Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 17, 2016

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THIS WEEK:

Miranda; Invoking Right to Have Counsel

State v. Philpot, S16A0334 (6/6/16)

Philpot was indicted for murder and other offenses. The trial court granted his motion to suppress his statements made during a police interview, finding that Philpot invoked his right to counsel prior to making the incriminating statements that were the subject of the motion to suppress. The State appealed.

The evidence showed that Detective Quinn surreptitiously recorded the interview he had with Philpot. At the start of the interview, the detective began informing Philpot of his Miranda rights and the following occurred: QUINN: Okay. All right. Number three, you're entitled to have a lawyer now and have them present now or at any time during questioning. Do you understand number three? PHILPOT: You need his number to get him on file? QUINN: Say that again. PHILPOT: My lawyer. QUINN: Okay, yeah. I mean, exactly. PHILPOT: You can call the old lady, get her to call him and have him come down here. After some discussion about Philpot's "old lady" – his girlfriend – and the name of his lawyer, the detective said, "So you're saying you have a lawyer is what you're telling me?" and Philpot responded, "Yeah." Shortly thereafter, while still going over the Miranda rights, Philpot stated "I need you to call my old lady to get the number." Philpot then gave the detective his girlfriend's phone number.

The Court found that although Philpot's first mention of his lawyer, asking if the officers needed the lawyer's phone number, may have not been an unambiguous invocation of his right to counsel, in the discussion that followed, Philpot was firmer and clearer in his request that the police officers contact his lawyer directly or through his girlfriend so the lawyer could come there. By the time he reiterated that he needed the officers to call his girlfriend to get his lawyer's number, he had unambiguously invoked his right to counsel. Consequently, the detectives should have stopped questioning Philpot at that point.

Nevertheless, the State argued, even if Philpot did unambiguously invoke his right to counsel, he reinitiated the interrogation and then waived his right. But, the Court found, nothing in the record supported the State's contention. Instead, the recording showed that the detectives never stopped interrogating Philpot, and all the statements Philpot made were in response to police questioning. Accordingly, the Court affirmed the trial court's order granting Philpot's motion to suppress his custodial statement.

Guilty Pleas; Motions for Out-of-time Appeal

Mims v. State, S16A0542 (6/6/16)

Appellant pled guilty in 1985 to murder and kidnapping for which he received consecutive terms of life imprisonment. In 2008, he

filed a motion for an out-of-time appeal alleging ineffective assistance of counsel in handling his plea. The trial court denied the motion without an evidentiary hearing, finding that the record revealed no error in the acceptance of the plea, and so, any appeal would prove unsuccessful.

The Court stated that in deciding a motion for out-of-time appeal from a guilty plea, the trial court must hold an evidentiary hearing to determine whether defense counsel's unprofessional conduct was the cause of the untimeliness only where the motion raises an issue that would have been meritorious on the existing record had a timely appeal been taken. Here, appellant asserted that the acceptance of his plea was erroneous in five respects: (1) the record of the plea proceeding failed to show that he was advised of his privilege against self-incrimination; (2) the record likewise failed to show that he was advised of his right to confrontation; (3) the record revealed no factual basis for his plea; (4) the record showed that his plea was induced by impermissible promises of leniency; and (5) that his plea was not a knowing, intelligent, and voluntary one.

The Court found that his first and second claims were belied by the record. Although the transcript of his plea did not itself show that the plea judge — or anyone else — specifically advised him in connection with his plea of the privilege against self-incrimination or the right of confrontation, the record of the plea did not consist solely of the transcript. And here, the written plea and acknowledgment-and-waiver-of-rights form — bearing the signatures of appellant and his lawyer — that advised appellant of his privilege against self-incrimination and the right of confrontation, on which appellant acknowledged that he understood his rights, and on which his lawyer certified that he had reviewed each item of the form with appellant and believed that appellant understood his rights. Such a record is sufficient to show that an accused properly was advised of the essential constitutional protections that he would waive by his entry of a guilty plea.

Similarly, as to appellant's claim that there was no factual basis for the plea in the record, the Court found that this too was incorrect. The transcript of the plea colloquy showed that the plea judge recited the relevant allegations of the indictment, confirmed with appellant that he understood the charges to which he intended to plead guilty, and confirmed that appellant, in fact, intended to plead guilty. Reference to the factual allegations of an indictment may be sufficient to lay a factual basis for a plea, and here, the Court concluded, an adequate factual basis was established on the record.

As to appellant's argument that he was induced to enter his plea by the promise of leniency, the Court disagreed. The Court noted that there was some reference in the record to an assurance of a law enforcement officer that if appellant "helped," the officer would see that appellant did not get "[a] whole bunch of time." However, the Court found that this reference in the record was vague and did not refer to any particular sentencing options, and in any event, it appeared to relate to appellant cooperating with law enforcement, not entering a plea. The alleged assurance said nothing about what sentence appellant would, in fact, have to serve if he pleaded guilty. Moreover, the record reflected nothing about the circumstances in which the assurance allegedly was given. And, the Court stated, most important, appellant unequivocally agreed in the end that no one had "ever suggested that [the plea judge is] going to give [appellant] some lighter sentence, easier sentence than the two consecutive life sentences that are possible under the law."

Finally, appellant contended that the record generally failed to show that his plea was freely, voluntarily and knowingly made. The Court again disagreed. In reviewing the record on a whole, the Court found that appellant was represented by counsel; that his legal and constitutional rights under the law were explained to him, he was advised of the consequences of entering a guilty plea and the plea was not induced by any promise of leniency. Furthermore, the record showed that he was not under the influence of any drug or intoxicant and that no one forced him to plead guilty.

Accordingly, the Court found, no evidentiary hearing was required in this case, and the trial court did not err when it denied the motion for out-of-time appeal.

Photographic Lineups

King v. State, A15A1878 (3/30/16)

Appellant was convicted of armed robbery, aggravated assault, and two counts of possession of a weapon during the commission of a felony. The evidence showed that appellant entered a convenience store wearing a handkerchief over his mouth and nose. The clerk and a customer were present. At some point, the bandana slipped down to appellant's chin. At trial, the customer identified appellant. However, appellant presented numerous alibi witnesses.

Appellant contended that the trial court erred in failing to exclude the customer's pretrial identification of him based upon a photographic line-up. A divided Court disagreed. The Court stated that the first step of the analysis is to consider whether the line-up was impermissibly suggestive. In determining whether an identification procedure was fair, the question is not whether the array of photographs used by police could have been more nearly perfect. Here, the Court found, the men depicted in the array were all the same race and had the same general complexion and facial hair. And while there were discernible differences between the quality of appellant's picture and the other five pictures in the photo line-up, slight differences in the size, shading, or clarity of photographs used in an identification line-up will not render the lineup impermissibly suggestive. In fact, the Court noted, a lineup is less likely to be found impermissibly suggestive when there are physical differences in the photographs themselves (as opposed to the persons pictured in the photographs). And here, the Court found, it was undisputed that the line-up was not shown to the customer in an improper way. A detective testified that he did not tell the customer "anything specific" about the lineup and merely asked him to look at it "to see if anyone on this page had committed the crime." He made no suggestions about which photographs the customer should or should not choose. The customer also testified that no one suggested what photograph he should select and that he selected appellant based on his memory. Accordingly, the Court held that the trial court was authorized to conclude that the photograph lineup and concomitant procedures were not impermissibly suggestive.

The Court then addressed the second step of the analysis: whether there was a substantial likelihood of irreparable misidentification. With regard to the customer's opportunity to view the robber at the time of the crime, the Court noted that he was adamant from his initial interview with the police that he got "a good look at him" and that "if [he] ever see[s] him or hear[s] his voice again [h]e would recognize him. You don't forget a person's voice or face when they put a double barrel in your stomach and cock it." The customer was standing close enough to the robber for him to put the gun

into his stomach. While he testified that the handkerchief over the robber's face did not slip down all the way during the robbery, he also explained "[i]t slid down just about here (pointing)." At one point, the customer agreed that it slipped down to the chin.

The Court also disagreed with appellant's argument that the customer's attention could not have been focused solely on the robber because he was also able to describe the weapon. That the customer, a self-described experienced hunter, was able to describe the weapon, does not exclude the possibility that at times his attention was focused solely upon the robber's face. And the customer's lack of eloquence in describing the robber's facial features should not render his testimony that he would never forget the robber's face meaningless. "Experience teaches . . . that many persons may lack the ability to articulate a detailed description of a person they have seen and yet can still identify him on sight." Furthermore, the customer's statement that he would never forget the robber's face also showed a great degree of attention.

Moreover, the customer testified that he was 99% certain after viewing the photographic lineup and he told the police "if I ever hear his voice I will be absolutely 100 percent sure. . . . I wanted to hear his voice because you never forget that voice." A couple of weeks later, the police asked him to come and listen to a person's voice, and the customer identified it as the robber's voice. He testified that he "didn't know who the person was. . . . They never let me see him, they just let me hear his voice." The investigating detective testified that the customer never had any hesitation before identifying appellant's photograph and that he was also able to identify appellant's voice. Finally, while the line-up occurred one year after the robbery, the Court noted it has found no substantial likelihood of misidentification in cases involving significant lapses of time between the crime and the identification.

Impeachment; O.C.G.A. § 24-6-609

Robinson v. State, A16A0125 (4/5/16)

Appellant was convicted in 2014 of aggravated assault, criminal damage to property in the second degree, and cruelty to children in the third degree relating to his smashing a concrete slab against a car driven by the victim and also occupied by her son. He contended that the trial court abused its discretion by admitting evidence of his previous convictions for impeachment purposes during his testimony. The record showed that appellant was paroled in 2006 on convictions for armed robbery and voluntary manslaughter. He was convicted of aggravated stalking and terroristic threats in 2012.

The Court noted that subject to the time limits of O.C.G.A. § 24-6-609(b), O.C.G.A. § 24-6-609(a)(1) provides that evidence that an accused who testifies has been convicted of a crime punishable by death or imprisonment in excess of one year "shall be admitted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the accused." First, the Court found, since appellant was not paroled on the armed robbery and voluntary manslaughter convictions until 2006, less than ten years before the 2014 trial, the more stringent "substantially outweighs" standard regarding prejudice did not apply as to these convictions. And, the Court noted, this differs from former O.C.G.A. § 24-9-84.1(a), under which, except for convictions involving dishonesty or false statements, even recent felony convictions could be used to impeach a defendant only if the probative value "substantially outweighed" the prejudicial effect.

Nevertheless, the Court stated, under former O.C.G.A. § 24-9-84.1(a), trial courts had to balance certain factors in considering admissibility. And, the Court stated, while it has raised questions about the continued applicability of these factors under the new Evidence Code when not more than 10 year have passed since the conviction or release from confinement of the witness, "[t]hey remain a useful guide."

And here, the Court found, the trial court considered these factors in determining the admissibility of the prior convictions. Therefore, the Court found no abuse of discretion in the "trial court's thoughtful and considered analysis."

In so holding, the Court also rejected appellant's contention that under Ross v. State, 279 Ga. 365) (2005), the trial court erred in admitting certified copies of his prior convictions given that he was willing to stipulate to the convictions. The Court found that appellant's argument was foreclosed by its decision in Jones v. State, 318 Ga. App. 105 (2012) which held that Ross does not apply to evidence used for the proper purpose of impeaching a defendant's credibility as a witness.

Weapons; Government Buildings

Malphurs v. State, A16A0140 (4/19/16)

On Oct. 10, appellant was arrested at a TSA security checkpoint at Hartsfield-Jackson International Airport after a handgun was discovered in his luggage. At the time, appellant was not a weapons carry license holder. He was charged with carrying a weapon in an unauthorized location in violation of O.C.G.A. § 16-11-127(b) (Count 2) and with carrying a weapon at a commercial airport in violation of O.C.G.A. § 16-11-130.2 (Count 5). He filed a general demurrer which the trial court denied.

Appellant contended that the trial court erred by denying his demurrer as to Count 2 because it was based on a violation of O.C.G.A. § 16-11-127, which he argued conflicts with the statute on which Count 5 was based, O.C.G.A. § 16-11-130.2. Specifically, he contended that O.C.G.A. 16-11-130.2 must control because it is the more specific statute governing the conduct at issue and because the legislature intended it to supercede O.C.G.A. § 16-11-127 as applied to airports. The Court disagreed because the two statutes do not conflict.

The Court noted that O.C.G.A. § 16-11-127(b) prohibits people who lack weapons carry licenses from carrying a weapon in a government building and appellant conceded that the airport was a "government building" within the meaning of the statute. O.C.G.A. § 16-11-130.2 prohibits an individual from entering a restricted access area of a commercial service airport in or beyond the airport screening checkpoint while knowingly possessing or having under his or her control a weapon or long gun, and specifically excludes from the prohibited area the "airport drive, general parking area, walkway, or shops and areas of the terminal that are outside the screening checkpoint and that are normally open to unscreened passengers or visitors to the airport." Thus, the Court found, as a nonlicense holder, appellant was prohibited under O.C.G.A. § 16-11-127(b)(1) from carrying a weapon into a government building — that is, the airport.

That appellant allegedly committed a separate offense by entering the airport security screening checkpoint while knowingly possessing or having in his control a weapon does

not invalidate the first charged offense. In this context, O.C.G.A. § 16-11-127 criminalizes the carrying of a weapon by a nonlicense holder through the airport's doorway. If appellant had stopped there, he would have violated only O.C.G.A. § 16-11-127. O.C.G.A. § 16-11-130.2 then criminalizes carrying the weapon further — to the security screening checkpoint. Therefore, the Court concluded, there is no conflict between the statutes.

In so holding, the Court noted that the focus of O.C.G.A. § 16-11-130.2's protection is on weapons carry license holders. License holders — and only license holders — have the opportunity to leave the security area without criminal penalty after being notified they have a firearm; people like appellant who lack a license have no similar opportunity. See O.C.G.A. §16-11-130.2(b). The same statutory distinction is also present in O.C.G.A. § 16-11-127. There, license holders — and only license holders — may carry firearms in non-secure portions of government buildings and have the opportunity to leave a security screening area without criminal penalty after being notified that they have a weapon. O.C.G.A. § 16-11-127(e)(1). People who lack a license may not carry weapons in government buildings at all.