Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 6, 2015

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THIS WEEK:

• **Impeachment; Prior Crimes**

• **Commenting on Defendant's Silence; Mallory**

• **Voir Dire; Batson**

• **Search & Seizure; "Tower Dump" Records**

• **Similar Transactions; Contemporaneous Objections**

• **Appellate Jurisdiction; State's Right to Appeal**

Impeachment; Prior Crimes

Peak v. State, A14A1890 (1/14/15)

Appellant was indicted for murder, felony murder, aggravated assault, and three firearms possession counts. The trial court granted the State an order of nolle prosequi on one of the firearm possession charges, and the jury acquitted appellant of murder and felony murder but convicted him of voluntary manslaughter as a lesser included offense and of the other charges. Appellant contended that the trial court erred in allowing the State to admit evidence of his 1978 convictions for burglary and armed robbery for impeachment purposes. The Court agreed.

Former O.C.G.A. § 24-9-84.1(b) established a presumption against the admission of evidence of a conviction if more than ten years had elapsed since the date of the conviction or the release of the defendant or witness from the confinement imposed for that conviction, whichever was later. Regardless of whether the person testifying was the defendant or a witness, a conviction more than ten years old could not be used to impeach the defendant or witness unless the trial court determined, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. Additionally, the proponent was required to give sufficient notice to the adverse party to give him a fair opportunity to contest the use of the evidence. The statute made the requirements for admitting evidence of older convictions far more rigorous than the requirements for admitting more recent convictions. The presumption underlying former O.C.G.A. § 24-9-84.1(b) was that if more than ten years had elapsed from the date of the conviction or the date of release from confinement for the conviction, whichever was later, evidence of the conviction was generally inadmissible. This presumption was founded on a legislative perception that the passage of time dissipates the probative value of a prior conviction, because reason dictates that the older such a conviction becomes, the less probative value it likely will have.

Here, the Court found, the trial court did not make an on-the-record finding of the specific facts and circumstances on which it relied in determining that the probative value of the 32-year-old convictions substantially outweighed their prejudicial effect, but only found on the record that "despite the fact of their age, I do find that their probative value insofar as impeachment goes, outweighs the prejudicial factor to the Defendant, and therefore, will allow those over objection." Moreover, the Court noted, only two people testified about the events that led to the shooting death of the victims and their testimony differed greatly. Because the credibility of their testimony was crucial to determining whether appellant was guilty

of a crime or a victim of accident, the Court found it could not say that any error in the admission of the two prior felony convictions was harmless. Accordingly, as recommended by the State, the Court remanded the case to the trial court to reconsider appellant's motion for a new trial after making an on-the-record finding of the facts and circumstances on which it relied in determining the probative value and prejudicial effect of evidence of appellant's 1978 convictions.

Commenting on Defendant's Silence; Mallory

State v. Sims, S14A1657 (2/2/15)

Sims was convicted of felony murder and possession of a firearm during commission of a felony. During opening statements, the prosecutor made several statements that Sims failed to come forward and call the police or call 911 after Sims shot the victim. The trial court held that defense counsel rendered ineffective assistance by failing to object and granted Sims a new trial. The State appealed and the Court affirmed.

The Court found that *Mallory v. State*, 261 Ga. 625 (1991) established a bright line rule that the State may not comment on either a defendant's silence prior to arrest or failure to come forward voluntarily. The fact that Sims never invoked his right to silence upon being arrested and subject to interrogation does not necessarily vitiate this rule. Here, the Court found, the comments expressly emphasized that Sims failed to call police after he shot the victim and prior to being arrested. This violated the bright-line rule of *Mallory*. Moreover, the Court stated, to the extent *Rogers v. State*, 290 Ga. 401 (2012), *Gilyard v. State*, 288 Ga. 800 (2011), *Stringer v. State*, 285 Ga. 842 (2009), or any other opinion by the appellate courts of this State may be interpreted to hold that *Mallory* never applies when a defendant has not invoked his right to remain silent, such interpretation is disapproved. Thus, the Court found, defense counsel rendered deficient performance by not objecting to the prosecutor's comments.

The Court also found that the deficient performance prejudiced Sims. Sims' sole defense was justification. The prosecutor's repeated improper comments at the very beginning of the trial left the jury with the initial impression that Sims could be found guilty based on his failure to contact police after the shooting. The Court noted that such an inference of guilt was what its ruling in *Mallory* was designed to prevent. And, the Court determined, it was not unreasonable to surmise that such an initial impression of guilt likely tainted the entire trial.

Nevertheless, the Court stated, "we note that *Mallory* was decided not on constitutional grounds but rather based on former O.C.G.A. § 24-3-36. … When this case is retried, the new Evidence Code will apply. We express no opinion about the continuing validity of *Mallory* under the new Evidence Code."

Voir Dire; Batson

DeVaughn v. State, S14A1722 (2/2/15)

Appellant was convicted of murder. He contended that the trial court violated *Batson v. Kentucky* by removing two African-American jurors for cause. However, the Court found, *Batson* applies only to the use of peremptory strikes, and it is unaware of any authority for extrapolating the *Batson* framework to for-cause strikes.

Nevertheless, the Court stated, racial bias is an impermissible basis for striking jurors for cause. Here, the record showed that during voir dire, the first prospective juror said that his prior bad experiences with the police and prosecutors might affect his judgment in the case and that he was a minister and would not feel comfortable sitting in judgment of others. The other juror twice broke down crying in the courtroom when questioned about her brother, who had recently died in prison, and said that her brother had been represented by an incompetent attorney when he was convicted for murder. The Court stated that the trial court has broad discretion to determine a potential juror's impartiality and to strike for cause jurors who may not be fair and impartial. Therefore, there was no abuse of discretion here and, more importantly, no indication that the trial court struck either juror because of their race.

Search & Seizure; "Tower Dump" Records

Ross v. State, S14A1278 (2/2/15)

Appellant was convicted of murder for her role in a murder-for-hire plot. The evidence showed that Schoeck contacted appellant because Schoeck wanted her husband killed. Appellant told Schoeck that her boyfriend, Coleman, did such work "on the side" and helped arrange for Coleman to murder the victim, Schoeck's husband. After the murder, Schoeck "discovered" the victim and called the police. Information taken from Schoeck's cell phone with her consent showed that appellant and Coleman were on her list of contacts, and that Schoeck had been in contact with appellant around the time that the victim was killed. Police then sought cell phone records relating to all calls made within four hours of the murder that were connected to two cell phone towers that were owned by Sprint and that were located in close proximity to the scene of the shooting. Pursuant to 18 USC § 2703, police obtained this cell phone "tower dump" information by court order, which showed a call around the time of the murder from Coleman, whose phone was near one of those towers, to appellant. From this information, police obtained cell phone records of Coleman and appellant by court order. Further investigation eventually led to Schoeck's arrest, and Schoeck testified in significant detail about the entire murder-for-hire plot at appellant's trial.

Appellant contended that the trial court erred by admitting into evidence at trial the Sprint cell phone "tower dump" records that police obtained by court order pursuant to federal law, 18 USC § 2703 (d). However, the Court found, appellant waived this issue on appeal. Nevertheless, the Court found, even if the issue had been properly preserved, appellant was not entitled to relief. As an initial matter, she lacked standing to challenge the admission into evidence of the cell phone "tower dump" records at issue on Fourth Amendment grounds, because, as to appellant, the "tower dump" records were only used to show telephone contact between appellant and Coleman and were owned by Sprint. Appellant did not own the "tower dump" records, and the records were not used to show the location from which appellant received Coleman's call when they were in contact with each other around the time of the murder. Thus, at least as to appellant, the "tower dump" cell phone records were no different than telephone billing records, which are business records owned by the telephone company, not the defendant. As a result, defendants, like appellant, generally

lack standing to challenge the release of such records under the Fourth Amendment because they do not have a reasonable expectation of privacy in records belonging to someone else. Accordingly, appellant was not entitled to challenge the release of the "tower dump" phone records in this case on Fourth Amendment grounds.

Moreover, the Court held, appellant also did not have standing to challenge the admission of the "tower dump" records themselves (as opposed to the contents of her phone calls) under State law because a defendant who lacks standing to challenge the admission into evidence of stored electronic records under the Fourth Amendment similarly lacks standing to challenge the admission of such records under O.C.G.A. § 16-11-67. Furthermore, the remedy sought by appellant, namely suppression of the evidence, is not an available remedy under federal law, as 18 USC § 2707 provides that a civil action, not suppression, is the available remedy when a party improperly releases covered records or information under 18 USC § 2701 et seq. Thus, the trial court did not err in admitting into evidence the cell phone "tower dump" records at issue here.

Similar Transactions; Contemporaneous Objections

Harper v. State, A14A2019 (1/28/15)

Appellant was convicted of two counts of armed robbery and one count of aggravated assault. The evidence showed that a buyer contacted a middleman about arranging a drug buy. The middleman contacted "Money Mike" and arranged the buy at a residence. When the middleman and buyer walked into the residence, appellant greeted them with a drawn gun and demanded their money. The middleman and buyer escaped, but not before the buyer got shot in the leg. Shortly after the incident, the middleman identified appellant from a photo line-up as the assailant. But at trial, the middleman recanted his identification of appellant in the line-up.

Appellant argued that the trial court erred in allowing the State to submit similar transaction evidence of his prior guilty plea to two counts of robbery because the State failed to prove a sufficient similarity between the prior crime and the current one to show identification. The Court noted that in *Whitehead v. State*, 287 Ga. 242 (2010), the Supreme Court abandoned the rule that the defendant must object to similar transaction evidence at trial if the defendant had previously objected to the evidence at a pre-trial hearing on the matter. Here, however, the Court found, the trial court did not issue a final ruling on the admissibility of the similar transaction evidence to prove identity at the pretrial hearing, stating only that the evidence might "possibly" be admissible to prove identity. At that point, the State did not anticipate that it would need to introduce the similar transaction evidence to prove identity, given that the middleman had previously identified appellant in a photo line-up as the gunman. It was only *after* the middleman recanted his identification that the State then sought, upon the trial court's prompting, to use the similar transaction evidence to prove identity, and appellant did not object. Thus, the analysis in *Whitehead* that to preserve the issue for appellate review, the defendant need not renew an objection to the admission of evidence that the trial court had previously ruled admissible, did not apply in this case, because the trial court did not issue a final ruling on the identity issue at the pretrial hearing, and the basis for the State's tender of the similar transaction evidence changed mid-trial when the middleman recanted his identification of appellant as the gunman. At that point, when the trial court issued its final ruling on the matter, appellant was required to object to the use of the evidence to prove identity, and because he did not do so, he waived his right to argue the issue on appeal.

Appellate Jurisdiction; State's Right to Appeal

State v. Andrade, A15A0092 (1/23/15)

The trial court granted Andrade's motion to suppress his incriminating statements, finding that the statements were involuntarily made. The order was entered on June 6. The State filed its notice of appeal on June 23. The Court sua sponte dismissed the appeal. The Court stated that pursuant to O.C.G.A. § 5-7-1(a)(5)(A), which became effective on July 1, 2013, the State was required to file its notice of appeal within two days of the trial court's ruling. The Court noted that under O.C.G.A. § 5-7-1(a)(4), the two-day requirement does not apply to pretrial orders excluding evidence on the basis that it was illegally seized, nor orders excluding the results of drug or alcohol tests. Here, however, the appeal is from an order which excludes "other evidence" and therefore, comes within the ambit of O.C.G.A. § 5-7-1(a)(5). The proper and timely filing of a notice of appeal is an absolute requirement to confer jurisdiction on this Court. Accordingly, the Court stated, because the State's notice of appeal was untimely filed 17 days after entry of the trial court's order, it lacked jurisdiction.