Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 20, 2016

THIS WEEK:

RICO; Demurrers

Kimbrough v. State, A15A1738 (3/24/16)

Appellants, Kimbrough and Mayfield, along with two others were charged under RICO and with certain drug offenses. The trial court denied their general and special demurrers and the Court granted them an interlocutory appeal.

The Court stated that a general demurrer challenges the validity of an indictment by asserting that the substance of the indictment is legally insufficient to charge any crime, and it should be granted only when an indictment is absolutely void in that it fails to charge the accused with any act made a crime by the law. An indictment couched in the language of the statute alleged to have been violated is not subject to a general demurrer. Here, the Court found, count one of the indictment substantially tracked the language of O.C.G.A. § 16-14-4(b), which provides that, "It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity." Therefore, the Court found, count one was sufficient to withstand the defendants' general demurrers.

Appellants also alleged that the trial court erred by denying their special demurrers because count 1 failed to inform them of 1) the manner in which they allegedly participated in the enterprise; 2) the enterprise's relationship to the alleged racketeering activity; and 3) which substantive counts in the indictment constitute the predicate acts. The Court disagreed.

As to the first two arguments, the Court noted that largely tracking the statutory language, count one alleged that appellants participated in an enterprise, Executive Wellness, through a pattern of racketeering activity. It generally described the racketeering activity as unlawfully obtaining possession of oxycodone by withholding information from the practitioners who prescribed the drug and then described that activity more specifically by incorporating the remaining counts of the indictment, which set out the predicate acts with more specificity. The Court found that this was sufficient to allege the manner in which the defendants participated in the enterprise: they participated by allegedly committing the predicate acts. Moreover, count one provided a nexus between the predicate acts and the enterprise by use of the preposition "through." Moreover, the indictment did more than just define the offense in general terms; it descended to particulars by specifying in the counts alleging predicate acts the acts that amounted to the defendants' participation in the enterprise. Thus, the Court concluded, the indictment, when read as a whole, was sufficient to withstand the special demurrer on these two grounds.

The Court also rejected appellants' argument that the indictment did not clearly specify the predicate acts alleged against them. Specifically, count one specified that the pattern of racketeering activity was unlawfully obtaining oxycodone and it incorporated as

predicate acts the remaining counts of the indictment charging the defendants with unlawfully obtaining oxycodone.

Nevertheless, Mayfield argued that the indictment was invalid because counts 12 and 13 alleged that she unlawfully obtained hydrocodone, not oxycodone. The Court noted that hydrocodone and oxycodone, although both opioids, are depicted as two different controlled substances in our Code. But, to the extent that Mayfield argued that the word "counts" means that the hydrocodone counts against her are also charged as predicate acts, the Court disagreed. The indictment was specific: it alleges that the defendants' unlawfully obtaining possession of oxycodone amounted to a pattern of racketeering activity. And to the extent the word "counts" can be read to include counts 12 and 13 — in spite of the sentence specifying that it is oxycodone at issue in the RICO count — this was mere surplusage. Mere surplusage will not vitiate an indictment. Accordingly, the trial court did not err in denying the demurrers.

Ineffective Assistance of Counsel

Blackmon v. State, A15A1834 (3/24/16)

Appellant was convicted of two counts of rape, two counts of aggravated child molestation, and two counts of child molestation against minor child S. L. The evidence briefly stated, showed that appellant was the live-in boyfriend of S. L.'s mother. When S. L. was 14 years old, appellant picked her up from school at her mother's request and took her to a doctor. On returning home, appellant informed the mother that the doctor said S. L. may be sexually active. When questioned by the mother, S. L. stated that she had been having sex with a neighboring boy. About an hour later, she told her mother she lied about the boy. A week later, she told her aunt that appellant had been sexually abusing her since she was 12 years old.

Appellant contended that his trial counsel was ineffective in failing to object to inadmissible hearsay testimony from multiple witnesses recounting out-of-court statements made by S. L., and in failing to object to the trial court's jury charge on prior consistent statements. The record showed that at trial, the State presented six witnesses who testified about out-of-court statements made by S. L. when she was 14 years old describing the alleged sexual abuse by appellant. The first two witnesses presented by the state were S. L.'s aunt and mother, both of whom testified, among other things, about statements that S. L. had made alleging that appellant had sexually abused her by inserting his penis into her mouth and vagina. S. L. herself then testified, after which the State introduced testimony from four witnesses involved in the investigation who recounted statements that S. L. had made to them describing the alleged acts of sexual abuse by appellant. At the motion for new trial hearing, trial counsel admitted that there was no strategic reason why she failed to raise hearsay objections to such testimony. Instead, she acknowledged her mistakes, attributing her failure to object to her being "a bonehead," "worn out," and "overwhelmed."

The Court found that counsel performed deficiently. The hearsay statements were not admissible under the Child Hearsay Statute in effect at the time of his 2011 trial, former O.C.G.A. § 24-3-16, because she was over 14 years old when she made the statements. The Court also disagreed with the trial court that the statements were admissible as prior consistent statements. To be admissible as such, they must have been proffered to refute an allegation of recent fabrication, improper influence, or improper motive. And the prior statement must predate the alleged fabrication, influence, or motive.

But here, the Court found, the first two witnesses testified *before* S. L. even testified. Also, during the cross-examination of S. L., trial counsel did not raise an affirmative charge of recent fabrication, improper influence, or improper motive. And even if, assuming that defense counsel raised the issue of fabrication (i.e. that she lied to cover up her sexual relationship with the boy in the neighborhood) in her opening statement, as the State argued, to authorized admission as a prior consistent statement, an affirmative charge of recent fabrication must be raised during cross-examination, not during opening statements. Moreover, the Court added, this was not a charge of *recen*t fabrication since the alleged fabrication predated the first outcry against appellant. Accordingly, since there was no strategic reason not to object, trial counsel's failure to object to any of the improper hearsay testimony constituted deficient performance. And the Court found, given the lack of overwhelming evidence against appellant, the cumulative effect of the admission of these hearsay statements prejudiced appellant.

Next, appellant contended that his trial court was also ineffective in failing to object to testimony from S. L.'s mother opining that S. L. was telling the truth. The Court agreed. The Court found that S. L.'s mother went beyond merely testifying about consistency between the objective evidence and S. L.'s story, and offered opinions as to S. L.'s truthfulness. In explaining why she questioned S. L. about the appearance of appellant's "private area," the mother testified: "Because I wanted to see … was she telling the truth. And from what she described, she was telling the truth." The mother also testified that initially she did not know whether to believe S. L.'s allegations, but "[i]n my heart now, I truly believe her." Counsel's failure to object to the mother's improper bolstering testimony opining as to S. L.'s truthfulness constituted deficient performance, and given the lack of evidence against appellant beyond that arising out of S. L.'s statements, the Court concluded that but for counsel's deficient performance, the outcome of this trial would have been different.

Finally, the Court also found that trial counsel also rendered ineffective assistance by not objecting to the trial court's charge on prior consistent statements, instructing them that they were authorized to consider such statements "as substantive evidence." Thus, because there were no properly admitted prior consistent statements, there was no basis for the trial court to instruct the jurors on prior consistent statements since a jury charge should be adjusted to the evidence.

Fundamental Fairness; Sufficiency of the Evidence

Williams v. State, A15A1973 (3/28/16)

In what the Court described as a "fundamentally flawed bench trial" appellant was convicted of "driving without a driver's license," assessed a substantial fine, and sentenced to jail and a lengthy term of probation. The record showed that appellant was initially stopped for speeding, but was given only a warning. Appellant produced a valid Florida license. However, "upon running him," the officer discovered that appellant's "privilege in Georgia was not valid. . . and he was written

a citation for . . . not having a license." The officer testified that he explained to appellant that even though his Florida license was valid, he could not drive in Georgia "per . . . the Department of Driver Services." No further explanation was offered as to the reason for the purported invalidity. The officer testified that appellant told him he "did live in Georgia" and had "for a while." And, prompted by the prosecutor, the officer agreed that appellant had "been living in Georgia for more than 30 days." The officer told appellant that "he could've went to jail" and instructed him that he needed to "get a Georgia license." Appellant testified that he "wasn't aware" that there was any problem with his drivers' license. He added that he went the same day to the Georgia drivers' license office as instructed by the police officer and obtained a Georgia license "without any issues" and without paying any costs. On cross-examination, he insisted that he "wasn't living as a resident" in Georgia. The prosecutor then asked if he did not become a resident when he obtained a Georgia drivers' license using an address in Georgia, and he responded that he did so, but only because the police officer told him that he had to get a Georgia license, and added that it was only a temporary address.

Appellant argued that the trial court failed to apprise him of the risks of proceeding without the representation of an attorney, and that he was also not advised at his arraignment, before a different judge, of the risks of proceeding without a jury trial. He contended from this that his waivers of his right to counsel and a jury trial therefore were not made knowingly or intelligently. The Court agreed. First, citing *Banks v. State*, 332 Ga. App. 259 (2015), the Court found that appellant did not knowingly and intelligently waive his right to counsel. The Court noted that the pretrial waiver form contained only conclusory statements concerning his rights rather than an explanation of the dangers of proceeding to trial pro se. The waiver form, standing alone, thus did not show that appellant's waiver was made with an understanding of the *Banks* factors, as required by Georgia law. And, although an insufficient pretrial waiver form may be supplemented by showing that a defendant has been advised individually and in detail of the dangers of proceeding pro se, no showing was made in this case.

Likewise, the Court held, the State failed to demonstrate that appellant was advised of the risks of waiving his right to a jury trial when he signed a preprinted form at his arraignment. Specifically, the record failed to contain a colloquy showing that the trial court asked appellant sufficient questions on the record to ensure that his waiver of his right to a jury trial was knowing, voluntary, and intelligent.

Finally, the Court considered appellant's contention that the evidence produced at trial was insufficient as a matter of law to support his conviction. The Court found that "a review of the bench trial demonstrates that the State, despite changing its theory of the alleged offense mid-trial, still failed to prove that [appellant] was in violation of the law." Thus, the Court found, the State initially attempted to prove that appellant violated the law by driving while his driving privileges were suspended in Georgia. But, this offense is governed not by O.C.G.A. § 40-5-20, the Code section under which appellant was charged, but by O.C.G.A. § 40-5-121. Therefore, even if the State had shown that appellant's Georgia driving privileges were suspended, the fatal variation between the accusation and the proof at trial would have rendered the evidence insufficient. Moreover, the Court stated, in any event, the only evidence in support of this charge was the police officer's testimony that "upon running him," which appeared to mean entering his drivers' license information into a computer database, the officer found that appellant's Georgia driving privilege was "not valid." However, the Court found, no documentary evidence was presented to support the officer's claim, and no testimony was adduced regarding how or for what reason appellant's privileges purportedly were suspended. On the other hand, in addition to his trial testimony, appellant presented documentary evidence at the hearing on his motion for new trial that no such suspension existed and that his Florida license was valid in Georgia. Therefore, the Court held that the officer's conclusory testimony at trial that appellant's record showed a suspension, based solely on his verbal report that upon "running him," he found his "privilege in Georgia was not valid," was insufficient to support a conviction.

Next, the Court noted, "[w]hen it became apparent that the officer's testimony with regard to a supposed suspension of driving privileges in Georgia was somewhat tenuous, the State pivoted from the allegation that [appellant] was driving while his Georgia driving privileges were suspended, to an allegation that he was driving with a Florida license after having been a resident of Georgia for more than thirty days. O.C.G.A. § 40-5-20(a)." The Court noted that the Georgia Code governing drivers' licenses defines "resident" as "a person who has a permanent home or abode in Georgia to which, whenever such person is absent, he or she has the intention of returning." O.C.G.A. § 40-5-1(15). This subsection also creates a rebuttable presumption that a person is a resident when that person "accepts employment or engages in any trade, profession, or occupation in Georgia," places children in school in Georgia, or "except for infrequent, brief absences, has been present in the state for 30 or more days." O.C.G.A. § 40-5-1(15)(A), (B). But, construing O.C.G.A. §§ 40-5-1(15) and 40-5-20(a) together, the Court concluded that "the intention of the General Assembly was . . . to permit visitors, with no intention of becoming residents, to drive here without obtaining a Georgia license."

Here, the Court noted, the State argued at trial that the Georgia license and "permanent" address that appellant obtained after the traffic stop proved that he was a resident. But, "this tautological reasoning borders on entrapment." Appellant testified that he obtained that license *only* because he was instructed to do so by the police officer, and that the address he used to obtain it was only temporary. Other than attempting to obtain an admission from appellant that he was a resident, an admission that he refused to give, the State produced no evidence to show that appellant had a "permanent home or abode in Georgia." The State in questioning appellant repeatedly used the term "living" rather than "residing," and made no attempt to elicit information tending to show his residence, such as voter registration, permanent mailing address, or other contacts with Georgia. Moreover, appellant repeatedly testified at trial that he "wasn't living as a resident" and that the apartment that he rented was "a temporary address" or "temporary residence." And he successfully grasped the central difficulty with the State's case: that he was "issued a citation for not having a license, not for changing over." Accordingly, construing the entire record in favor of the verdict, the

Court concluded that appellants' testimony at trial rebutted the presumption created by O.C.G.A. § 40-5-1(15)(B).

Finally, the Court stated, "[a]s a result of the State's conduct, [appellant] was convicted of a crime with which he was not charged, jailed, fined over $600, and sentenced to a year of probation….Justice was denied to [appellant] in this case, and accordingly, the judgment of conviction is reversed."

Judicial Comments; O.C.G.A. § 17-8-57

Alday v. State, A15A2236 (3/29/16)

Appellant was convicted of two counts of child molestation. He contended that the trial court violated O.C.G.A. § 17-8-57 (2013) by improperly intimating his opinion as to what had been proven in the case. The Court agreed and reversed his convictions.

The record showed that on cross-examination, defense counsel asked the forensic interviewer if her goal was to confirm the state's allegations of abuse, noting that during the forensic interview she had consulted with a law enforcement investigator who told her to ask certain questions of the child. After the forensic interviewer denied that confirming the allegations of abuse was her goal, defense counsel sought to challenge that response by pointing out that she had continued questioning the victim even after she had said "no" four times when asked about being touched. When counsel began asking the witness about those initial denials, the State objected as to the lack of a question, and the trial judge responded: "Well, I think he's reading toward a question. But I think that was the distinction they made between touching and a massage, but keep going, [defense counsel]."

The Court noted that the judge's comment referenced the forensic interviewer's earlier testimony that the inconsistency between the victim's initial responses that she had not been "touched" and her subsequent responses that she had been "massaged" could be explained by the terminology used by the child: the forensic interviewer had opined that appellant might have introduced the term "massage" in the course of "grooming" the victim, that is of teaching her to tolerate molestation. Prior to the judge's comment, the touch/massage distinction had not come up in defense counsel's questions or the forensic interviewer's responses. Thus, the Court found, the jury could have interpreted the trial court's comment as expressing his favorable opinion of the credibility and reliability of the forensic interviewer's explanation of the distinction between the "touch" and "massage." "Therefore, the trial court erred in making statements that could have been interpreted as offering an opinion on the forensic interviewer's credibility.

Additionally, appellant's attorney asked the forensic interviewer if a statement by the child that she had been touched was different from a statement by the child that she had *told* someone that she had been touched. The court intervened, interrupting the defense's cross-examination to pose the following question to the witness: "Are we dealing here with a matter of semantics with . . . a little child[?] I mean, it would be like taking one page out of a hundred page book and isolating it. You've got to get the whole thing together basically; is that what you're trying to do?" The forensic interviewer responded that the distinction raised by the defense question was indeed "a matter of semantics."

The Court stated that it was arguable whether defense counsel's question was about a matter of semantics or about a substantive distinction — between a child saying she had been touched and saying she had told someone she had been touched. Thus, the characterization of defense counsel's question as merely a "matter of semantics" could have been construed by a juror as an intimation of the judge's opinion that the defense was attempting to draw a meaningless distinction. And, the Court stated, the lack of any objections to the trial court's comments is of no consequence because under the version of the statute then in effect, a violation of O.C.G.A. § 17-8-57 was always plain error and failure to object would not preclude appellate review. Accordingly, the Court held, given the mandatory nature of O.C.G.A. § 17-8-57 as it existed at trial, and the case law interpreting it, appellant's convictions were reversed and the case remanded to the trial court for a new trial.