He filed a habeas petition, contending that his pretrial pro se notice of appeal deprived the court of jurisdiction to try him and therefore, his convictions were void. The habeas court found

that appellant had procedurally defaulted this jurisdictional claim by failing to raise the issue in the trial court and on direct appeal, and that he had not shown cause and prejudice to overcome the default.

The record, briefly stated, showed that appellant's public defender filed a statutory speedy trial motion, but then sometime later the court struck it during a conference with the prosecutor and defense counsel, but without the presence of appellant. The court thereafter allowed it to be refiled, but it never was. The case was set for trial in August of 2008. On July 15, appellant, while still represented, filed a pro se motion for discharge and acquittal on the statutory speedy trial grounds and for removal of his counsel. At a hearing two days later, the court denied both motions. Appellant immediately moved to represent himself and the court relieved the public defender from representing him, stating that it would file an order, but none appeared in the record. On July 31, the public defender filed a motion to withdraw. The next day, August 1, appellant filed a pro se notice of appeal from the denial of his motion for discharge and acquittal. Three days thereafter, new counsel filed an entry of appearance for appellant. Eventually, a jury convicted appellant.

The Court stated that the pretrial notice of appeal, if effective, would have deprived the trial court of jurisdiction until the appeal was resolved and the remittitur returned. But, the appeal would properly have been dismissed, because the trial court's oral ruling had not been reduced to an appealable written order. And contrary to the habeas court's ruling, this sort of jurisdictional defect due to supersedeas cannot be waived. Accordingly, the habeas court erred in relying on procedural default to reject appellant's jurisdictional claim.

Nevertheless, the Court concluded that the habeas court's implicit assumption that appellant's pro se August 1, 2008 notice of appeal was effective was mistaken. The order relieving the public defender from his representation was not in the record and even though an order may be signed, it is not considered to have been entered and, thus, does not become effective until it is filed with the clerk. Also, the public defender's motion to withdraw had no effect on appellant's representation because a formal withdrawal of counsel cannot be accomplished until after the trial court issues an order permitting the withdrawal. Thus, because appellant could not show from the record that he was not represented by counsel on the date he filed his pro se notice of appeal, he could not show that his notice of appeal was legally valid and acted to deprive the trial court of jurisdiction to try him. The habeas court therefore reached the right result in denying relief on appellant's jurisdictional claim.