

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 24, 2011

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THIS WEEK:

- **Habeas Corpus; Boykin Rights**
- **Plea Bargain; Effective Assistance of Counsel**
- **Recidivist Sentencing**
- **Guilty Plea; Habeas Corpus**
- **Mental Retardation; Burden of Proof**
- **Motions For New Trial**
- **Batson; Jackson-Denno**
- **Spoliation of Evidence; Due Process**
- **Demurrers**
- **Jury Deliberations; Jury Charges**
- **Similar Transaction Evidence; Closing Argument**

Habeas Corpus; Boykin Rights

Wilson v. Kemp, S10A1465 (6/24/2011)

The Court granted appellant a certificate of probable cause to appeal the denial of his petition for habeas corpus in which he challenged the validity of his guilty plea on the basis, that it was not entered voluntarily. The record showed that appellant pled guilty to voluntary manslaughter at a mass guilty plea hearing. The transcript of the hearing showed that the trial court stated that each defendant was presumed to be innocent and that each defendant had a right to remain silent, thereby not giving any evidence against themselves.

The Court held that under *Boykin v. Alabama*, 395 U. S. 238 (1969), the court is required to inform a defendant of the three constitutional rights he is waiving if he pleads

guilty: the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. In this case, the trial court's instruction did not comply with these requirements because it only referred to appellant's "right to remain silent" during the guilty plea hearing itself, without ever informing him that, by pleading guilty, he would waive that right at trial. The Court also found that appellant's statement that he had been advised of the "constitutional rights" he was waiving was not sufficient because it did not enumerate the specific constitutional rights referenced. Therefore, the Court concluded that the State failed to meet its burden of establishing that appellant's guilty plea was made voluntarily, knowingly, and intelligently. Accordingly, the Court reversed the judgment of the habeas court.

Plea Bargain; Effective Assistance of Counsel

Johnson v. State, S10G0617 (6/13/2011)

Appellant was indicted for armed robbery, aggravated assault and two counts of burglary. The State made a plea offer to appellant, but appellant rejected the offer and pled not guilty. Appellant's trial attorney did not inform appellant until after his plea that, due to his prior record, appellant would face a mandatory sentence of life without parole if he was convicted on the armed robbery count. Appellant then attempted to accept the State's offer, but the ADA informed him that the offer was revoked because appellant had already entered his plea. Appellant was subsequently tried, convicted, and sentenced to life without parole.

Appellant argued that his trial counsel rendered ineffective assistance by failing to timely advise him that if he rejected the State's

plea offer, he would face a mandatory sentence of life without parole if convicted on the armed robbery count. The Court granted certiorari.

The Court first noted that in *Lloyd v. State*, 258 Ga. 645, 648 (1988), the Court held that trial counsel renders “less than reasonably professional assistance” if he fails to inform his client of a plea offer and to advise his client of the consequences of his plea. The Court also stated that an accused is entitled to rely upon his attorney to advise him in the plea bargaining process.

The Court held that in this case, appellant was not reasonably represented by any of his attorneys during the plea bargaining process. The record showed that no one from the public defender’s office negotiated a plea deal with the State on appellant’s behalf prior to the entry of his not guilty plea. Furthermore, defense counsel performed no investigation of the facts in appellant’s case in order to develop an opinion as to what plea should be entered. Finally, trial counsel failed to inform appellant prior to his rejection of the State’s plea offer that he was facing a mandatory sentence of life without parole if convicted at trial. As a result, appellant could not make an informed decision about his plea. Therefore, the Court found that appellant’s trial counsel was deficient.

The Court also held that there was a reasonable probability that appellant would have accepted the State’s plea offer had he been sufficiently informed by trial counsel. Therefore, the Court found that appellant was also prejudiced. Because appellant met his burden of proving both elements of ineffective assistance of counsel, the Court reversed the judgment of the Court of Appeals and remanded for further proceedings.

Recidivist Sentencing

State v. Slaughter, S10G1592 (6/13/2011)

Slaughter was convicted of numerous felonies, including armed robbery, attempted murder, and possession of a firearm by a convicted felon. He was sentenced as a recidivist to life in prison and a number of years to serve consecutively, without parole. The prosecutor used Slaughter’s three prior felony convictions to prove the charge of possession of a firearm by a convicted felon under OCGA §16-11-131.

Slaughter argued that his sentence was void because his prior convictions were also used to enhance his sentence under OCGA §

17-10-7 (c). He argued that at least one of his three prior convictions had been “used up” on the firearm possession conviction pursuant to *King v. State*, 169 Ga. App. 444 (1984), and, therefore, the remaining two felony convictions could not support sentence enhancement under OCGA §17-10-7 (c), which requires three prior felony convictions for sentence enhancement.

In *King*, the Court of Appeals held that a prior conviction to establish firearm possession by a convicted felon under OCGA §16-11-131 could not also be used to sentence the defendant as a recidivist under OCGA §17-10-7(a). The Court held, however, that *King* applied only to those situations where the defendant has one prior conviction and he is later convicted of firearm possession by a convicted felon. In such situations, the application of O.C.G.A. § 7-10-7 (a) eviscerates the sentencing range of one to five years set forth in OCGA §16-11-131 because the trial court is forced to impose a five-year sentence.

In contrast, the application of OCGA § 17-10-7 (c) to a defendant who has three prior convictions and, in a subsequent prosecution, is convicted for firearm possession by a convicted felon, does not eviscerate the sentencing range set forth in OCGA §16-11-131. Rather, the trial court still has discretion to sentence a defendant to up to five years for felony firearm possession by a convicted felon. The Court found that because the sentencing range in OCGA §16-11-131 was not eviscerated by the application of OCGA § 17-10-7 (c), there was no basis to extend the holding in *King* to that subsection.

Guilty Plea; Habeas Corpus

Pride v. Kemp, S11A0159 (6/13/2011)

Appellant was indicted on charges of rape, aggravated assault and two counts of cruelty to children based upon his actions in sexually attacking his wife, who was in the process of divorcing him; stabbing her 12-14 times in the presence of their four and five-year-old sons; and then slicing her across the throat before leaving with the children. Defense counsel negotiated a beneficial plea deal in which appellant would be sentenced to 20 years but serve only 13 years in prison, but the trial judge refused to accept it. The judge stated that she would like to give appellant at least 20 years, but that she would much rather try him so she could give him the maximum. Defense

counsel then consulted with appellant, and appellant thereafter accepted the trial court’s terms and pled to the two felony counts (20 years to serve, each to run concurrently) and the cruelty to children counts (12 months each, to run concurrently).

The Court found that in this case, the judicial participation in the plea negotiations was so great as to render appellant’s plea involuntary. Appellant heard the trial court repeatedly state that it would impose a longer sentence if he went to trial and, indeed, would prefer that appellant go to trial so that the trial judge could “give [appellant] what I would really like to give him.” Appellant subsequently agreed to a plea with terms far less favorable than those originally negotiated. Accordingly, the Court reversed the habeas court’s denial of appellant’s petition.

Mental Retardation; Burden of Proof

Stripling v. State, S11A0474 (6/13/2011)

Appellant was convicted on two counts each of murder, armed robbery, and aggravated assault and was sentenced to death for the murders. After appellant filed a petition for a writ of habeas corpus, the Court ordered a trial on the question of appellant’s mental retardation. While that case was pending, the Court granted appellant’s application for interim review.

The Court first noted that Georgia law provides that a defendant will be exempt from the death penalty if he can prove beyond a reasonable doubt that he is mentally retarded. In this case, however, appellant had claimed that the burden of proof standard was unconstitutional, and the trial court had responded by allowing appellant to prove his mental retardation merely by a preponderance of the evidence. The Court noted that in so ruling, the trial court had relied on the decision in *Hill v. Schofield*, 608 F3d 1272 (11th Cir. 2010), which had since been vacated for rehearing.

The Court also explained that it had previously ruled that Georgia’s beyond a reasonable doubt standard is not unconstitutional. In *Atkins v. Virginia*, 536 U. S. 304 (2002) the Supreme Court “specifically left “to the States the task of developing appropriate ways to enforce the [federal] constitutional restriction” on executing the mentally retarded.” *Hill*, 277 Ga. at 260 (II) (B) (quoting *Atkins*, 536 U. S. at

317 (III)), including determining the standard of the burden of proof. The Court also rejected the argument that claims of mental retardation were sufficiently analogous to claims of incompetence to stand trial so that the preponderance of the evidence standard should apply to both. Therefore, the Court found that the trial court had erred in this regard.

Appellant argued that because the trial court had assigned him the burden to prove his mental retardation, he should be entitled to make the first opening statement, to present his evidence first, and to make the first and last of the closing arguments, rather than the State. However, the Court disagreed, finding that because the trial on appellant's claim of mental retardation should be regarded as a completion of the guilt/innocence phase of his original trial, the law and rules normally applicable to the guilt/innocence phase should apply.

Appellant also argued that the trial court erred by ruling that it lacked the authority to consider a possible plea because appellant's original guilt/innocence phase verdict of "guilty" had been left undisturbed by the Court's ruling in the habeas corpus appeal. The Court agreed, finding that because the current trial was a mere completion of the "guilty" verdict in the guilt/innocence phase, the trial court had the authority to accept a plea of "guilty but mentally retarded" if both parties were willing to do so and if the trial court found a factual basis to enter such a judgment.

Motions For New Trial

Manuel v. State, S11A0603 (6/13/2011)

Appellant was convicted of malice murder and possession of a firearm during the commission of a felony. Appellant argued that the trial court erred by not exercising its discretion in its review of his motion for new trial when assessing whether the verdict was contrary to the weight of the evidence. Appellant cited OCGA § 5-5-21, which gives the trial judge discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of the evidence.

In its order denying appellant's motion, the trial court stated that, "being constrained to the record, [it] is compelled to conclude that... the evidence presented at trial was sufficient to support the jury's verdict." When appellant filed a motion for reconsideration asking the court to apply the appropriate

standard, the trial court stated that while it "disagreed with the jury's verdict, it was not empowered to overturn it where... there was sufficient evidence to sustain it."

The Court found that the trial court had failed to apply the proper standard in assessing the weight of the evidence and that the trial court's statements were entirely contrary to the discretion vested in the trial judge by law. Moreover, the Court held that the trial court's use of the phrase "sufficient evidence" in particular showed that it failed to apply its discretion, as a determination of "sufficient evidence" is a matter of law.

Accordingly, the Court vacated the judgment and remanded the case for consideration of appellant's motion for new trial under the appropriate discretionary standard.

Batson; Jackson-Denno

Watkins v. State, S11A0348 (6/13/2011)

Appellant was convicted of malice murder, aggravated assault, conspiracy to commit armed robbery, and possession of a firearm during the commission of a crime. Appellant first argued that the State engaged in unconstitutional gender-based discrimination by using seven of its eight peremptory strikes against women. However, the Court found that the record showed that ten of the jurors were women and that the prosecutor actually had four strikes that he did not use. He could have used those strikes to form a jury with only eight women. Therefore, the Court found no error.

Appellant also argued that the State engaged in unconstitutional race-based discrimination by using three of its eight peremptory strikes against African-Americans. However, the Court found that the trial court had required the State to offer race-neutral reasons for striking these jurors, and the State had complied. Therefore, the Court found no error.

Appellant also argued that the trial court erred in denying his motion to suppress his statement to the police because the State failed to show that he made a knowing and voluntary waiver of his *Miranda* rights. At the *Jackson-Denno* hearing, appellant's expert witness testified that appellant's behavior during the police interview was consistent with being high on ecstasy, and that, in his opinion, appellant was too impaired to make a knowing and intelligent waiver of his rights. However, the detective who interviewed appellant testified that based on his

experience, he saw no evidence whatsoever that appellant was under the influence of alcohol or drugs. The Court held that under these circumstances, the trial court did not err because its decision was based on a preponderance of the evidence and was not clearly erroneous. Accordingly, the Court affirmed.

Spoliation of Evidence; Due Process

State v. Mussman, S10G1743 (6/13/2011)

In *State v. Mussman*, 304 Ga. App. 808 (2010), the Court of Appeals reversed the trial court's denial of Mussman's motion to suppress evidence or dismiss the indictment against him for vehicular homicide. In reaching its decision, the Court of Appeals found that the State had acted in bad faith and committed a due process violation by failing to preserve constitutionally material evidence, and found that the State had violated OCGA § 17-5-56 (a), which required governmental entities to maintain all biological material, that relate to the identity of the perpetrator of a crime.

In interpreting OCGA § 17-5-56 (a), the Court of Appeals held that the statute required that law enforcement maintain not only biological samples, but also the "container" or "source" of the sample. In this case, blood and hair were collected from the hinge of the roof of the car in which the victim died. The Court held that the plain language of the statute specified biological material only, and not the objects on which the material was found. Therefore, the Court found that the Court of Appeals had incorrectly interpreted the statute. The Court determined that the State had complied with the statute by maintaining the hair and blood samples even though it did not maintain the hinge itself.

The Court also pointed out the absurd practical ramifications of forcing law enforcement to maintain all of the objects and bodies from which samples of biological materials were taken, rather than just the samples themselves.

Further, the Court found that the Court of Appeals had erred in holding that the State violated Mussman's due process rights by failing to preserve the vehicle of the victim and his clothing. Although the Court of Appeals found that these objects contained exculpatory evidence that was constitutionally material, the Court determined that the evidence was merely potentially exculpatory.

Moreover, the Court reasoned that even if the lost evidence was exculpatory, the State still did not violate Mussman's due process rights because there was no evidence that the officers acted in bad faith. The officers merely followed the county policy of releasing evidence in vehicular homicide cases it deems to be solved. Accordingly, the Court affirmed.

Demurrers

State v. Meeks, A11A0699 (6/10/2011)

Meeks was charged by accusation with electronically furnishing obscene material to a minor, contributing to the delinquency of a minor, three counts of possession of drugs not in the original container, four counts of possession of a dangerous drug, six counts of theft by taking, and six counts of theft by deception. Meeks specially demurred to all 21 counts, and the trial court sustained the demurrer as to furnishing obscene material, contributing to delinquency, the three counts of possession of drugs not in the original container, five counts of theft by taking, and five counts of theft by deception. The State appealed on two grounds: with respect to Count 1 and Count 2 (the charges of electronically furnishing obscene material and contributing to the delinquency of a minor) the trial court erred in ruling that the accusation failed to allege the date of the alleged crimes with sufficient specificity because it failed adequately to narrow the range of dates within which they allegedly occurred; and with respect to Counts 11-14 (the charges of theft by taking) and Counts 17-20 (the charges of theft by deception) the trial court erred in ruling that these charges were "not distinguishable in any meaningful way" from Count 10 (theft by taking) or Count 16 (theft by deception) or from the other charges in each series.

In response to the first contention, the Court cited *State v. Layman*, 279 Ga. 340, 340-341 (2005), which held that "Generally, an indictment [or accusation] which fails to allege a specific date on which the crime was committed is not perfect in form and is subject to a timely special demurrer." The investigating officer testified that the victim gave him "an approximate timeframe" during which she received nude photographs from Meeks, but the officer acknowledged that "we don't know when they came in." The State gave no explanation as to why the investigating officer was

unable simply to ascertain those dates from his examination of the victim's computer, and the officer was unable to recall why he failed to do so. The Court agreed with the trial court that the State failed to demonstrate an inability to narrow the range of dates within the two and a half months alleged in the accusation. Therefore, the Court affirmed the trial court's grant of the special demurrer as to Counts 1 and 2 of the accusation.

In response to the State's second contention, the Court found that Counts 11 through 13 contained the elements of the offense of theft by taking, informed Meeks of what he should have been prepared to meet, and adequately showed him to what extent he could have pled an earlier acquittal and conviction. The record showed that each count included the allegation that it differed from the other counts of theft by taking. The Court found that the trial court therefore erred in sustaining the special demurrer as to three of the counts. The judgment was affirmed in part and reversed in part.

Jury Deliberations; Jury Charges

Brown v. State, A11A0686 (6/10/2011)

Appellant was convicted of first degree homicide by vehicle.

The Court first held that the trial court did not abuse its discretion under OCGA § 15-12-172 by removing a juror and replacing the juror with an alternate juror during jury deliberations. The Court found that the trial court had removed the juror for good cause on the basis that communications between the juror and the bailiff may have improperly influenced the juror's consideration of the case. Furthermore, both the prosecutor and defense counsel agreed to the juror's removal. The Court held that because appellant had assented to the juror's removal, he waived the right to assert error on appeal.

Appellant argued that the trial court erred by refusing his request to re-charge the jury after the juror was removed and replaced. The Court found, however, that the trial court instead instructed the jury to deliberate in accordance with the jury instructions previously given. Because it presumes that qualified jurors under oath follow the trial court's instructions, the Court held that the trial court did not need to re-charge the jury.

Appellant also argued that the trial court erred by not giving the jury the entire causation instruction that he requested. However, the Court found that appellant had waived his right to this claim of error by not objecting before the jury retired to deliberate. Moreover, the Court found that the trial court's jury instructions gave the substance of the requested causation instruction, and there was no plain error. Accordingly, the Court affirmed.

Similar Transaction Evidence; Closing Argument

Spradling v. State, A11A0264 (6/9/2011)

Appellant was convicted on one count of aggravated sexual battery, one count of aggravated sodomy, four counts of child molestation, and two counts of enticing a child for indecent purposes. His sole contention was that the trial court erred by admitting a certified copy of his prior conviction because (1) the State failed to establish a similarity between the prior crimes and current crimes, and (2) the California documents were insufficient to otherwise establish that he had been convicted of the prior crimes.

The Court first held that it was well established that in cases involving sexual offenses against children, "a certified copy of a prior conviction for a sex crime against a child may, with no other evidence, sufficiently prove that the prior crime is similar to the current crime." In this case, the certified copies submitted by the State included a California indictment that charged appellant with one count of "continuous sexual abuse" against a child from the time the child was 8 until he was 13, and three counts of "lewd and lascivious conduct" upon the same child when he was 14 and 15 years old and appellant was at least 10 years older. The certified documents further included a plea form showing that appellant pleaded no contest to each of the crimes charged and a document reflecting that appellant had been sentenced to prison for 13 years.

The Court held that these documents were sufficient to prove not only the similarity between the present crimes and the former crimes, but also to establish that appellant was, in fact, convicted of the earlier offenses. The Court declared that it was of no import that the terminology of the California convictions differed from that used in Georgia. Accordingly, the Court affirmed.

