Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 23, 2014

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THIS WEEK:

Voir Dire; Jury Charges

Franklin v. State, S14A0302 (5/19/14)

Appellant was convicted of murder. He argued that the trial court erred in not removing a juror for cause. The evidence showed that the juror raised his hand when the trial court asked, on behalf of the prosecution and the defense, the following question: "Do any of you believe that it is the job of the defense attorneys to trick you?" Appellant did not follow up on the juror's response in individual voir dire and the only matter addressed with the juror was whether or not he had a valid hardship that would preclude his service as a juror. When appellant later requested that the juror be struck for cause, the trial court noted he had failed to ask any follow-up questions of that juror at the appropriate time and the juror was allowed to remain. Appellant then used one of his peremptory challenges to strike the juror. The Court concluded that there had been no showing that the trial court manifestly abused its discretion in not striking the juror for cause.

Appellant also argued that the facts of the case did not conform to the jury charges given by the trial court so as to authorize the jury to find him guilty of felony murder. At trial, the court charged on the connection between the felony and the homicide. Regarding felony murder during commission of a felony, the court charged the jury as follows: "If you find and believe beyond a reasonable doubt that the defendant committed the homicide alleged in this indictment at the time the defendant was engaged in the commission of the felony of aggravated assault, then you would be authorized to find the defendant guilty of felony murder, whether the homicide was intended or not. In order for a homicide to have been done in the commission of this particular felony, there must be some connection between the felony and the homicide. The homicide must have been done in carrying out the unlawful act, not collateral to it. It is not enough that the homicide occurred soon or presently after the felony was attempted or committed. There must be such legal relationship between the homicide and the felony so as to cause you to find the homicide occurred before the felony was at an end or before any attempt to avoid conviction or arrest for the felony. The felony must have a logical relationship to the homicide, be at least concurrent with it in part and be a part of it in an actual and material sense. A homicide is committed in the carrying out of a felony … when executed by the accused while engag[ed] in the performance of any act required for the full execution of the felony."

After this instruction was given to the jury, appellant argued that the judge had improperly instructed the jury that the felony had to have a "logical relationship" instead

of a "legal relationship" to the homicide. The judge then promptly recharged the jury; much of the original charge remained the same with the only modification being that: "The felony must have a legal relationship to the homicide, be at least concurrent with it in part and be part of it in an actual and material sense." With this correction, appellant voiced no further objection and reserved any other objections to the jury charge for a later time.

Appellant argued that under the recharge as given by the court, there wasn't a showing that the homicide occurred before or during the "full execution" of the aggravated assault and therefore his conviction should be reversed. The Court disagreed. The jury charges were correct statements of law and contrary to appellant's argument, the jury was not required to find that the homicide occurred prior to or during the completion of the felony aggravated assault. The victim suffered from head trauma as a result of appellant's aggravated assault, which caused complications leading to the victim's death and the death of the victim occurred prior to any attempt by appellant to avoid conviction or arrest. Therefore, the Court found that the jury charge and the facts were in conformity.

Speedy Trial; O.C.G.A. § 17-7-170(b)

Williamson v. State, S13G1133 (5/19/14)

The Supreme Court granted certiorari in this case to determine whether the Court of Appeals erred by affirming the denial of the defendant's motion for discharge and acquittal under O.C.G.A. § 17-7-170. The evidence showed that Fulton County has six annual terms of court beginning on the first Monday of January, March, May, July, September, and November. Appellant filed his speedy trial demand on Wednesday November 2, 2011, which was during the tail end of the September term of court. Thirty-seven jurors were impaneled and qualified for a criminal trial on November 3. No jurors were impaneled on Nov. 4. The November term of court did not begin until Monday, November 7, 2011. Appellant was not tried during the September or November terms and in January of 2012 he filed a motion for discharge and acquittal. The motion was denied by the trial court. The Court of Appeals affirmed the trial court's decision. It found that there was an insufficient number of jurors available for criminal trial on November 3 because of the 37 jurors who appeared, 14 had been sent to a courtroom for a trial and 18 were committed to other courtrooms, leaving only five available for this particular trial.

But the Court found, O.C.G.A. § 17-7-170(b) does not require that courts examine how many jurors were serving on other trials or had been committed for other trials. Nor does the statute require an analysis of whether the trial court had time to try the defendant, an examination of the court's calendar, or even whether there was enough criminal trial weeks scheduled during the term. Instead, juries must merely be qualified and impaneled for that term to count. Thus, the Court concluded, for purposes of the statute, "impaneled" means jurors who have been summoned, have appeared for service, and have not yet been discharged. "To the extent that our courts have held otherwise, those cases are overruled."

Therefore, Supreme Court found, the September term counted as the first of the two terms during which the State had to try the defendant. And since it was undisputed that appellant was not tried during the succeeding, November term of court, the Court of Appeals erred in finding that the September term did not count for purposes of assessing whether the State tried appellant within the time required by law.

Nevertheless, the Court determined, since the Court of Appeals held that the State did not violate appellant's right to a speedy trial, it did not address the other issue raised on appeal: whether appellant's defense counsel waived his right to a speedy trial. Therefore, the case was reversed and remanded back to the Court of Appeals to address this issue.

Search & Seizure; Prosecutorial Misconduct

Geiger v. State, S14A0168 (5/19/14)

Appellant was convicted of felony murder and other related crimes. Appellant argued that his arrest on his mother's property, along with evidence seized at the time of his arrest and statements made as a result of his arrest, should have been suppressed. The evidence showed appellant lived with the victim, his girlfriend. After being asked to take his belongings and leave, he stabbed the victim. Two days later, law enforcement obtained an arrest warrant for appellant and, based on information he had been seen at his mother's house, they drove to her home. As officers were pulling onto the mother's property, they observed appellant crossing a cotton field behind the home and they took him into custody.

Appellant argued that the warrantless entry onto his mother's property to execute the arrest warrant was illegal. The Court noted that appellant made no argument that merely entering onto his mother's property to knock and inquire of his whereabouts required the authorities to obtain a search warrant first. Rather, appellant's argument was based upon his assumption that he was wrongfully apprehended within the curtilage of his mother's home without a search warrant. However, the Court found, even assuming appellant was living at his mother's home, the arrest warrant authorized entry to make the arrest. But, if appellant was not living in his mother's home and was only visiting, he had no standing to complain about a warrantless entry into the house or its curtilage, as only those living in the home could challenge such a search.

Moreover, the Court found, the evidence showed that appellant was actually in plain view of the officers and he was apprehended in the "open field." Undisputed testimony established that the officers who drove to the front of the property to knock on the front door could see appellant walking across a field near the house as their vehicles approached the house. For that reason, the officers drove their vehicles directly to the field to prevent appellant from attempting to escape and to arrest him. Although appellant argued otherwise, the Court found that a cotton field behind a house which is visible from the road cannot reasonably be deemed to be as private as one's home. And, the Court stated, no expectation of privacy legitimately attaches to open fields.

Appellant also argued that the trial court committed reversible error by failing to give a curative instructions and rebuke the prosecutor in accordance with O.C.G.A. § 17-8-75. The record showed that during cross examination of appellant, the prosecutor asked appellant about a prior bad act. Defense counsel objected and asked for a mistrial, which the court denied, but warned the

prosecutor concerning the line of questioning. The prosecutor then asked appellant about a prior incident in which a previous girlfriend stabbed appellant. Again defense counsel objected and moved for a mistrial. Outside the presence of the jury, the trial court strongly rebuked the prosecutor and defense counsel requested curative instructions which the court agreed to give. However, when the jury was brought back in, no curative instructions were given.

The Court stated that the prosecutor's first statement violated O.C.G.A. § 17-8-75 by making "statements of prejudicial matters which [were] not in evidence . . . ." The Court also assumed, without deciding, that the second prosecutorial statement to which appellant raised an objection, which referenced that appellant, himself, was a victim of an assault, was also an improper prejudicial statement by the prosecutor. Once a defendant's counsel has raised an objection, O.C.G.A. § 17-8-75 imposes a duty upon the trial court to rebuke the prosecutor, give an appropriate curative instruction, or grant a mistrial in the event that the prosecutor has injected into the case prejudicial statements on matters outside of the evidence. And, contrary to the State's argument, once an objection has been raised, a defendant does not waive appellate review of the trial court's failure to rebuke a prosecutor or give a curative instruction by failing to request a specific remedy.

Nevertheless, the Court held, given the overwhelming evidence of appellant's guilt, including his custodial confession, it was highly probable that the trial court's error, if any, did not contribute to the verdict. Accordingly, the trial court's error in failing to remedy the impact of the prejudicial statements by the prosecutor, if any, was harmless.

Search & Seizure

Baker v. State, A14A0325 (5/6/14)

Appellant was convicted of VGCSA. He argued that the trial court erred by denying his motion to suppress drugs seized during a traffic stop because the arresting officer had improperly expanded the stop. The evidence showed that an officer pulled over appellant's truck for a tag light infraction and as he approached the truck, he saw two passengers, appellant's daughter and her boyfriend, bending toward the floorboard as if they were trying to hide something. The officer noticed that appellant's hands were shaking nervously while going through his wallet looking for his license. Appellant's daughter made eye contact with the officer, but her boyfriend appeared nervous and stared straight ahead even when the officer spoke to him. The officer asked appellant to exit the vehicle because there were multiple occupants and separating them was safer, and to show him the tag light infraction. Appellant complied but was fidgety when doing so.

The officer noticed that appellant's pupils were abnormally constricted and given that it was dark outside, this could have been an indicator of narcotics consumption or narcotics analgesics. The officer inquired if appellant had taken any medication and appellant stated he had taken prescribed oxycodone earlier that day. As a state-certified drug recognition expert, the officer found this answer to be satisfactory and consistent with constricted pupils. The officer then conducted an investigation to determine if appellant was a less safe driver because of his consumption of oxycodone. Appellant agreed to a field sobriety test and although some components of the exam suggested he was impaired, the officer didn't find it sufficient enough to arrest appellant for driving under the influence.

Yet, the officer still suspected something else, so he conducted a HGN test on appellant and the results indicated a potential use of some depressant; not the oxycodone. The HGN test, along with appellant's constricted pupils, appellant's admitted use of oxycodone, signs of impairment indicating the use of a drug other than oxycodone, and appellant's and his passengers' conduct, all made the officer suspicious that something more was going on, so he extended his investigation further. The officer asked for consent to search the vehicle and to search appellant for weapons and contraband. He was given consent to search the vehicle and all of its occupants. On appellant's daughter, a small pill box was found in her bra with one oxycodone and methadone pill. Appellant admitted that they were his and that he gave them to his daughter to hide.

Appellant argued that the officer did not have reasonable, articulable suspicion to continue the detention once he had completed dealing with the traffic violation and conducted a DUI investigation and that therefore, the consents to a pat-down should be invalid. The Court disagreed. Once the purpose of a traffic stop has been fulfilled, the additional detention passes muster under the 4th Amendment when the officer has reasonable, articulable suspicion of other illegal activity. Here, there were three detentions: One for the tag light infraction, the second to investigate for DUI and the third for pat-down searches. Appellant did not challenge the first two detentions or the scope of the pat-down search of his daughter in the third. Thus, the issue on appeal was whether reasonable, articulable suspicion of other activity supported the third detention. The Court found that the officer's suspicion along with the actions of the truck's occupants and the reasonable inference drawn from this evidence provided a substantial basis for continuing the detention. Accordingly, the trial court did not err in denying the motion to suppress.

Extraordinary Motions for New Trial; Coram Nobis

State v. Carrion, A14A0657 (5/7/14)

In 1989, Carrion, a legal permanent alien resident, pled guilty to carrying a pistol without a license and carrying a concealed weapon. In October 2013, after immigration officials detained Carrion, a legal permanent resident of the United States, he filed a "Motion for Extraordinary Relief Writ of Coram Nobis" in Clayton County State Court, asking the court to vacate his guilty plea. Carrion argued that his guilty plea was neither knowing nor voluntary because he did not speak or understand English and therefore could not understand the charges against him or appreciate the consequences of his plea. The trial court granted Carrion's motion, vacated his conviction, and dismissed the underlying charges, finding that the record did not show that Carrion made a knowing and voluntary waiver of his rights. The State appealed.

The Court first noted that a petition for writ of error coram nobis is an obsolete writ, and its use is discouraged. However, as it is the ancestor of an extraordinary motion for new trial based on newly discovered evidence, the prerequisites for issuing a writ of error coram nobis or for granting an extraordinary motion for new trial based on newly discovered evidence appear to be identical. But, before

a court may authorize either, it is generally required that the moving or petitioning party base the pleading on facts which are not part of the record and which could not by due diligence have been discovered at the time of the trial.

Here, the Court found, Carrion failed to point out any newly discovered evidence that would have allowed for the trial court to grant the writ. Carrion knew at the time of the plea that he had a limited knowledge of the English language. Although O.C.G.A. § 17-7-93(c) requires trial courts to advise defendants of the possible immigration consequences of their guilty pleas, this Code section was not enacted until 2000 and only applies to pleas entered on or after July 1, 2000; eleven years after Carrion entered his guilty plea. And the Court found, this Code section is the only source of a requirement that a defendant be advised of the possible effect of a plea on immigration status. A resident alien's guilty plea is not rendered involuntary because he was unaware that he might be deported because the effect of the plea on his immigration status is deemed a collateral consequence of the plea. A guilty plea will not be set aside because a defendant is not advised of possible collateral consequences of his guilty plea. Thus, Carrion could not challenge the plea under a writ of error coram nobis.

Moreover, the Court found, even if it were to consider Carrion's motion, he was still not entitled to relief because a trial court's authority to grant a motion to withdraw a guilty plea ends with the term of court in which the judgment of conviction is entered. Carrion filed his motion well after the expiration of the term of court in which the judgment of conviction on the plea was entered. Thus, the trial court had no authority to grant the motion. The only remedy possibly available to Carrion was through habeas corpus proceedings and since the trial court here was a state court, not a superior court, it lacked jurisdiction to treat Carrion's motion as a habeas corpus proceeding.

Venue; Jury Charges

Faulkner v. State, S14A0404 (5/19/14)

Appellant was convicted in Houston County of murder and other crimes. The evidence showed that that while riding in a van together, the victim was shot in the head and his body was left on the side of a dirt road in Houston County. Appellant abandoned his van in Peach County, called 911, and told law enforcement officers that he had been kidnapped by the victim and others. Appellant alleged that another person shot the victim.

Appellant argued that the State failed to prove venue. A criminal case must be tried "in the county where the crime was committed," Ga. Const. of 1983, Art. VI, Sec. II, Par. VI, and a murder generally is "considered as having been committed in the county in which the cause of death was inflicted." O.C.G.A. § 17-2-2(c). However, if it cannot be determined in which county the cause of death was inflicted, it is considered to be inflicted in the county in which the death occurred. And if a dead body is discovered in this State, and it cannot be readily determined in what county the cause of death was inflicted, it is considered that the cause of death was inflicted in the county in which the dead body was discovered. Furthermore, if a crime is committed in any vehicle traveling within this State, and it cannot readily be determined in which county the crime was committed, the crime is considered as having been committed in any county in which the crime could have been committed through which the vehicle traveled. Here, there was no clear evidence that the fatal injury was inflicted anywhere other than Houston County and appellant conceded that the victim was found in Houston County after having been killed in a moving vehicle. Accordingly, the State sufficiently proved venue as to the murder.

Appellant also argued that the State could not have proven venue under the provisions O.C.G.A. § 17-2-2(c) (homicide) or O.C.G.A. § 17-2-2(e) (moving vehicle) because there was no jury charge on those provisions. But, the Court stated, this failure does not control whether the *proof* of venue was sufficient. Moreover, the trial court did charge that "criminal actions shall be tried in the county in which the crime was committed. Venue… is a jurisdictional fact that must be proved by the State beyond a reasonable doubt, as to each crime charged in the indictment, just as any element of the offense." Thus, the Court found, any additional clarification that venue could be proper in the county where the victim's body was found or in a county through which the vehicle traveled would only have benefitted the State.

Appellant also argued as error the trial court's instruction to the jury that "[a] statement the defendant made after arrest has been offered for your consideration" and that before considering it as evidence for any purpose, the jury must determine whether appellant was warned of his constitutional rights and whether he understood and knowingly gave up those rights. Appellant did not object at trial to this jury charge. Thus, the Court noted, its review was limited to whether the instruction was plain error.

The Court found that the jury charge was substantially identical to the pattern charge on the statement of a defendant. Appellant did not dispute that the charge is an accurate statement of the law. Instead, he argued that the charge was not adjusted to the evidence because, before he was formally arrested and advised of his constitutional rights, he had already made statements while in custody, having been searched and placed in a holding cell, and interviewed for several hours.

The Court stated that a trial court is not required to instruct the jury to make an independent determination regarding the voluntariness of a custodial statement or the waiver of constitutional rights where no evidence of, nor claim of involuntariness or constitutional violation appears. Here, appellant never sought to exclude his pre-arrest statements, and he expressed no objection to the entire video recording of his interview being introduced as evidence. Thus, as the trial court found, appellant conceded the voluntariness of his statement on the record. Moreover, the Court noted, during his initial interview by the police, appellant was not a suspect, he was presumed to be the victim. Accordingly, since there was no effect on his substantial rights, the trial court's jury charge was not plain error.

Impeachment; Vindictive Sentencing

Adams v. State, A14A0677 (5/13/14)

Appellant was convicted of armed robbery of a CVS store. He contended that the trial court erred in preventing him from impeaching the CVS store employee who emptied the cash register and gave appellant the money. The evidence showed that the former employee stated that he began working at CVS because his work in real estate had

declined. During cross-examination, the former employee testified that he left CVS because he wanted to return to real estate. When asked by defense counsel whether he left voluntarily, the former employee stated that it was a mutual decision. Defense counsel then asked the former employee whether he had been accused of any wrongdoing. After some discussion about whether he was required to answer, the trial court excused the jury, and asked the former employee to answer defense counsel's question. The former employee stated that he had become disgruntled with his pay and, as a form of protest, he would eat snacks without paying for them and that he would do this in front of the store's security video camera. The former employee told management of his actions and the reasons for his actions, and they mutually decided that it was best if the employee resigned. The former employee stated that CVS "technically could have gotten [him] for theft or something," but no charges were ever filed against him. Defense counsel argued that he should be allowed to introduce evidence of the former employee's theft as prior bad acts to impeach the witness. The judge permitted defense counsel to ask the employee if there were other reasons for leaving CVS, but the trial court did not allow defense counsel to bring up any prior bad acts.

The Court noted that generally, a victim may not be impeached with instances of specific misconduct or prior bad acts. Appellant argued that the trial court was required to allow him to cross-examine the employee about his admitted theft under former O.C.G.A. § 24-9-84.1(a)(3). which provided that "[e]vidence that any witness . . . has been convicted of a crime shall be admitted if it involved dishonesty or making a false statement, regardless of the punishment that could be imposed for such offense." But here, the Court found, appellant did not submit proof that the employee was convicted of, much less charged with, failing to pay for the snacks he stole. As a result, the testimony regarding such specific bad acts was not admissible for impeachment purposes. Therefore, the trial court did not abuse its discretion in limiting appellant's cross-examination of the former employee.

Appellant also argued that the trial court acted vindictively by giving him a greater sentence after trial than he would have received if he had accepted the State's plea offer. The Court disagreed. There is no presumption of vindictiveness when a trial court imposes a greater penalty after trial than it would have after a guilty plea. Here, the Court found, there was no evidence that the trial court acted in a vindictive manner. Instead, the Court stated, in imposing a harsher sentence following trial, the trial court was merely following through on the inevitable and permissible threat which is implicit in any plea bargain situation—that rejection of the plea bargain may diminish or destroy the very rationale for the imposition of a lenient sentence.