

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 25, 2011

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THIS WEEK:

- **Ineffective Assistance of Counsel**
- **Mental Capacity; Intent**
- **Discovery; OCGA § 17-16-6**
- **Impeachment Evidence; Prior Convictions**
- **Hearsay; Language Conduit Rule**
- **DNA Testing; OCGA § 5-5-41(c)**

Ineffective Assistance of Counsel

Ware v. State, A10A1652 (2/10/2011)

Appellant was convicted of robbery. He contended that the trial court erred in not removing his appointed defense attorney and replacing him with his counsel of choice. The record showed that prior to trial, appellant sent to the judge a letter stating that his appointed counsel would not meet with him; would not give him discovery material; and would not accept his collect calls. He asked the judge to replace that lawyer with another person he specifically named. The trial court summarily denied his request. Appellant sent another letter to the judge and got the same result.

The Court held that an indigent defendant has no right to compel the trial court to appoint an attorney of his own choosing. However, when a defendant's choice of counsel is supported by objective considerations favoring the appointment of the preferred counsel, and there are no countervailing considerations of comparable weight, it is an abuse of discretion to deny the defendant's request to appoint the counsel of his preference. The Court found

that nothing in appellant's letters or in his testimony at the motion for new trial provided any objective considerations for replacing his counsel with the person he chose. Therefore, the trial court did not abuse its discretion in denying his motion.

Nevertheless, citing *Heard v. State*, 173 Ga. App. 543 (1985), appellant argued that the trial court erred by summarily denying his motion to replace his counsel without first holding a pretrial hearing. The Court noted that when the issue of ineffectiveness of appointed counsel is raised, the trial court should conduct a hearing, but *Heard* provides that a trial court's error in refusing to conduct a hearing "can be cured by a post-trial hearing before the judge in the trial court." Here, the trial court conducted a hearing in which it determined that appellant's claims of ineffective assistance of counsel were without merit. Thus, the post-trial hearing cured any error by the trial court in refusing to conduct a pretrial hearing as to the basis of appellant's request for appointment of new counsel. Since the record revealed that appellant failed to demonstrate that he was deprived of effective assistance of counsel, no new trial was warranted.

Mental Capacity; Intent

Pittman v. State, A10A2106 (2/8/2011)

Appellant was convicted of family violence battery for kicking his brother. The evidence, briefly stated, showed that a week before the incident, appellant hit his head causing a concussion so severe it required hospital treatment. Thereafter, he began having difficulty communicating, often blacked out, and sometimes screamed that he was being attacked, needed assistance with basic tasks, and had to be supervised. On the night

in question, he consumed some alcohol and went to bed. Thereafter, he jumped out of bed and started screaming that people were trying to kill him. He ran out into the street and his wife was unable to calm him. His brother, the victim, arrived and took him back to his house. Thereafter, his brother called the police from his home because appellant was again acting out. While a deputy was placing appellant under arrest for disorderly conduct, appellant kicked the victim in the leg, leaving a mark.

Appellant contended that he lacked requisite mental capacity to commit the offense as his behavior was attributable to the after-effects of his concussion. The Court disagreed. Evidence that appellant had suffered a concussion approximately a week earlier did not demand a finding that he lacked the requisite criminal intent to commit the battery as charged. Georgia law presumes every person is of sound mind and discretion; criminal trials begin with the rebuttable presumption that the defendant is sane, and this presumption is evidence. The jury was free in this case to reject testimony that a concussion negated his ability to form criminal intent and to conclude instead that he intended to commit the offense, perhaps inferring from the evidence that his conduct was attributable to his voluntary intoxication and anger at the victim, who had summoned law enforcement and accused him of “faking” his injury. Conflicts in the testimony, including conflicts regarding the accused’s intent to commit the crime charged, are for the jury to resolve. Where, as here, there was sufficient evidence, even though contradicted, to support each fact necessary to make out the State’s case, the jury’s verdict was upheld.

Discovery; OCGA § 17-16-6

Vaughn v. State, A10A1658 (2/9/2011)

Appellant was convicted of child molestation. He argued that the trial court erred in refusing to allow him to call a witness that was not disclosed to the State prior to trial. The record showed that on the day of trial, defense counsel stated that she wanted to call the victim’s mother to testify about another allegation of child molestation made by the victim. Defense counsel said she knew about the witness the week before but did not inform the State until just before the jury was being brought in on the morning of trial. Counsel said that she had spoken to the mother and

“learned through her a lot of history about the case, which I think is relevant to show the intentions of some of the State’s witnesses. I also learned that there is a videotaped interview of one of the children where she has accused another man ... of committing the same act as she has accused my client of.” Defense counsel then stated that she might need to do additional investigation depending on what the video revealed. The trial court questioned defense counsel about why she waited so late to interview the mother, why she did not notify the State as soon as she learned of the mother’s evidence, and why she had not attempted to subpoena the videotape. The trial court then asked defense counsel twice if she wanted a continuance and she responded that she did not, but rather requested a “delay.”

Appellant argued that the trial court violated OCGA § 17-16-6 because a trial court may exclude a witness not disclosed only “upon a showing of prejudice and bad faith...” The Court found, however, that the trial court had sufficient information to determine whether the State would be prejudiced by the late disclosure of this witness and videotape. The requirement of prejudice to the State was satisfied because the State had no notice of the witness or the videotape until the day of trial and thus had no opportunity to interview the witness or view and investigate the videotape. The requirement of bad faith was satisfied because nothing in the record indicated that appellant did not know of this witness or videotape until the day of trial. Therefore, the trial court’s exclusion of this witness was not an abuse of discretion.

Impeachment Evidence; Prior Convictions

Johnson v. State, A11A0074 (2/10/2011)

Appellant was convicted of aggravated assault. He contended that the trial court erred in allowing the State to impeach him with his prior felony convictions. At trial, appellant testified that he acted in self defense. On cross-examination, the state was allowed to impeach Johnson’s credibility by introducing certified copies of his convictions for aggravated assault, terroristic threats and possession of a firearm by a convicted felon. OCGA § 24-9-84.1 (a) (2) provides, “[e]vidence that the defendant has been convicted of a crime shall be admitted if the crime was punishable by death or imprison-

ment of one year or more under the law under which the defendant was convicted if the court determines that the probative value of admitting the evidence substantially outweighs its prejudicial effect to the defendant...” The trial court is required to make express findings when balancing the probative value and the prejudicial effect of such evidence. Here, the trial court’s order stated that “[t]he Court does find that the probative value in this case outweighs the prejudicial value.” The Court found that omitting the word “substantially” was error. However, the error was harmless and did not require reversing appellant’s conviction because of the overwhelming evidence of guilt.

Hearsay; Language Conduit Rule

Ursulita v. State, A10A1733 (2/8/2011)

Appellant was convicted of first degree arson and burglary. She argued that the trial court erred in allowing certain hearsay testimony at trial. Specifically, she argued that an arson investigator who was present when an officer interviewed her in Spanish should not have been allowed to testify as to what the investigator told him in English that appellant said to the officer in Spanish. Even if the officer was not available to testify, under the “language conduit” rule, “[a]bsent a motive to mislead, distort or some other indication of inaccuracy, when persons speaking different languages rely upon a translator as a conduit for their communication, the statements of the translator should be regarded as the statements of the persons themselves without creating an additional layer of hearsay.” Moreover, the officer himself testified to the interview with appellant and defense counsel, who spoke Spanish, had the opportunity to question the officer closely as to his translation of appellant’s statements. Therefore, appellant’s right to confrontation was not violated and appellant failed to show harm as a result of this claimed error.

DNA Testing; OCGA § 5-5-41(c)

Howard v. State, A10A2160 (2/9/2011)

Appellant appealed from the denial of his post-conviction motion for DNA testing pursuant to OCGA § 5-5-41(c). This statute provides that one who has been convicted of a

serious violent felony may file a written motion petitioning the court in which the conviction was entered for DNA testing. The trial court conducted a hearing as provided by the statute. One of the purposes of the hearing is “to allow the parties to be heard on the issue of whether the petitioner’s motion complies with [the statute] . . . and whether . . . the evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion.” If the trial court determines that this showing has been made and other requirements have been met, the trial court must grant the motion for testing.

Here, the case agent testified and explained that in 1989, when appellant was convicted of rape and burglary, DNA testing was not available to the State, and any testable evidence from his trial had since been destroyed. There was no evidence showing otherwise, nor was there evidence of bad faith on the part of the State. Under these circumstances, the Court found that appellant failed to meet the statutory requirements, and thus, the trial court did not err in denying his motion for DNA testing.