Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 24, 2017

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Robert W. Smith, Jr.
General Counsel

Lalaine Briones
State Prosecution Support Director

Sheila Ross
Director of Capital Litigation

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

Gilbert A. Crosby
Sr. Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Kenneth Hutcherson
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

Indictments; Bruton

Allen v. State, S16A1528 (2/6/17)

Appellant was convicted of malice murder and other related charges. He was tried with his two co-defendants, Lucas and Norwood. Appellant first contended that the trial court erred in denying his motion to dismiss Counts 14 and 15 of the indictment due to the jury's inability to distinguish these two identical counts and the failure of each count to name a victim. Counts 14 and 15 each charged appellant and his co-defendants with: "the offense of POSSESSION OF A WEAPON DURING THE COMMISSION OF A CERTAIN CRIMES [sic] for that the said accused…., on the 18th day of January, 2009, did have on accused's person a firearm, to wit: a certain handgun, during the commission of the crime of aggravated assault." The motion was made on the first day of trial.

The Court noted that to the extent appellant's motion could be deemed a general demurrer, it was meritless. Appellant would not be innocent of the crimes if he admitted that, "on the 18th day of January, 2009, [he] did have on [his] person a firearm, to wit: a certain handgun, during the commission of the crime of aggravated assault," which is a felony against another person. Accordingly, neither Count 14 nor Count 15 of the indictment was subject to a general demurrer.

To the extent appellant was demanding to know to which of the two aggravated assault counts alleging use of a firearm Count 14 and Count 15 were referring, or the name of the victim of the predicate aggravated assault, then his motion was a special demurrer and appellant forfeited his claim by failing to file it within ten days after May 6, 2010, the date that he waived arraignment. Specifically, appellant filed his motion to dismiss Counts 14 and 15 nearly 21 months after the statutory deadline, and there was no indication that the trial court granted him an extension.

Appellant also argued that the admission of State's Exhibit 102 violated the Confrontation Clause of the Sixth Amendment, citing *Bruton v. United States*, 391 U.S. 123 (88 S.Ct. 1620, 20 L.E.2d 476) (1968). Exhibit 102 was a signed, handwritten statement that co-defendant Lucas's uncle, who testified at the trial, gave to the police before trial. In the written statement, the uncle repeated co-defendant Norwood's oral statement to him that "they would have nothing on them saying how Brandon [Norwood] set up the robbery" if appellant "would have just kept his mouth close[d]." The exhibit thus included two levels of out-of-court statements offered for the truth of the matter asserted: (1) the written statement that the uncle gave to the police; and (2) Norwood's oral statement to the uncle that was embedded in that writing. Appellant challenged only the second level — the statement that his co-defendant Norwood made to Lucas's uncle.

The Court noted that Norwood's statement to Lucas's uncle was subject to a Confrontation Clause challenge under *Bruton*

only if the statement was testimonial. A statement is testimonial if its primary purpose was to establish evidence for use in a future prosecution. The Court found that Norwood's statement — which was made shortly after the crimes and before any arrests to a friend's uncle rather than to police officers investigating a crime — clearly was not intended for use in a future prosecution and cannot be considered testimonial. Accordingly, the admission of that statement did not violate *Bruton*.

Sentencing; Void Sentences

Philmore v. State, S17A0723 (2/6/17)

In 1991, appellant was convicted of felony murder and sentenced to life without parole pursuant to former O.C.G.A. § 17-10-7(b) (1991). Appellant appealed from the denial of his motion to modify his sentence and argued, for the first time on appeal, that his life without parole sentence is void pursuant to *Funderburk v. State*, 276 Ga. 554 (2003), recognizing that the sentencing provision under former O.C.G.A. § 17-10-7(c) (2000), the successor to O.C.G.A. § 17-10-7(b) (1991), did not apply to capital offenses, such as murder.

The Court stated that although the issue of a void sentence was raised by appellant for the first time on appeal, it was preserved for review as Georgia law recognizes that a sentence which is not allowed by law is void and its illegality may not be waived. Further, the Court agreed with appellant and the State that, based upon the language of the 1991 version of the recidivist statute and the Court's holding in *Funkerburk*, appellant's sentence is void. Therefore, appellant's life without the possibility of parole sentence was vacated. Furthermore, the Court reversed the trial court's denial of appellant's motion to modify his sentence and remanded the case back to the trial court to enter a legal sentence.

Transcripts; Supplementing the Record

Mosely v. State, S16A1657 (2/6/17)

Appellant was convicted of malice murder. Due to recording equipment failure, the first day of appellant's trial in June 2012 was unable to be transcribed. The trial court then held a hearing in May 2015 on a motion by the State to supplement the record with evidence of the missing day of trial. Three of the four witnesses who had testified at the first day of trial were heard, as well as appellant's trial counsel, and the assistant district attorney who prosecuted the case. The same judge who presided over the first day of trial presided over the hearing. Following the hearing, the trial court granted the State's motion to supplement the record, finding that the testimony at the hearing was substantively the same that was heard during the first day of trial and adequately supplemented the record.

Appellant contended that the trial court erred when it determined that the testimony at the hearing on the motion to supplement the record was sufficient. But, the Court found, in the specific situation in which a portion of a transcript is lost or destroyed, subsections (f)and (g) of O.C.G.A. § 5-6-41 permit the parties to recreate the transcript from memory and also allow the trial court to do so when the parties cannot agree as to what transpired. In fact, when the parties are unable to agree as to the correctness of such a supplemental transcript, the issue is to be decided by the trial judge, and pursuant to O.C.G.A. § 5-6-41(g), such decision is final and not subject to review.

Here, the Court found, the trial court complied with O.C.G.A. § 5-6-41(f) by holding a hearing on the State's motion to supplement the record and rehearing testimony of all but one of the witnesses who testified on the first day of trial as well as the recollections of the attorneys who tried the case. And, because the trial court's adoption of this testimony to supplement the record is dispositive and not subject to review, the trial court's ruling provided no basis to overturn appellant's convictions or to grant him a new trial.

Crime Scene Photos; O.C.G.A. § 24-4-403

Plez v. State, S16A1537 (2/6/17)

Appellant was convicted of murder and other related crimes. He contended that the trial court erred when it admitted photographs of the victim's unclothed body at the scene of the crime. Specifically, that the photos showed the victim's genitals and were cumulative, inflammatory and prejudicial under O.C.G.A. § 24-4-403. The Court disagreed.

The Court found that the photographs in question showed the crime scene from different angles, the position of the victim's body after the stabbing, and the nature, location, and extent of the victim's wounds, and they were presented to the jury in connection with the testimony of a crime scene expert. Although one photograph was taken from a position near the victim's genitals and did not show his wounds, the photograph did show blood smeared on the victim's legs, and it was used by the crime scene expert to show how the body was moved. In all, the photographs assisted in the presentation of the opinions of the crime scene expert, and they were probative of the question of whether the victim was killed with malice. Furthermore, the Court noted, the photographic depiction of the victim was not especially gruesome and did not show any sort of genital mutilation. And in any event, photographic evidence that fairly and accurately depicts a body or crime scene and is offered for a relevant purpose is not generally inadmissible under Rule 403 merely because it is gruesome. Therefore, the Court concluded, the trial court did not abuse its discretion in admitting the photographs.

Sufficiency of the Evidence; Sentencing

Moore v. State, A16A2088 (2/1/17)

Appellant was convicted of two counts of armed robbery, five counts of false imprisonment, and other offenses. The evidence showed that appellant ambushed A. J., who was leaving a restaurant where she worked after it had closed for the evening, revealing what appellant represented to be a gun hidden under his shirt. Appellant shoved A. J. back into the store. Appellant continued to shove A. J. toward the counter, and then ordered her to lie on the floor and not move. Appellant subsequently approached the back of the store, and confronted the store manager and two other employees. Appellant ordered the manager and another employee to open the safe, but once it became clear the manager was unable to get into the safe, appellant took the contents of the register, after being informed by the manager that it was the only money accessible in the store, as well as the manager's wallet and fled.

Appellant argued that the evidence was insufficient to show that one victim, T. R., was ever confined or detained, as he was unaware of her presence. The Court noted that while T. R. did not testify at trial, other employees testified

that T. R. observed appellant accosting A. J. as A. J. was attempting to leave the restaurant through the front door. T. R., who was watching A. J. leave as a safety precaution, observed enough of the confrontation between A. J. and appellant to cause her run and alert the manager that they were being robbed, and then activated the silent alarm in the back of the store and hid. Therefore, the Court found, the testimony from the other employees about T. R.'s actions — observing the encounter between appellant and A. J., retreating from the front door of the store to warn the manager of the robbery, activating the silent alarm, and hiding in the back of the store — constituted sufficient evidence for the jury to determine that she was detained against her will. Moreover, the fact that appellant argued that he was unaware of T. R.'s presence because he "surely . . . would have gathered her up with the other four employees had he known she was there" does not negate the evidence of false imprisonment, as appellant's actions upon accosting A. J. as she attempted to leave the restaurant and his actions towards the other employees located inside clearly demonstrated an intent to confine them.

Appellant also argued, and the State conceded, that the trial court erred in sentencing him on two counts of armed robbery. Count 2 charged appellant with using an unknown weapon to take $15.60 from the restaurant's cash register in the manager's presence, and Count 3 charged appellant with using an unknown weapon to take the manager's wallet and $20 contained inside. Appellant was found guilty on both counts and was sentenced to life without parole for both convictions, with his sentence for Count 3 to run concurrent with his sentence for Counts 2.

The Court stated that robbery is a crime against possession, and is not affected by concepts of ownership. Similarly, one may only rob a person, and not a corporate entity, or an object such as a cash drawer. Therefore, since there was only one victim, the manager, who was by this single transaction despoiled of his possession of both his own money and his employer's money, there was only one robbery. Accordingly, the Court agreed with appellant and the State that only one armed robbery occurred.