

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 3, 2017

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THIS WEEK:

- **Sufficiency of the Evidence**
- **Ineffective Assistance of Counsel; Expert Testimony**
- **Street Gang Activity; Evidence**
- **Cross-examination; Mistrials**
- **Motions for New Trial; Appellate Jurisdiction**
- **Constitutional Right to a Speedy Trial; Sentencing**

Sufficiency of the Evidence

Thomas v. State, S16A1520, S16A1521 (1/19/17)

Julius Thomas and Desmond “Philly” Nixon were tried jointly and convicted of murder and related offenses in connection with a crime spree that took place over a three-day period. The evidence established that Thomas, Nixon and Ishmael “Smurf” Carter were close friends and members of a rap group known as B.G.M. Witnesses recalled that Thomas and Nixon were so close that they would periodically live in the same house and answer incoming calls on the other’s cell phone. On January 7, 2013, B.W., who was working at a Chinese restaurant, was delivering her last order of the night to the address of an abandoned house which was located approximately one block from Thomas’ then-residence. Upon B.W.’s arrival at the house, a man she later identified as Carter was standing outside near the driveway. Carter approached and asked to sit inside the vehicle until his friend brought out money to pay for the order. B.W. allowed him to sit in the front passenger’s seat and, despite having flirted with her on the phone earlier in the evening when he was placing the delivery order, Carter was now quiet and texting on a phone.

Eventually, another man came outside and spoke with Carter about paying for the meal, leaving the front passenger door open. The men returned to the driver’s side door where B.W. was still seated. Shortly thereafter, she felt a gun against her right side. She turned and faced a third man, later identified as Nixon, who demanded money from her. B.W. said she did not have any money, at which point Nixon took her cell phone and told her to remove her clothes. She complied. Nixon proceeded to rape her in the front seat of the car at gun point while the other two men blocked the driver’s side door. The group left B.W. in the car and headed back into the house.

B.W. later identified Nixon and Carter from photographic line-ups as two of the men involved in her assault, but she was unable to identify Thomas as the third man. Phone records introduced at trial showed that Thomas’ cell phone was used to place the delivery order with the restaurant the night of the crimes. Law enforcement also located Nixon’s finger prints in the car where B.W. was raped. Finally, after B.W. replaced her cell phone and re-activated her old phone number, she began receiving phone calls for “Philly” and “Smurf.” In fact, Nixon’s girlfriend testified at trial that, after the night B.W. was raped, she would reach Nixon by calling the phone number belonging to B.W.’s stolen cell phone.

The Court found that the evidence was insufficient to support Thomas’ guilty verdicts for the armed robbery and aggravated assaults of B.W. Here, although Thomas’ phone was used to place the delivery order, the evidence at trial showed that Carter and Nixon would routinely use Thomas’ cell phone. In fact, the evidence at trial showed that Carter

placed the delivery order and had Thomas' phone when B.W. arrived at the abandoned residence. Further, although B.W. provided a general description of her third attacker, she did not identify Thomas either during the investigation or at trial. With no other evidence linking Thomas to B.W.'s assault, the State's evidence of his presence, much less his participation as a party to the crimes, was tenuous at best. Consequently, the Court held, the evidence was insufficient to establish Thomas' guilt beyond a reasonable doubt regarding the armed robbery and aggravated assaults of B.W. Accordingly, his convictions regarding the assault on B. W. were reversed.

Ineffective Assistance of Counsel; Expert Testimony

Mosby v. State, S16A1580 (1/23/17)

Appellant was convicted of murder and other offenses. The evidence showed that appellant and Burns had been in a romantic relationship which soured and that the Burns thereafter befriended the victim. Appellant drove into a hotel parking lot and partially blocked a vehicle in which the victim was driving and Burns was a passenger. Appellant confronted the two, pointed a gun toward Burns and fired it. Burns was not struck and ran into the hotel lobby, but more shots were fired, including return fire by the victim. According to the evidence, appellant fired a total of four bullets from her gun and the victim fired a total of eleven. Appellant and the victim were each hit four times, but the victim died from his wounds. The entire event was recorded by a security camera and shown to the jury.

Appellant argued that her counsel was ineffective by failing to consult with a crime scene reconstruction or firearms expert prior to trial or to retain such an expert as a witness to challenge the testimony or other evidence relating to the shootout. Specifically, the expert would have testified from the video that appellant only fired first as a warning shot and thereafter fired only in self-defense. The Court disagreed.

First, the Court noted, expert testimony is admissible where the expert's conclusion is beyond the ken of the average layman. But where jurors can take the same elements and constituent factors which guide the expert to his conclusions and from them alone make an

equally intelligent judgment of their own, then expert opinion testimony is not admissible. And here, the Court found, the jury could draw its own conclusions about the events shown on the video, and appellant failed to show that the testimony of an expert witness with respect to what the expert observed on the video would have been admissible or that the jury would have accepted his testimony over what it observed. Thus, counsel was not deficient for failing to present expert testimony at trial.

Appellant also argued that pre-trial consultation with an expert witness would have assisted counsel in utilizing evidence of the trajectory of the fatal bullet to support her defense and would have helped prepare counsel to cross-examine witnesses concerning the ballistic and other evidence. But, the Court found, even if such pre-trial consultation would have better prepared trial counsel to establish that appellant fired the fatal shot while leaning into her car attempting to flee from the victim, and even assuming counsel's representation was deficient in this regard, appellant failed to demonstrate a reasonable probability that the trial result would have been different if trial counsel had made such a consultation because appellant fired the first shot and was the aggressor who started this gunfight. The State did not dispute that the victim returned fire. The jury was properly instructed, however, that an aggressor is not entitled to a finding of justification. Consequently, appellant failed to demonstrate a reasonable probability that the trial result would have been different even assuming counsel's performance was deficient in this regard.

Street Gang Activity; Evidence

Brown v. State, S16A1530 (1/23/17)

Appellant was convicted of malice murder, felony murder, criminal street gang activity, and weapons charges. The trial court granted his motion for new trial solely on the street gang count because the State failed to properly authenticate the evidence used at trial to convict him.

Appellant contended that the admission of the unauthenticated evidence required the reversal of all his convictions. The Court disagreed. Assuming without deciding that the trial court correctly found that the evidence was not

properly authenticated, the evidence supporting his other convictions was overwhelming.

Nevertheless, appellant argued, all his convictions should be reversed because the trial court erred by admitting evidence of his prior conviction for criminal street gang activity. The Court again disagreed. The Court noted that pursuant to O.C.G.A. § 16-15-9, the trial court admitted appellant's 2011 guilty plea for participation in criminal street gang activity, aggravated assault, influencing a witness, and obstruction. But, the Court found, after its admission, the trial court instructed the jury that it could only be considered for the determination of whether appellant was currently guilty of criminal street gang activity— not the remaining counts of the indictment. Thus, the Court found, it must presume that the jury followed this instruction. Moreover, there was no evidence that the jury did not do so and the evidence was overwhelming as to his other convictions.

Cross-examination; Mistrials

Upshaw v. State, S16A1524 (1/23/17)

Appellant was convicted of murder and unlawful possession of a firearm during the commission of a felony. The evidence showed that the victim got into a car with appellant, Franks and a third person. Appellant got into an argument with the victim. Appellant asked Franks to pull over. Appellant and the victim got out of the car and appellant shot the victim in the head.

Appellant argues that the trial court erred by limiting his cross-examination of Franks. Appellant sought to impeach Franks by asking him about the circumstances that led to his prior arrest (and conviction) for aggravated assault. The trial court sustained the State's objection. The Court found that while appellant was entitled to a thorough and sifting cross-examination of the State's witnesses, a witness may be cross-examined only as to relevant matter. And where, as here, a defendant seeks to impeach a witness with a prior conviction, the specific facts underlying the crime are irrelevant unless the witness attempts to rehabilitate himself by explaining the circumstances of his conviction. Here, the Court found, Franks explained that he was on parole for aggravated assault, and he made no effort to rehabilitate himself by explaining the circumstances that led to his conviction.

As a result, the trial court did not err when it prevented appellant from interrogating Franks about the specific facts of that offense.

Appellant also argued that the trial court erred when it refused to grant a mistrial after another prosecution witness — a man named Mark Price — refused to be cross-examined. The record showed that the State had referred to this witness in its opening statement, saying that the evidence would show that appellant made “a confession” to Price. Later, the boyfriend of appellant’s mother testified and made a vague reference to a jailhouse statement made by Price that involved the murder (although he did not describe what was said), and a police detective testified that appellant “supposedly” told Price about the murder. When Price was called as a witness by the State, he did not testify that appellant confessed to him, but he admitted that he made a jailhouse statement to the police in 2008. The contents of the statement were not entered into evidence, and Price distanced himself from the statement, claiming that a detective told him to sign off on the statement or the detective would “see to it that [he] never g[ot] out of [the] chain gang.” But when the State asked Price about his prior convictions, he invoked his right to remain silent and provided no additional testimony on direct examination. Price refused to answer any questions at all on cross-examination. The Court held Price in contempt, instructed the jury to disregard any statements that may have been made by any witness concerning a statement by appellant to Price, and offered to further instruct the jury to disregard Price’s testimony in its entirety, but appellant declined the offer.

The Court stated that when a witness declines to answer on cross examination certain pertinent questions relevant to a matter testified about by the witness on direct examination, the trial court may be able to cure this inequity by striking all of the witness’ testimony on the same subject matter. But, here, the Court noted, appellant declined the court’s offer to strike Price’s testimony, likely because the little testimony that Price gave was favorable to him. And the trial court acted within its discretion when it provided a curative instruction for the jury to disregard any testimony about a statement made by appellant to Price. Thus, the Court held, no mistrial was required.

Motions for New Trial; Appellate Jurisdiction

Southall v. State, S16A1721 (1/23/17)

Appellant was convicted of murder. He filed a motion for new trial raising a claim that the State failed to disclose evidence in violation of *Brady* and *Giglio*. The motion was filed a day *before* the judgment of conviction was filed. He then amended the motion twice before the trial court eventually denied it after a hearing. Although neither party addressed the issue, the Court raised the question of its jurisdiction over the matter.

The Court stated under its decision in *Harrison v. Harrison*, 229 Ga. 692 (1) (1972), a premature motion for new trial is invalid. But, even if a motion for new trial is premature, it will not serve to deprive an appellate court of jurisdiction to review the merits of the appeal in the face of a timely notice of appeal from the order finally disposing of the motion. However, *Harrison* further held in Division 2 that since the motion was void, there was no error in denying it. Thus, the Court noted, the Court of Appeals “reasonably has understood this holding to mean that an appellate court is required to automatically affirm as to claims of error that are premised on and directed only to a trial court’s denial of a prematurely filed motion for new trial.” Accordingly, the Court noted, if *Harrison* and its progeny were applied here, appellant’s claim of error regarding the prosecution’s alleged failure to disclose evidence — regardless of whether that claim had merit had the motion for new trial been timely filed — would not require reversal on appeal because the claim was raised only in the premature motion for new trial.

The Court determined that this part of the *Harrison* decision was wrongly decided. Thus, the Court concluded, a prematurely filed motion for new trial that sufficiently identifies the judgment involved becomes fully effective upon entry of that judgment, enabling the trial court — and ultimately the appellate court pursuant to a properly filed notice of appeal — to review all of the issues raised in the motion on their merits. Accordingly, the Court overruled Division 2 of *Harrison* and its progeny, including *Gomez-Oliva v. State*, 312 Ga.App. 105, 106 (1) n. 4 (2011); *Dae v. Patterson*, 295 Ga.App. 818, 819 (1) (2009); *Lipscomb v. State*, 194 Ga.App. 657 (1) (1990); *Jessup v. Newman*, 191 Ga.App. 772

(1989); *Hill v. Bailey*, 187 Ga.App. 413, 415 (2) (1988); *Joiner v. Perkerson*, 160 Ga.App. 343 (1981); and *Wall v. Citizens & Southern Bank of Houston County*, 153 Ga.App. 29, 30 (2) (1980).

Turning to the merits of appellant’s claim, the Court found no violation of *Brady* or *Giglio*.

Constitutional Right to a Speedy Trial; Sentencing

Epperson v. State, A16A1849 (12/28/16)

Appellant was convicted of armed robbery, aggravated assault, aggravated battery, and three counts of possession of a firearm during the commission of a felony. He first argued that the trial judge assigned to hear his motion for new trial erred in finding that his motion to dismiss the indictment on speedy trial grounds had been correctly denied. Specifically, appellant maintained that the newly assigned trial judge erred by finding that the fourth and final factor of the *Barker-Doggett* balancing test, the prejudice factor, weighed slightly against him. Appellant contended that if the prejudice factor had been properly weighed against the State, three of the four *Barker-Doggett* factors then would have weighed in his favor, and the balancing of those factors would have led the trial court to find that his speedy trial right had been violated. The Court disagreed.

The Court noted that the trial court considered the specific interests addressed by the prejudice factor of the *Barker-Doggett* balancing test and found that, while appellant’s pre-trial incarceration was excessive, appellant was also being held on other, unrelated charges during the same time period. The trial court further noted that appellant never testified about his speedy trial claim, never offered any evidence regarding his level of anxiety or concern, and never presented any evidence that his defense had been impaired by the delay. In light of these findings, the trial court found that the prejudice factor weighed slightly against him. Thus, the Court found, where, as here, the defendant makes no attempt at all to demonstrate (or even argue) that he suffered any particular prejudice to his mental or physical condition or to his defense strategy, any prejudice that might be presumed by virtue only of the passage of time will carry very little weight in the *Barker-Doggett*

analysis. Accordingly, the Court concluded that given the paucity of evidence of actual prejudice, the trial court did not abuse its discretion in weighing the prejudice factor in the State's favor.

Appellant also argued that the trial court should have merged his aggravated battery conviction into his armed robbery and aggravated assault convictions for purposes of sentencing. The Court again disagreed. As to the aggravated battery, the indictment charged that appellant "maliciously cause[d] bodily harm to [the victim] by depriving said person[] of the use of his legs, members of said victim's body," in violation of O.C.G.A. § 16-5-24(a). As to armed robbery, the indictment charged that appellant, with the intent to commit a theft, took money from the victim by use of a handgun, an offensive weapon, in violation of O.C.G.A. § 16-8-41(a). Thus, the Court found, because the taking of the victim's property was not a fact required to establish the aggravated battery offense, and because depriving the victim of a member of his body was not a fact required to establish the armed robbery offense, the two offenses did not merge under the required evidence test.

Appellant next argued that under the Supreme Court's recent decision in *Regent v. State*, 299 Ga. 172 (2016), his aggravated battery conviction should have been merged into his armed robbery conviction. But, the Court found, while the aggravated battery and armed robbery in the present case were based on the same criminal transaction, aggravated battery and armed robbery do not differ only with respect to the seriousness of the injury or risk of injury suffered by the victim. Aggravated battery and armed robbery do not simply prohibit different degrees of injury or risk of injury; rather, the two crimes prohibit entirely different categories of injury — depriving a victim of a member of his body versus depriving a victim of property. Thus, the two offenses serve different primary purposes and do not merge under O.C.G.A. § 16-1-6(2), in contrast to the offenses in *Regent*. Therefore, appellant's convictions for aggravated battery and armed robbery did not merge under the required evidence test applicable under O.C.G.A. § 16-1-6(1) or under the statutory definition for included offense found in O.C.G.A. § 16-1-6(2). Consequently, the trial court committed no error in sentencing him for both offenses.