

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 12, 2017

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THIS WEEK:

- **Sentencing; Merger**
- **Probation Revocation; Due Process**
- **Rule 404 (b); Intrinsic Acts**
- **Rape Shield; Prostitution**
- **Jury Questions; Right to Counsel**

Sentencing; Merger

Sullivan v. State, S17A0664 (4/17/17)

Appellant was convicted of murder and other offenses. Specifically, Count 1 [Malice murder of Kevin Daniel]; Count 2 [Felony murder of Kevin Daniel (aggravated assault, aggravated battery and armed robbery as the underlying felonies)]; Count 3 (Armed robbery of Kevin Daniel); Count 5 [Aggravated assault with intent to rob and kill of Kevin Daniel]; and Count 9 [Aggravated battery (by shooting multiple times) of Kevin Daniel]. The trial court merged the felony murder into the malice murder, and sentenced appellant for the aggravated assault with intent to rob and kill of Daniel (Count 5) as well as the aggravated battery of Daniel (Count 9).

The Court found that the trial court properly sentenced appellant on the malice murder (Count 1) and the armed robbery of Daniel (Count 3) because malice murder has an element that must be proven (death of the victim) that armed robbery does not, and armed robbery has an element (taking of property) that malice murder does not. However, the trial court erred in merging the felony murder count into the malice murder sentence instead of vacating the charge by operation of law. Therefore, the Court vacated that portion of the trial court's sentencing order.

As to Counts 5 and 9, the elements required to prove appellant had committed the aggravated assault with intent to rob and kill as alleged in Count 5 were among the elements required to establish that he committed the armed robbery and the murder of the same victim. Accordingly, the Court found, Count 5 should have merged into these charges. Likewise, the aggravated battery alleged in Count 9 should have merged with the malice murder. Both the malice murder and the aggravated battery, as indicted, required proof that appellant shot Daniel with a firearm. Moreover, there was no evidence to suggest that the aggravated battery occurred independently from the act which caused the victim's death, nor was appellant charged that way. Therefore, the aggravated battery should have merged with the malice murder.

Consequently, the Court vacated the portion of the trial court's sentencing order insofar as it purported to merge the felony murder verdict into the malice murder sentence, and further vacated the sentences imposed for Counts 5 and 9. Moreover, the Court stated, appellant must be re-sentenced on Counts 10, 11, and 12 as each was originally sentenced to be served concurrently with or consecutive to the sentences vacated by the Court. Accordingly, the Court remanded to the trial court so a proper sentence may be imposed on all remaining counts.

Probation Revocation; Due Process

Ponder v. State, A17A0495 (4/19/17)

The Court granted appellant a discretionary appeal after the trial court revoked his probation. The record showed that appellant

was on probation for terroristic threats. The State filed a petition to revoke his probation on misdemeanor stalking. At the hearing, appellant indicated that he would stipulate to the facts supporting the offense of misdemeanor stalking. In response, the State informed the court that after it filed the revocation petition, it had also charged appellant, via indictment, with aggravated stalking. Upon being so informed, the court noted that the revocation petition did not allege aggravated stalking. Nevertheless, the trial court issued an order revoking appellant's probation on the ground that he committed a new felony offense.

Appellant contended that the trial court erred in revoking his probation on the ground that he committed the felony of aggravated stalking when the State's petition sought revocation solely on the ground that he committed the offense of misdemeanor stalking. The Court stated that due process requires that a defendant be given written notice of the claimed violation of his probation prior to a probation revocation hearing. Consequently, in order to revoke the probationary features of a sentence, the defendant must have notice and opportunity to be heard, the notice being sufficient to inform him not only of the time and place of the hearing and the fact that revocation is sought, but the grounds upon which it is based. In addition, a defendant's probation may not be revoked when there is no evidence that the defendant violated its terms in the manner charged in the notice, even though there be evidence at the hearing that the defendant violated the terms of probation in some other manner as to which there was no notice given. Thus, if a judgment is based upon an offense not charged in the petition for revocation, it must be reversed. And here, the Court found, the State's petition to revoke appellant's probation sought to do so on the ground that he committed a new offense of misdemeanor stalking. But the trial court's order provided that it was revoking appellant's probation on the ground that he committed a new felony offense—presumably the offense of aggravated stalking mentioned by the State during the revocation hearing. Given these particular circumstances, the trial court revoked appellant's probation on a basis that was not alleged in the State's petition, and in doing so, it erred.

Rule 404 (b); Intrinsic Acts

Sanchez-Villa v. State, A17A0459 (4/19/17)

Appellant was convicted of trafficking in cocaine. The evidence, briefly stated, showed that agents of a DeKalb HIDTA Task Force received CI information of a pending drug deal and that a suspect (who he identified as "Cuarenta") would arrive in a gray Honda® Accord and that he would meet someone driving a black Lincoln. The agents, based on this information, watched what looked like a drug deal in a parking lot. The drugs were put into the Honda® which then drove off. A county police officer stopped the vehicle and identified appellant as the driver. The officer saw that the Honda® was equipped with special hand controls and noted that appellant appeared to be disabled. A large duct-taped block on the floor between the passenger's feet, tested positive for cocaine. Incident to the arrest, Task Force officers searched the vehicle and located hidden compartments adjacent to the back seats. They located roughly eight additional kilograms of cocaine in that space; no cocaine was located in the front seat area of the vehicle.

At trial, appellant conceded that cocaine was found in the vehicle, but he argued that he had no knowledge of the cocaine or the hidden compartments in the vehicle and was merely present as a driver. The State was then allowed to admit as intrinsic evidence of the trafficking charge evidence of a DEA investigation of appellant that had been ongoing for over a year preceding his arrest. That evidence included a secret DEA recording in which an individual the State claimed to be appellant discussed the sale of significant quantities of cocaine and marijuana with a CI who was cooperating with the DEA. The State also brought forth testimony through a DEA agent detailing the agency's investigation of appellant, including the agent's knowledge that appellant was a cocaine supplier and his characterization of appellant as a "heavy distributor" of drugs in the metro Atlanta area. The DEA agent also discussed various forms of lingo for cocaine used by appellant in the recorded conversation, which the agent indicated were in common use in conversations regarding cocaine trafficking. The DEA agent stated that, at various times, appellant had been observed driving the same Honda® that he was driving at the time of the arrest. The DEA agent also testified that he was

aware the Honda® had secret compartments. According to his testimony, the agent knew from his investigation that appellant was disabled and that he went by the alias "Carnal."

Appellant argued that the trial court's decision to admit evidence from the DEA investigation, including the recorded conversation, violated Rule 404(b), as it was admitted without pre-trial notice from the State. The Court found that this case turned on whether the evidence at issue was "intrinsic" to the charged offense. Appellant argued that the State failed to sufficiently link the DEA evidence to the events immediately surrounding appellant's arrest, and therefore such evidence cannot be intrinsic to the charged trafficking offense. The Court agreed.

As an initial matter, the Court noted that the timeline established by the DEA agent's testimony essentially ends on the date on which appellant was secretly recorded by the DEA (just under a month before his arrest for trafficking). The Court stated that while this temporal attenuation was not dispositive in this case, it was a factor to be considered.

Also, this was not a "modus operandi" and "ongoing criminal concern" type of case. The contested evidence failed to show a clear modus operandi on the part of appellant. The evidence—specifically, the recording—showed appellant to be a potential *seller* of cocaine, whereas he was charged in this case following a *purchase* of cocaine. This inconsistency alone argued against finding that the DEA evidence showed a well-defined pattern of activity that was virtually identical to appellant's behavior at the time of his arrest. Likewise, appellant was identified in the recording and by the DEA agent by the alias "Carnal," but no other evidence presented at trial showed him going by that name at the time of the trafficking arrest. In contrast, the CI's tip to the Task Force involved the alias "Cuarenta." The State made no effort to show that "Carnal" and "Cuarenta" were the same person, and, in any event, the DEA agent's testimony regarding appellant's use of the "Carnal" alias did not fit into any other clear pattern of behavior shown by other evidence presented by the State. At most, the DEA agent's testimony confirmed that appellant was driving the same Honda® at the time of the recording that he was driving at the time of the arrest. But, the Court stated, while the DEA agent's testimony at trial confirmed that the agent was aware that

the Honda® "had a trap in the back portion of the back seat," neither this testimony nor any other evidence offered by the State connected appellant's use of that vehicle at the time of the recording (driving to discuss a potential drug sale) with his use of the vehicle at the time of the arrest (driving to make a drug purchase). Without more, the DEA agent's testimony that he was aware that the Honda® contained a secret compartment did not establish a *modus operandi* on the part of appellant.

Furthermore, this case could not be characterized as "crime spree" cases in which the evidence could be found to be intrinsic in regard to a series of similar crimes involving the defendant that all had similar characteristics. Here, however, the contested evidence was more general in nature and did not specifically show appellant participating in a series of similar drug buys leading up to the charged offense, nor did it show him acting with the same participants or playing a role similar to that which he was performing in the transaction for which he was arrested. In addition, the State did not establish before the jury that the discussion captured by the recording was the predicate sale transaction for which appellant was seeking supply when he was arrested. While the trial court speculated that the cocaine discussed in the recording may well have been the same cocaine that was seized in the arrest, the State did not present any evidence or make any argument to the jury to that effect.

Additionally, the Court rejected the State's contention that admission of the evidence was necessary to complete the story of the trafficking offense. The Court noted that appellant was arrested by a DeKalb County police officer following a call from a Task Force agent who was also employed by DeKalb County. The DEA was not involved in the surveillance or the apprehension of appellant that night, and the State conceded that neither the Task Force agents nor the DeKalb officer knew that a DEA investigation involving appellant had been ongoing. The testimony from the DEA agent and the recording thus shed no light on why the DeKalb police began surveilling appellant that night or what they later found in his vehicle. Likewise, despite the trial court's theory that appellant may have planned to use the cocaine seized in the arrest to fill the order discussed in the recording, neither the DEA agent's testimony nor the recording were necessary to give context to the

essential facts of this case. Because appellant was charged with a possession-based offense (albeit possession of a large quantity of contraband) the essential story of the case began with the tip received by the Task Force and concluded with the traffic stop where appellant was arrested and the drugs were seized. Thus, rather than completing the story of this crime in any meaningful way, evidence from the DEA investigation expanded it considerably.

Accordingly, the Court held, because the evidence lacked any demonstrated connection to the events on the night of appellant's arrest, it was not intrinsic to the charged trafficking offense. The testimony was thus in regard to "other acts" by appellant, and as it was ostensibly offered by the State to prove knowledge, the trial court abused its discretion by admitting the evidence without requiring the State to provide appellant with notice pursuant to Rule 404(b). And, because it was highly probable that the jury's verdict was affected by the decision to admit the contested evidence, the Court found that the trial court's decision to admit this evidence constituted reversible error.

Rape Shield; Prostitution

Bill v. State, A17A0790 (4/20/17)

Appellant was convicted of kidnapping, aggravated assault, aggravated sodomy, aggravated sexual battery, rape, and false imprisonment. The facts, briefly stated, showed that on July 14, 2008, appellant, a deputy sheriff, entered a bar, displayed a gun and badge, and grabbed the female victim. The Hispanic victim, who spoke no English, believed she was under arrest. But, instead of taking her to jail, appellant took her to his apartment where he sexually assaulted her.

Appellant argued that the trial court improperly excluded evidence that the victim had engaged in prostitution. Specifically, he sought to introduce testimony that (a) after the assault, someone had written "hooker" on her apartment door, and (b) a previous roommate had kicked her out of her residence because she was a prostitute and brought too many men to the home.

The Court found that such evidence was inadmissible under former OCGA § 24-2-3 (a), the rape shield statute applicable at the time of trial. But, even if such evidence might be admissible under certain circumstances, despite the limitations of the rape shield statute,

the Court agreed with the trial court that the evidence was irrelevant, speculative, and highly prejudicial. Specifically, appellant pointed to no evidence — other than rank speculation — linking the July 14, 2008 sexual assault to the victim's prior prostitution with other men. There was no evidence that she was previously threatened or physically injured by any of these individuals. In other words, appellant failed to draw a nexus between her history of prostitution and the assault in this case. The trial court, therefore, properly excluded the evidence.

Nevertheless, appellant contended, the trial court erred in preventing him from impeaching the victim with the prostitution-related evidence. According to appellant, the victim opened the door to cross-examination "concerning [her] prior acts of prostitution" when she denied having sex with him before July 14, 2008. The Court stated that it is true that evidence of prior sexual behavior may be admissible to impeach a victim's contradictory trial testimony. But here, the "impeachment" evidence did not relate to his prior contact with the victim; it involved general allegations that she had engaged in prostitution. Appellant failed to cite to any place in the record where the victim denied being a prostitute; she simply stated that she had not had sexual relations with him. The general prostitution evidence, therefore, did not contradict or impeach the victim's testimony, and appellant was not entitled to cross-examine her on it.

Finally, appellant argued that portions of the prostitution-related evidence did not directly involve sexual behavior and thus fell outside of the rape shield statute. However, the Court found, the trial court properly concluded that the evidence was speculative, irrelevant, and subject to exclusion. Although appellant claimed that this ruling unduly restricted his cross-examination of the State's witnesses, a trial court retains broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion, repetition, or irrelevant evidence.

Jury Questions; Right to Counsel

Dowda v. State, A17A0531 (4/21/17)

Appellant was convicted of criminal trespass and acquitted of criminal attempt to commit a misdemeanor (theft by taking). He contended that the trial court erred in failing

to allow defense counsel to read and respond to a note the jury sent out during its deliberations that clearly showed that the jury was confused and had not reached a unanimous verdict. The Court agreed.

The record shows that after about three hours of deliberation, the trial judge received a note from the jury, which stated: "Sir, we cannot reach a unanimous decision[.]" The note indicated that the jury had voted "4 - not guilty based on evidence [and] 2 - innocent on evidence." The note did not indicate whether the jury was split on both counts, just the trespass count, or just the attempted theft count, but it clearly evidenced confusion as to the charges received by the jury. When the trial court received the note from the jury, the trial court merely informed defense counsel and the State that the note said that the jury could not reach a unanimous verdict. The trial court did not show the note to defense counsel, advise defense counsel of its entire content, or afford defense counsel an opportunity to suggest an appropriate response in light of the entire content of the note. Instead, the trial court brought the jury back in and encouraged them to continue discussing the case.

The Court stated that the failure of the trial court to inform counsel of the contents of a jury note and to seek comment or input in the formulation of the court's response constitutes a violation of a defendant's right to counsel. In light of this constitutional right, the Supreme Court requires trial courts to have jurors' communications submitted to the court in writing; to mark the written communication as a court exhibit in the presence of counsel; to afford counsel a full opportunity to suggest an appropriate response; and to make counsel aware of the substance of the trial court's intended response in order that counsel may seek whatever modifications counsel deems appropriate before the jury is exposed to the instruction. Here, the Court found, given the jury's obvious confusion, the trial court's failure to provide counsel with an opportunity to review the jury note and know its full contents and then discuss the trial court's response to the note was not harmless error. Instead, the action of the trial court kept the defendant's counsel ignorant to the jury's confusion and deprived defendant of his right to counsel. Thus, the Court found, appellant's conviction for criminal trespass must be reversed. However, because the evidence was sufficient

to convict him, the State is entitled to retry appellant on the trespass charge.