

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 19, 2017

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THIS WEEK:

- **Statements; Appellate Review**
- **Search & Seizure; Ineffective Assistance of Counsel**
- **Prosecutorial Misconduct; Brady Violation**
- **Indictments; General Verdicts**
- **Jury Questions Posed to Witnesses**
- **Statements; Burden of Proof**

Statements; Appellate Review

Williams v. State, S16G1162 (5/1/17)

Appellant was charged with burglary and obstruction of an officer. He moved to suppress his statements to police following his arrest. The only witness was the arresting officer. The trial court ruled that Williams fled a first-tier encounter and that his subsequent arrest for obstruction was illegal and without probable cause. The trial court therefore suppressed appellant's statements. In *State v. Williams*, 336 Ga.App. 97 (2016), the Court of Appeals reversed the trial court's granting of appellant's motion to suppress. The Supreme Court then granted appellant a writ of certiorari.

The Court found that in reviewing the testimony of the arresting officer, the Court of Appeals found additional facts that were not referenced by the trial court in its ruling on the motion to suppress. The Court found that the Court of Appeals erred by assuming that the trial court must have accepted all of the officer's testimony as true, and then, based on that erroneous assumption, the Court of Appeals made its own additional factual findings that were not contained in the trial court's order to reverse the trial court's ruling

on appellant's motion to suppress. And, although the trial court was authorized to make credibility determinations with respect to the officer's testimony, it did not expressly indicate in its order what credibility determinations it made. Moreover, the trial court made almost no express findings of fact either. Thus, the Court held, given the uncertainty in the trial court's order regarding the basis for its ruling, the Court vacated the opinion of the Court of Appeals and remanded for the Court of Appeals to remand this case to the trial court for further clarification on the specific findings that formed the basis for its legal conclusions with regard to appellant's motion to suppress.

Search & Seizure; Ineffective Assistance of Counsel

State v. Harris, S17A0117 (5/1/17)

Harris was convicted of felony murder of a cab driver. Harris timely filed a motion for new trial claiming, among other things, that trial counsel was ineffective for failing to move to suppress text messages obtained from Harris' cell phone by law enforcement without a warrant. After a hearing, the trial court agreed with Harris and granted the motion. The State filed a motion for reconsideration, arguing that, had defense counsel timely filed a motion to suppress the text messages, the State could have cured its error by obtaining a warrant. In support of this argument, the State attached a search warrant and supporting affidavit to its motion as an exhibit, both of which were obtained subsequent to the hearing on Harris' motion for new trial. However, the State did not request the record be re-opened so this new evidence could be admitted into the record and considered by the trial court.

Thereafter, the court denied the State's motion for reconsideration. The State appealed.

The Court first noted that "the State continues its uncanny effort to snatch defeat from the jaws of victory by echoing its unsupported argument that its post-motion for new trial attempts to obtain a search warrant show that the State could have corrected its initial error in obtaining the text messages, therefore making them admissible at trial. However, because the search warrant and supporting affidavit were not introduced as evidence at the motion for new trial, they are not a proper part of the record before us on review."

However, the Court stated, premitting whether trial counsel was deficient for failing to file a motion to suppress the contents of the text messages, it agreed with the State that the trial court's prejudice analysis was flawed, as Harris failed to show that, but for trial counsel's deficiency, there is a reasonable probability that the outcome of his trial would have been different. Thus, the Court noted, while the evidence was not overwhelming, looking at the evidence as a whole, it could not be said that, without the introduction of the text messages, there is a reasonable probability that the outcome of the trial would have been different. Contrary to Harris' assertion, the State's case did not center on the text messages, nor did the State emphasize these messages as a smoking gun at any point during the trial. Instead, they were a small piece of many moving parts utilized by the State to establish Harris' guilt. Accordingly, the Court reversed the trial court's order granting Harris a new trial and remanded the case with direction that the trial court consider the remaining grounds in Harris' motion for new trial.

Prosecutorial Misconduct; Brady Violation

In re Lee, S16Y0832 (5/1/17)

In 2013, Lee was an ADA and newly assigned to prosecute sex crimes against children. About a week before a particular trial, in which the defendant was charged with oral and anal sodomy, Lee interviewed the child, who previously had given a statement (that was video recorded) implicating the accused in both oral and anal sodomy. In speaking with Lee, the child recounted an incident of oral sodomy, but when Lee asked if the accused ever had "touched [the child's] butt,"

the child responded in the negative. Lee did not inquire further of the child at that time about the earlier allegation of anal sodomy. Lee then consulted a more seasoned prosecuting attorney in his office about the failure of the child to recount any instance of anal sodomy and how Lee ought to present the case at trial. Lee did not disclose to defense counsel before trial, however, that the child had denied that the accused "touched [his] butt."

At trial, Lee asked the child about the anal sodomy and the child denied it happened. In closing argument, Lee noted the inconsistency between the recorded statement of the child and his testimony at trial, and he acknowledged that the child not only failed to testify about any anal sodomy, but the child had testified that the anal sodomy, in fact, "didn't happen." Lee urged the jury to accept the trial testimony as credible, and he conceded an acquittal as to the charge involving anal sodomy. When the jury returned its verdict, it found the accused guilty of oral sodomy, but not guilty of anal sodomy. After the jury was dismissed, Lee spoke with a juror in the presence of defense counsel. The juror asked about the charge involving anal sodomy, and Lee made reference to his having interviewed the child a week earlier. Defense counsel overheard these remarks. Defense counsel later filed a motion for new trial, asserting that the State violated *Brady* by failing to disclose that the child had denied before trial that the accused had "touched [his] butt." The State consented to a new trial, and the trial court granted the motion.

Thereafter, the State Bar filed a formal complaint, charging Lee with a violation of Rule 3.8 (d) for having failed to disclose to defense counsel that the child before trial denied that the accused had "touched [his] butt." Upon a review of the evidentiary record, the special master concluded that Lee failed as a result of an unintentional oversight to disclose evidence that should have been disclosed under *Brady*, and for that reason, Lee committed a "technical violation of Rule 3.8 (d)." The Review Panel endorsed the findings and recommendation of the special master, specifically adopting the finding that Lee committed a "technical violation of Rule 3.8 (d)" and that a formal admonition was appropriate. The matter then was transmitted to the Court for decision.

The Court found that the record clearly and convincingly showed that Lee failed to

disclose to defense counsel before trial that the child denied the anal sodomy. But, the Court stated, *Brady* does not always require pretrial disclosure of exculpatory evidence, and at least in some circumstances, a prosecuting attorney may satisfy *Brady* by disclosing it at trial. Moreover, a prosecuting attorney may satisfy *Brady* simply by himself introducing at trial the substance of the exculpatory evidence. Whether a disclosure at trial is timely enough to satisfy *Brady* depends on the extent to which the delay in disclosing the exculpatory evidence deprived the defense of a meaningful opportunity to cross-examine the pertinent witness at trial, whether earlier disclosure would have benefitted the defense, and whether the delay deprived the accused of a fair trial or materially prejudiced his defense.

And here, the Court concluded, given the particular circumstances of the case, the Court found that the State Bar failed to show a clear-cut *Brady* violation. Therefore, the Court held, no discipline was warranted under Rule 3.8 (d). In so holding, however, the Court noted that "[a]lthough we impose no discipline in this matter, we caution that when a prosecuting attorney delays the disclosure of exculpatory evidence until trial, he plays with fire. Whether a delay in disclosing such evidence violates *Brady* is a question that requires a consideration of numerous circumstances, [cite] many of which are unknowable for the prosecutor until well after the trial is underway, and some of which may be unknowable until long after the trial has concluded. A prudent prosecutor would disclose exculpatory evidence as promptly as reasonably possible."

Indictments; General Verdicts

Jones v. State, S17A0301 (5/1/17)

Appellant was acquitted of malice murder, but convicted of felony murder of his four-year-old daughter, Ty'Asia. The indictment charged appellant with felony murder based on two predicates, that he committed cruelty to children in the first degree, and that he committed cruelty to children in the second degree. Specifically, the sole count of felony murder charged that appellant caused Ty'Asia's death "by maliciously and with criminal negligence" causing the child "cruel and excessive mental and physical pain" by beating her and by throwing her into a piece

of furniture, onto the floor and into a space heater. The jury was instructed on each of the underlying offenses. The verdict form did not specify which predicate felony was the basis for the finding of guilt on the felony murder count.

Appellant argued that he was entitled to a new trial because he was convicted by general verdict on a count of felony murder predicated on cruelty to children in the first degree and cruelty to children in the second degree, and there was insufficient evidence to support the predicate of cruelty to children in the second degree. Specifically, he did not dispute that there was sufficient evidence to support a conclusion that he committed the crime of first degree cruelty to children, which, as that predicate was charged in the indictment, required a showing of malice. Instead, he contended that the evidence was insufficient to support a conclusion that he committed the crime of second degree cruelty to children, which requires a mens rea of criminal negligence. Thus, he argued, citing *Thompson v. State*, 271 Ga. 105 (1999), because the jury might have based its guilty verdict on the unproven predicate of second degree cruelty to children, the verdict must be set aside.

But, the Court stated, it has never cited *Thompson* to reverse a guilty verdict for the sole reason that one of multiple possible bases of conviction was unsupported by sufficient evidence. And here, appellant could not obtain a reversal on the basis that there was insufficient evidence for the jury to find him guilty of felony murder based on his commission of the crime of cruelty to children in the second degree, as long as there was sufficient evidence for the jury to find him guilty of felony murder based on his commission of the crime of first degree child cruelty. And, since appellant effectively conceded that the evidence was sufficient to support a conclusion that he committed the crime of first degree cruelty to children, his conviction was affirmed.

Jury Questions Posed to Witnesses

Benton v. State, S17A0355 (5/1/17)

Appellant was convicted of malice murder, possession of a firearm by a convicted felon, and various other offenses. He argued that the trial court erred by allowing jurors to submit questions to be posed to the witnesses. However,

the Court stated, while jurors may not ask questions of witnesses directly, a trial court may receive written questions from the jury and ask those questions which the court finds proper, or allow counsel for either party to ask a testifying witness the questions found to be proper. And here, the Court found, the written questions were properly reviewed by the trial judge and counsel for the parties before being posed to the witnesses by the trial court once the court found the questions to be proper. Thus, the trial court committed no error.

Appellant also contended that the trial court erred by failing to use the exact words that the jurors used in their written questions when the court posed the questions to the witnesses. But, the Court stated, a trial court is not required to use the exact language of the jurors in posing their questions, as a trial judge may propound questions to a witness to develop the truth of the case, to clarify testimony, to comment on pertinent evidentiary rules and to exercise its discretion when controlling the conduct of counsel or witnesses in order to enforce its duty to ensure a fair trial to both sides. The Court found that the judge reviewed and approved the questions by the jurors and posed them in the manner that he believed to be most appropriate for developing the truth of the case and clarifying the witness' testimony consistent with the jurors' requests. In doing so, the trial court fulfilled its duty to ensure a fair trial for both sides and did not inappropriately intimate or express an opinion as to the matters proved at trial or the guilt or innocence of the accused.

Statements; Burden of Proof

Welbon v. State, S17A0359 (5/1/17)

Appellant was convicted of murder. He argued that the trial court erred by allowing the State to present testimony regarding statements he allegedly made to the police, contending any such statements were given involuntarily. The record showed that appellant filed a motion to suppress his statements and the trial court held a mid-trial *Jackson-Denno* hearing about the voluntariness of the statements. After hearing evidence and argument on the suppression issue, the trial court said simply, "All right. I am going to allow the statement." Following the hearing on appellant's motion for new trial, the trial court stated that in a *Jackson-Denno* hearing,

the defendant must prove by a totality of the circumstances that his statements were involuntarily made, and here, the defendant failed to carry his burden.

The Court stated that in determining whether a defendant's statement was voluntary as a matter of constitutional due process, a trial court must consider the totality of the circumstances. The State bears the burden of demonstrating the voluntariness of a defendant's statement by a preponderance of the evidence. But, here, the trial court's statements showed that it proceeded under the premise that appellant bore the burden of proof on the issue of voluntariness. Normally, where the trial court uses a wrong standard in reaching its conclusion, a remand is appropriate unless there is no evidence which would authorize the grant of a motion to suppress. And here, the Court found there was sufficient evidence by which a court could find that the statements were involuntary, specifically, a statement by the investigating detective to appellant that "You and I have to have a conversation." Because the trial court made no judgments about the credibility, tone, and context of the testimony and made no specific factual findings, the Court vacated the trial court's order denying appellant's motion for new trial and remanded the case to the trial court for its consideration of appellant's claim of involuntariness under the proper standard, including making appropriate factual findings.