Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 27, 2016

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State Prosecutor

Kenneth Hutcherson
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

- Rule 404 (b); Intent
- Waiver of Right to Withdraw Guilty Plea; O.C.G.A. § 17-7-93(b)
- Habeas Corpus; Voluntary Dismissal
- Aggravated Assault; Party to a Crime

Rule 404 (b); Intent

Olds v. State, S15G1610 (5/23/16)

Appellant was convicted of false imprisonment and battery of a woman with whom he previously had a romantic relationship. He contended on appeal that the trial court erred in allowing Rule 404 (b) evidence to be admitted at trial. The Court of Appeals affirmed. Relying almost exclusively on *Bradshaw v. State*, 296 Ga. 650 (2015), the Court of Appeals held that appellant put intent at issue simply by pleading not guilty. The Court granted certiorari to address the interpretation of its *Bradshaw* decision.

The Court noted that there are three general requirements for the admission of other acts evidence under Rule 404 (b). First, such evidence must be relevant to some issue other than character. Second, for evidence of other acts to be admitted under Rule 404 (b), the evidence must pass the test of O.C.G.A. § 24-4-403 ("Rule 403"), which provides that "[r]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." And third, there must be sufficient evidence to conclude by a preponderance of the proof that the person with whom the evidence is concerned actually committed the other acts in question.

The Court found that in *Bradshaw*, it relied on *United States v. Edouard*, 485 F3d 1324, 1345 (11th Cir. 2007) to conclude that ""[b]ecause the murder of the victim in this case and the Ohio case involve the same mental state and [the defendant] did not take steps to remove intent as an issue, evidence of the Ohio murder was relevant to establish his intent." But, the Court stated, "[w]ith the benefit of hindsight, we now see that our discussion of intent in *Bradshaw* may have confused the lower courts, especially with respect to the second requirement for other acts evidence." Specifically, the Court stated that it "inadvertently may have intimated too much about the probative value of such evidence when offered to prove intent." Also, the Court added, it failed to appreciate that *Edouard* is in significant part about the unique problems of proof in conspiracy cases. Generally speaking, in conspiracy cases, quality evidence of other acts that tends to prove criminal intent ordinarily will have substantial probative value, both because intent often is disputed in such cases, and because the prosecution frequently will find itself without other strong proof of intent. That may or may not be true in non-conspiracy cases, like this case, in which the second requirement of Rule 404 (b) — that other acts evidence passes the Rule 403 test — calls for a careful, case-by-case analysis, not a categorical approach.

Thus, the Court found, the Court of Appeals in this case relied extensively on *Bradshaw* to determine that the evidence concerning the other women assaulted by appellant was properly admitted under

Rule 404 (b) to prove intent. The Court of Appeals appeared to have concluded that the second requirement for the admission of evidence of other acts was satisfied because the prosecution had a "substantial burden" to prove intent and the evidence of appellant' other crimes, therefore, had substantial probative value with respect to intent principally because those crimes were very similar to the crimes with which appellant was charged. But, the Court stated, given the way in which it relied on *Edouard* in *Bradshaw* — suggesting that proof of intent is a "substantial burden" for the prosecution in every case in which the defendant pleads not guilty, and implying that evidence of other acts ordinarily ought to be admitted for the purpose of intent — that the Court of Appeals reached this conclusion was quite understandable. However, the propositions for which the Court cited *Edouard* do not always hold in non-conspiracy cases, and the contention that the trial court in this case abused its discretion when it admitted evidence concerning the other women requires further consideration. By so holding, the Court added, it did not mean to suggest that admitting that evidence for intent — or for any of the other purposes that the Court of Appeals did not reach in its earlier consideration of the case — was, in fact, an abuse of discretion. Instead, the Court left the question for the Court of Appeals. Accordingly, the judgment of the Court of Appeals was vacated, and the case was remanded for reconsideration in light of its opinion.

Waiver of Right to Withdraw Guilty Plea; O.C.G.A. § 17-7-93(b)

Blackwell v. State, S16A0270 (5/23/16)

Appellant appealed from the denial of his motion to withdraw his guilty plea. The record showed that appellant entered a guilty plea to malice murder and several other crimes and agreed to provide truthful testimony at the trial of his two co-indictees. However, on the eve of his co-indictees' trial, appellant filed a motion to withdraw his guilty plea pursuant to O.C.G.A. § 17-7-93(b), because he had not yet been sentenced.

O.C.G.A. § 17-7-93(b) provides that "[a]t any time before judgment is pronounced, the accused person may withdraw the plea of 'guilty' and plead 'not guilty'". The Court noted that it has never decided whether the right to withdraw a guilty plea at any time prior to sentencing may be waived. In this connection, the Court stated that if there is no constitutional, statutory, or public policy prohibition against waiver, an accused may validly waive any right. And, where no such prohibition against waiver exists, a criminal defendant may make a voluntary, knowing, and intelligent waiver of the right in question.

As to the first issue, the Court found that there is no constitutional, statutory, or public policy prohibition against waiver in this instance. Furthermore, in situations like the instant case where the defendant has agreed to provide truthful testimony at the trial of his co-indictees and will not be sentenced under his plea agreement until after he fulfills his end of the bargain with the State, the ability to waive the right to withdraw the guilty plea prior to sentencing creates the means to incentivize the criminal defendant to follow through on his or her plea agreement. If the right to withdraw a guilty plea under circumstances such as those presented here could never be waived, an incentive could be created for a criminal defendant to manipulate the criminal justice system by simply withdrawing his guilty plea on the eve of his co-indictees' trial in order to avoid testifying. This type of manipulation of the system and disruption to the orderly administration of justice is made less likely by allowing for the waiver of a criminal defendant's right to withdraw his or her guilty plea prior to sentencing. Therefore, the Court concluded, a criminal defendant's right under O.C.G.A. § 17-7-93(b) to withdraw his or her guilty plea at any time prior to sentencing is a right that can be waived. In so holding, the Court expressly overruled the prior decisions of the Court of Appeals holding that one's right to withdraw a guilty plea before sentencing under the terms of O.C.G.A. § 17-7-93(b) can never be waived.

The Court then addressed whether appellant had in fact waived his right under O.C.G.A. § 17-7-93(b) to withdraw his guilty plea prior to sentence being pronounced in this case. The Court noted an exchange between the prosecutor and appellant during the plea hearing which revealed that appellant knew not only that the trial court was under no obligation to follow the sentencing recommendation of either the prosecutor or his defense counsel once he entered the plea, but also that, once he entered the plea, he would be subject to any future sentence imposed by the trial court without having the opportunity to withdraw the plea beforehand. The Court also noted a later colloquy between appellant and the trial court in which appellant directly reaffirmed to the trial court that he knew and agreed that he would not be able to withdraw his plea once he had entered it, and that this was the case despite the fact that he would not be sentenced until a later date. Thus, the Court found, appellant made a voluntary, knowing, and intelligent waiver of the right to withdraw his plea of guilty. Accordingly, the trial court did not err in denying his motion to withdraw his plea prior to sentencing pursuant to O.C.G.A. § 17-7-93(b).

Habeas Corpus; Voluntary Dismissal

Darling v. McLaughlin, S16A0071 (5/23/16)

Appellant was granted a certificate of probable cause to appeal after the habeas court denied his voluntary motion to dismiss his habeas petition without prejudice. The record showed that appellant filed a pro se petition for habeas corpus relief challenging the voluntariness of his plea. At an evidentiary hearing appellant's plea counsel, among other witnesses, testified. The habeas court granted the parties 60 days to file post-hearing briefs. During this time, defense counsel entered an appearance on behalf of appellant and filed a motion to dismiss appellant's pro se petition without prejudice pursuant to O.C.G.A. § 9-11-41(a)(2), which provides "[e]xcept as provided in paragraph (1) of this subsection, an action shall not be dismissed upon the plaintiff's motion except upon order of the court and upon the terms and conditions as the court deems proper". The motion claimed that testimony at the evidentiary hearing revealed that plea counsel coerced appellant's plea by misrepresenting the date at which appellant would become parole eligible. In response to this motion, the Warden relied on O.C.G.A. § 9-11-41(a)(1), which allows a plaintiff to voluntarily dismiss his or her case "[b]y filing a written notice of dismissal at any time before the first witness is sworn; or … [b]y filing a stipulation of dismissal signed by all parties who have appeared in the action." Relying solely on O.C.G.A. § 9-11-

41(a)(1) in its order, the habeas court denied appellant's motion, finding that witnesses had been sworn and had provided testimony at the evidentiary hearing, and that the Warden had not agreed to dismissal.

The Court reversed. The Court found that because witnesses had already been sworn at the hearing on appellant's pro se petition for habeas corpus relief, and because the parties had not stipulated to the voluntary dismissal of appellant's case, the means of voluntary dismissal described in O.C.G.A. § 9-11-41(a)(1) were unavailable to him. However, this did not foreclose appellant from seeking to voluntarily dismiss his petition pursuant to the terms of O.C.G.A. § 9-11-41(a)(2), which is exactly what he did. Because the habeas court only considered the factors outlined in O.C.G.A. § 9-11-41(a)(1) to determine whether appellant's voluntary dismissal was proper, however, it did not analyze whether voluntary dismissal might otherwise be available "upon order of the court and upon the terms and conditions as the court deems proper" pursuant to O.C.G.A. § 9-11-41(a)(2). Accordingly, the Court vacated the habeas court's order denying appellant's motion to voluntarily dismiss his case and remanded the case to the habeas court for a proper consideration of the motion under the terms of O.C.G.A. § 9-11-41(a)(2).

Aggravated Assault; Party to a Crime

Hoglen v. State, A15A1755 (3/29/16)

Appellant was convicted of aggravated assault and three counts of felony obstruction. The evidence, briefly stated, showed that before sunrise three uniformed deputies approached a double-wide trailer where appellant was living in order to investigate a report of a prowler and to arrest appellant on an outstanding warrant. When two of the deputies knocked and identified themselves as police, appellant fled out of a back window and began running towards a fence 15 feet from the house. The third deputy, who had stationed himself at the back of the house, saw appellant, gave chase, and ordered him to stop running. Appellant climbed over the fence and ran down a hill. Appellant tripped, and was caught by the deputy. With the help of the first and second deputies, who had run to the scene without clearing the trailer, appellant's hands were secured. As appellant was apprehended, he began screaming, "Paw Paw, they're killing me," and "They are beating my ass." The three deputies began to escort appellant back up the hill to the fence and the trailer, but appellant soon refused to walk. When a woman in the trailer asked what was happening, the deputies responded that they were sheriff's officers making an arrest. As appellant continued to scream that "they" were "killing," "beating" and "hurting" him, a shot rang out. At this, appellant screamed even more loudly that he was being harmed and also added, "Over here, over here[!]" The officers took cover in the pitch blackness. No other shots were fired. Eventually, appellant's grandfather was arrested in his truck located near the trailer. He told the deputies that he shot a gun into the air because he thought that thieves were hurting appellant.

Appellant argued that the evidence was insufficient to sustain his conviction for aggravated assault. A divided en banc Court agreed. The Court noted that the State's theory of the case was that taken together, evidence of appellant's cries for help before the single shot fired, as well as his exclamation "Over here!" after that shot, authorized this jury to conclude that he was a party to the aggravated assault at issue. Even if appellant intended his grandfather to intervene in his arrest, there was no evidence to show that appellant knew that his grandfather possessed a pistol while driving his truck to the scene, that the grandfather was likely to respond to appellant's initial cries for help by firing a shot, or that those cries intentionally encouraged the grandfather to discharge the single shot actually fired. While the Court agreed with the State that the jury was entitled to believe the officers' testimony that appellant's exclamation after the single shot placed them in reasonable apprehension of receiving a serious injury, a second shot never came. In short, and although appellant's exclamation could reasonably be interpreted as an expression of encouragement or incitement, it was made *after* appellant's grandfather already completed act of firing his revolver near the officers, which was the act that formed the basis of the indictment against both the grandfather and appellant.

Furthermore, the Court state, it found no law authorizing a jury to infer that when appellant called out for help, he intentionally caused, aided, or encouraged his grandfather to fire the single shot that put the officers in reasonable apprehension of immediately receiving a violent injury. Nor can appellant's exclamation "Over here!" authorize a jury to conclude that he encouraged the crime that had already occurred. Accordingly, the Court held, appellant could not be found to have been a party to the crime of aggravated assault, and his conviction for that crime must be reversed.