

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 30, 2015

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THIS WEEK:

- **Discovery Violations; Mistrial**
- **Guilty Pleas; Right of Withdrawal**
- **Sexual Exploitation of Children; Video Evidence**
- **Prior Inconsistent Statements; Testifying ADA**

Discovery Violations; Mistrial

Burton v. State, A14A1864 (12/18/14)

Appellant was convicted of three counts of criminal damage to property in the first degree. The evidence showed that appellant threw bricks or rocks at three moving vehicles, hitting each in the windshield. During the course of trial, it was learned that there were three written statements given by three of the victims that were taken by a deputy, but not provided to defense counsel. An attempt to find these statements during trial proved fruitless. Appellant contended that the trial court erred in denying his motion for a mistrial for the discovery violations. The Court disagreed.

The Court found that the record contained no evidence that the statements were lost or misplaced due to bad faith on the State's part. Nor did appellant establish prejudice resulting from the State's failure to disclose the statements. Because the statements could not be located, the State could not use them to support its case against appellant. In addition, any argument that the statements might have aided appellant's defense or provided a basis to impeach the State's witnesses was simply speculative, and appellant's counsel was able to use the

statements' absence to attempt to undermine the deputy's credibility at trial. Consequently, the Court stated, it did not perceive how granting a mistrial would be just under the circumstances, especially since there was no evidence in the record that the statements might yet be found and thus potentially alter appellant's strategy in a new trial. As appellant failed to establish bad faith, prejudice, or any other imperative to grant a mistrial, the trial court did not abuse its discretion in denying his motion for mistrial based on the failure to disclose these witness statements.

Guilty Pleas; Right of Withdrawal

Usman v. State, A14A1644 (1/7/15)

Appellant entered a non-negotiated plea to child molestation on Nov. 5, 2012. He was sentenced after a hearing on Jan. 16, 2013. Two days later, the trial court called appellant to court to inform him of his right to appeal his conviction and sentence, which it had failed to do at the previous hearing. The trial court also informed him that he had the right to an appellate attorney if he was indigent. The trial court, however, did not inform appellant that he could move to withdraw his guilty plea. Appellant was represented by counsel at his plea and sentencing hearings, including at the hearing when the trial court advised him of his right to appeal his conviction. Thereafter, appellant filed a motion to withdraw his plea which the trial court denied because it was out of term.

Appellant contended that the trial court misled him that the appropriate procedure for challenging his convictions was to file a direct appeal rather than a motion to withdraw his

guilty plea within the term of court, and he relied on this advice to his detriment since his motion to withdraw was denied as filed out of term. The Court disagreed. O.C.G.A. § 17-7-93(b) provides, in relevant part, that, at any time before judgment is pronounced, the accused may withdraw a plea of guilty and plead not guilty. But, there is no absolute statutory right under this Code section to withdraw a guilty plea after the trial court's oral announcement of the sentence. Moreover, the trial court is only obligated to personally inform the defendant of the right to withdraw his guilty plea before judgment is pronounced if the trial court intends to reject a *negotiated* plea agreement and here, appellant's plea was non-negotiated. As a result, the trial court was not obligated to inform him of his right to withdraw the plea before sentencing.

Nevertheless, appellant argued, the trial court affirmatively misled him into believing that he could raise an ineffective assistance claim on appeal without first moving to withdraw his guilty plea or developing the record to address the issue. But, the Court found, the trial court unambiguously advised him of his right to appeal his conviction, and it was not obligated to inform him that this right was qualified in light of his guilty plea. Likewise, the Court found no merit to appellant's claim that the trial court advised him that he had to affirmatively request post-conviction counsel. While the trial court advised appellant that the court would appoint appellate counsel "upon appropriate request to do so," the trial court's statement, in context, indicated that appellate counsel would be appointed if appellant wished to appeal and showed that he was indigent. And here, the Court concluded, the record did not show that the trial court committed error in advising appellant of his appellate rights.

Sexual Exploitation of Children; Video Evidence

Beaver v. State, A14A1509, (12/18/15)

Appellant was convicted of 15 counts of sexual exploitation of children. The evidence showed that during the time a computer was in appellant's possession, 54 pictures and 23 videos of child pornography had been downloaded to it. He contended that the trial court erred in allowing the jury to view portions of the videos rather than still shots

taken from the videos. Prior to trial, appellant moved in limine to preclude the State from presenting the actual videos to the jury, arguing that showing video clips rather than still shots was unfairly prejudicial. The trial court denied his motion, but limited the State's presentation of the videos to 10-12 seconds per video. The Court noted that the test for excluding relevant evidence has been well set out: relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. And, a trial court's determination on this issue will not be disturbed absent an abuse of discretion.

Citing *Simpson v. State, 271 Ga. 772 (1999)*, the Court stated that in a prosecution for a sexual offense, sexually explicit material can only be admitted if it can be linked to the crime charged. Here, the videos presented were clearly directly relevant to the specific offenses charged. And where the trial court limited their prejudicial impact by significantly restricting the State's use of the videos that were themselves the subject of the charges against appellant, there was no abuse of discretion.

Prior Inconsistent Statements; Testifying ADA

McNair v. State, A14A1814 (12/16/15)

Appellant was convicted of four counts of armed robbery and four counts of possessing a firearm during the commission of a crime. The evidence showed that some of the crimes involved a Pontiac owned by appellant's cousin. The cousin told a police investigator in a recorded interview that he had loaned his car to Andrew Dunn and that the car had been stolen while in Dunn's possession. The State also offered the testimony of an ADA who interviewed the cousin before trial. The ADA testified that, during his interview, the cousin told him that he had rented his car to Dunn and appellant. The cousin also told the ADA that appellant was the one who had informed him that his car had been stolen. Appellant contended that the admission of the interviews by the police and the ADA were improper as impeachment evidence. The Court disagreed.

First, the Court held, the record showed that the State laid a proper foundation for the admission of the cousin's out-of-court

statements. The evidentiary rules pertaining to examining witnesses on their prior inconsistent statements and using those statements for impeachment purposes or as substantive evidence are currently codified at O.C.G.A. § 24-6-613 and § 24-8-801(d) (1)(A). These new evidentiary rules retain Georgia's former approach to a testifying witness's out-of-court statements and such statements are not hearsay. Thus, they may be admitted both for impeachment purposes and as substantive evidence. Further, under O.C.G.A. § 24-6-613(a), the prosecutor was not required to show the witness his recorded statements during direct examination to refresh his recollection. Nor, under O.C.G.A. § 24-6-607, was it improper for the prosecutor to impeach his own witness.

Moreover, the Court found, the State was authorized under O.C.G.A. § 24-6-613(b) to present extrinsic evidence of the witness's prior inconsistent statements for impeachment purposes and as substantive evidence, given the facts of this case. Thus, the record showed that the cousin testified that he did not own the car at issue and that he did not rent it to anyone; statements inconsistent with those previously given in the case. Both the prosecutor and defense counsel examined the witness as to each of his prior inconsistent statements. The witness was afforded an opportunity to explain or to deny his prior inconsistent statements, and he chose to explain them by saying that, because of his drug use, he simply had no recollection of making them. Given the State's compliance with the prerequisites of O.C.G.A. § 24-6-613(b), the trial court did not err in admitting extrinsic evidence of the cousin's prior inconsistent statements both for impeachment purposes and as substantive evidence.

Nevertheless, appellant argued, the prosecutor knew that the cousin was reluctant to testify against appellant, but called him to the stand anyway, with the intent of eliciting substantive evidence through his prior inconsistent statements evidence. Citing *United States v. Gilbert, 57 F.3d 709, 711 (9th Cir. 1995)*, appellant argued that impeachment was improper when employed as a guise to present substantive evidence to the jury that is otherwise inadmissible. But the Court found, unlike the Federal Rules of Evidence, O.C.G.A. § 24-6-613(b) allows a testifying witness's prior inconsistent statements to be

admitted both for impeachment purposes and as substantive evidence, making the prosecutor's intent under the circumstances irrelevant.

Finally, appellant argued, the trial court erred in allowing the ADA to testify as to the cousin's prior inconsistent statements because the ADA was a prosecutor handling the case. The Court stated that the practice of trial attorneys testifying is not approved by the courts except where made necessary by the circumstances of the case. Because allowing an advocate to testify as a witness poses innumerable threats to the integrity and reliability of the judicial process, courts have often refused to permit a prosecutor to testify as a witness unless there is a compelling need. Whether to allow a prosecutor to testify as a witness in a case is a matter within the discretion of the trial judge. In this case, however, the Court found it was not necessary to reach the question of whether the trial court abused its discretion in allowing the ADA to testify because the record showed that the ADA was not acting as a prosecutor in the case. Instead, the record showed that the ADA who testified was not responsible for trying appellant and that his only appearance during the trial of the case (other than as a witness) was to enter the courtroom briefly before jury selection commenced because the prosecutor who actually tried the case had planned to have the ADA assist him with jury selection. He did not question any prospective jurors. When it became clear that the ADA might need to offer testimony in the case, he was removed from the courtroom and was sequestered with the other trial witnesses. Further, defense counsel was notified prior to trial of his status as a potential witness. The record did not support a finding that the ADA was listed as counsel for the trial of the case, nor did the record support an inference that he was present in the courtroom for trial in a capacity that would lead the jury into believing that he was prosecuting the case. In fact, he testified that the instant case was not assigned to him, and he told the jury: "I have not been a part of preparing this case outside of meeting at the . . . jail [to interview the cousin]." Given these facts, appellant failed to show any impropriety in allowing the ADA to testify.