Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 23, 2017

THIS WEEK:

Terroristic Threats; Sufficiency of the Evidence

Steplight v. State, S17A0296 (5/30/17)

Appellant was convicted of felony murder, possession of a knife during the commission of a crime, and terroristic threats, all in connection with the death of his former girlfriend, Mobley. The evidence showed that earlier on the day the victim was murdered, Grimes, a friend of the Mobley, found appellant at the home of Campbell. Adams was also at Campell's house. Grimes heard appellant say to Adams that, "if he can't have her [Mobley] no one can 'cause that's the man from the soup kitchen,' " which was a reference to Slaughter[, Mobley's new live-in boyfriend]. Adams also heard appellant "talking about if he couldn't have [Mobley] . . . wasn't nobody else going to have her."

Appellant contended that the evidence was insufficient to support his conviction for terroristic threats. The Court agreed. The Court stated that the crime of making terroristic threats focuses solely on the conduct of the accused and is completed when the threat is communicated to the victim with the intent to terrorize. That the message was not directly communicated to the victim would not alone preclude a conviction where the threat is submitted in such a way as to support the inference that the speaker intended or expected it to be conveyed to the victim. And here, the evidence did not support an inference that appellant intended or expected his statements to be communicated to Mobley. He did not ask or direct anyone to convey his messages to Mobley and there was no evidence to support the inference that he intended or expected that they would be. Although the State argued that Grimes and Adams were both neighbors and acquaintances of the Mobley, the State did not present evidence that appellant was aware of any relationships between them and Mobley such that they would be expected to repeat any threatening statements of appellant's to Mobley, and thus, presented no evidence that appellant intended, or would expect, that his statements would be conveyed to her; Grimes and Adams did not live with Mobley and were not related to her, and the evidence presented would not lead to any inference that they would be expected, by virtue of their status as neighbors, to cause the messages to be conveyed to Mobley. Therefore, the Court concluded, without evidence to support an inference that appellant intended or expected his statements to be conveyed to Mobley, his conviction for terroristic threats was reversed.

Ineffective Assistance of Counsel; Search & Seizure

Bryant v. State, S17A0388 (5/30/17)

Appellant was convicted of murder and other related crimes. The evidence showed that after appellant shot the victim, the police searched his home and found a box of bullets with the same caliber as the murder weapon; but the murder weapon was not found. He

contended that his trial counsel was ineffective for failing to move to suppress the fruits of the search warrant on particularity grounds. The Court agreed.

The State conceded that the search warrant did not describe the property sought to be seized. However, the State argued that this obvious and apparent deficiency was cured by the affiant detective's testimony by cell phone video to the magistrate at the time the affidavit was presented, identifying what she expected to seized. However, the Court found, the contents of the search warrant itself, not the contents of the supporting documents, are scrutinized under the Fourth Amendment's particularity requirement. The search warrant did not incorporate the affidavit or the oral testimony by reference — in fact, the box marked "oral testimony, given under oath, received and recorded" on the affidavit and application was not checked — and there was no evidence that a copy of the video testimony or even a transcript of the testimony was left at appellant's home. The return of the search warrant and inventory provided that only a copy of the warrant and a receipt of the items seized were left at the residence. Thus, because the executing officers did not have a warrant particularly describing the items they intended to seize, the search was presumptively unreasonable and unconstitutional under the Fourth Amendment.

As to prejudice, the Court found that the only physical evidence connecting appellant to the crime was the empty box of ammunition of the same caliber as the gun used to shoot the victim. Moreover, the prosecutor mentioned the evidence prominently in opening argument and leaned on it heavily in closing arguments. Moreover, although there were three eyewitnesses who testified, their respective credibility was substantially challenged and there was evidence that someone other than appellant shot the victim. Thus, the Court found, appellant established a reasonable probability that the outcome of trial would have been different but for the deficient performance.

Search & Seizure; Right to Counsel

Clements v. State, S17A0088 (5/30/17)

Appellant was convicted of malice murder and other related crimes for the murder-for-hire plot that culminated in the shooting death of his wife. The evidence showed that during the murder investigation, the police obtained warrants to wire-tap appellant's phone. One of the wiretapped calls was a conversation between the lead detective, Detective Wright, and appellant concerning the murder of appellant's wife.

Appellant argued that the trial court erred in denying his motion to suppress evidence of the wiretapped phone conversation between him and Detective Wright wherein the detective asked him about the murder. Clements contended that, because he had already invoked his Sixth Amendment right to counsel by hiring an attorney before the call took place, the police were not allowed to speak with him without his counsel being present. The Court disagreed. The Sixth Amendment addresses an accused's right in all criminal prosecutions to have the assistance of counsel for his defense and attaches only at the initiation of adversary criminal proceedings. Before judicial proceedings are initiated, a suspect in a criminal investigation has no constitutional right to the assistance of counsel. And here, the Court found, no formal criminal proceedings had been initiated against appellant at the time that his conversation with Detective Wright took place. He was not under arrest, confronted with any criminal charges, or in custody. He was merely speaking on the phone with the officer during an investigation in which no judicial proceedings had yet been initiated against him. Accordingly, the Court held, appellant's Sixth Amendment right to counsel had not yet attached at the time of his telephone conversation with Detective Wright, and his hiring of an attorney prior to this conversation taking place did not change that fact. Accordingly, the trial court did not err in denying appellant's motion to exclude the recorded telephone conversation from the evidence presented at trial.

Pretrial Hearings; Extraneous Evidence

State v. Ogunsuyi, S17A0357 (5/30/17)

Ogunsuyi was indicted for murder. The State appealed after the trial court granted her pretrial motion for immunity pursuant to OCGA § 16-3-24.2. The State contended that the trial court committed reversible error when it "sought out and considered extraneous material" which it claimed significantly contributed to the court's decision to grant the motion. Specifically, the State complained that the court's determination that Ogunsuyi was credible was based, in part, on a document which was filed of record but not admitted at the pretrial hearing: "doc. no. 17," a more-than-400-page discovery packet the State supplied to the defense.

The Court agreed that it was error for the trial court to cite the subject discovery disclosures by the State as support for its findings. But, the Court found, even though the court did cite doc. no. 17 numerous times in its order, it never did so in isolation but always in conjunction with specific citations to the transcript of testimony adduced at the motion hearing, and in fact, at the tail end of these other citations. Indeed, doc. no. 17 appeared to have been referenced as merely a summary addition. Notably, although doc. no. 17 was more than 400 pages long, almost none of the court's citations to it contain specific page numbers. In many instances, it was unclear why the court cited the document as it did not contain any information not clearly conveyed in the hearing testimony or in the exhibits admitted into evidence. Furthermore, the court never cited to any of these exhibits, which included Ogunsuyi's videotaped statement to police, surveillance video, and photographs; thus indicating that the court may have used doc. no. 17, which included summaries of these videos and the photographs, as a shorthand to refer to these exhibits.

Nevertheless, the State argued, the court's error in considering doc. no. 17 was harmful because it affirmatively appeared within the trial court's own order that its conclusion that Ogunsuyi was credible was based on the trial court's decision to review extraneous material not properly before it as the trier of fact, and that its consideration of such material appears likely to have contributed to the decision. Bur, the Court found, all of the information the court mentions as proving Ogunsuyi's credibility came most clearly from evidence at the hearing. To the extent this evidence was echoed by doc. no. 17, the document did not serve to clarify or further corroborate any material evidence. Thus, there simply was no showing of harm. Accordingly, as the State conceded there was evidence introduced at the motion hearing to support the ruling in favor of Ogunsuyi, the State failed to provide a meritorious basis for reversal of the court's grant of Ogunsuyi's motion for immunity from prosecution.

Habeas Corpus; Juveniles

Oubre v. Woldemichael, S17A0656 (5/30/17)

Woldemichael pleaded guilty to armed robbery and other charges for his role in the robbery and beating of a pizza delivery woman. He filed a petition for habeas corpus alleging that he would not have pleaded guilty but for the ineffective assistance of trial counsel. In particular, he contended that trial counsel did not inform him of the likelihood that his custodial statements would have been excluded had counsel sought their suppression. The evidence, briefly stated, showed that Woldemichael was 14 years old at the time of the police interview. The trial court granted the habeas petition and the Warden appealed.

The Court stated that in determining whether a juvenile has given a statement voluntarily, a court considers nine factors set forth in *Riley v. State*, 237 Ga. 124 (1976): (1) the age of the accused; (2) the education of the accused; (3) the knowledge of the accused as to the substance of the charge and nature of his rights to consult with an attorney; (4) whether the accused was held incommunicado or allowed to consult with relatives or an attorney; (5) whether the accused was interrogated before or after formal charges had been filed; (6) the methods used in interrogation; (7) the length of the interrogation; (8) whether the accused refused to give voluntary statements on prior occasions; (9) and whether the accused repudiated the extrajudicial statement at a later date. The State would have borne the burden of demonstrating the voluntariness of Woldemichael's statements by a preponderance of the evidence had a motion to suppress been filed.

The Court found that the habeas court correctly determined that, considering the *Riley* factors, Woldemichael met his burden to show that prosecutors could not have met theirs. At the time of the interview, Woldemichael was 14 years old and had not yet entered high school, having failed the eighth grade. Law enforcement's interview of Woldemichael was a relatively lengthy two-and-a-half hours, and he was held in the interrogation room for more than four hours. As found by the trial court, there was no indication that the police contacted family when they picked him up or before they initiated questioning. Although a parent's absence or presence is not dispositive of the question of whether a juvenile's confession is admissible, it is a significant factor in the analysis.

Most significantly, the Court found, the officers used aggressive interrogation methods, repeatedly suggesting to Woldemichael that cooperating with them in their investigation could inure to his benefit in the court proceedings to come. Here, officers told Woldemichael that if other suspects cooperated and he did not, that would make him look "[p]retty bad" before a judge. They suggested that his cooperation could affect whether he was charged as a juvenile or an adult. Woldemichael subsequently made inculpatory statements. As the interview continued, with officers pressing Woldemichael to give more details, Woldemichael asked whether his cooperation would really make a difference. In response, they insisted it would make "a big difference" from the perspective of the prosecutor, jury, and judge. Then they specifically drew a connection between what he chose to say to them in the interview and what sort of sentence he would receive — "It starts at ten. It goes up from there. That's why I'm saying, when you walk out this door, you want this video to look as good as possible." And the officers made these statements to a 14-year-old middle schooler over the course of a two-and-a-half hour interrogation without attempting to contact his parents.

Thus, the Court found, some of the officers' statements to Woldemichael at least arguably constituted assurances creating a "hope of benefit" within the meaning of the statute. And offering a hope of benefit is a method of interrogation, a factor to be considered in evaluating the totality of the circumstances under *Riley*. Regardless of whether Woldemichael's statements to police would have been admissible under OCGA § 24-3-50 had he been an adult, under the standard applicable to juveniles, Woldemichael's inculpatory statements to police were involuntary under a totality of the circumstances. Thus, the Court concluded, the habeas court did not err in concluding those statements were subject to suppression.