Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 29, 2012

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THIS WEEK:

- Future Dangerousness; Closing Argument
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- Theft by Taking; Venue
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- Search & Seizure; "No Knock" Search Warrant
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Future Dangerousness; Closing Argument

Lewis v. State, A12A0517 (6/18/2012)

Appellant was convicted of aggravated assault (family violence) for hitting the victim with his "hands, fists, and/or feet" and with battery (family violence) by striking her with a curtain rod. He contended that the trial court erred in overruling his objections to the State's closing argument and while the Court agreed that the arguments were improper, it found that they did not constitute reversible error. Here, the prosecutor argued, "I have been doing this for 29 years, a long time. When I first got into this business, I had domestic abuse cases. And just as [one of the witnesses] told you, there are many, many, many of them and most of the women will recant—the vast majority." Appellant objected and was overruled. Appellant made the same objection when the prosecutor continued, "Women will come in and be battered and they will say to you, 'I don't want to press charges." The trial court made the same ruling. Appellant also objected unsuccessfully when the prosecutor argued that "people in domestic situations get killed" and when the prosecutor began to describe an elderly man's murder to illustrate that a jury will convict based on eyewitness testimony even when the police make mistakes in failing to gather evidence.

The Court stated that the prosecutor's arguments referring to her prior criminal experience, the frequency with which the victims recanted, and people being killed in domestic situations, were not supported by evidence and the trial court erred in denying appellant's objections to them. Likewise, while a prosecutor may analogize between a defendant and historical criminals such as Jesse James, *James v. State*, 265 Ga. App. 689 (2004), the prosecutor's reference to the murder of an elderly man in this case was not such an analogy and was improper. The test to determine if a trial court's failure to sustain an objection to an improper closing argument is reversible error is whether it is highly probable that the error contributed to the judgment. Here, despite the victim's testimony that she had previously lied to everyone about appellant striking her, the evidence to the contrary was strong. Furthermore, the trial court charged the jury fully as to what constituted evidence, including instructing them that evidence did not include the attorneys' opening statements or closing arguments. All things considered, including the strength of the State's evidence in this case, the Court concluded that it was highly probable that the trial court's error did not contribute to the verdicts.

Davenport v. State, A12A0146 (6/15/2012)

Appellant was convicted of rape, solicitation of sodomy, and incest. Appellant contended among other things that the trial court erred in failing to declare a mistrial after the prosecutor made improper comments during closing argument. For the reasons that follow, the Court discerned no error and affirmed. The Court noted that it is manifestly improper for a prosecutor to argue to the jury during the guilt-innocence phase of any criminal trial that if found not guilty, a defendant poses a threat of future dangerousness. However, when the defendant has not requested a mistrial, the trial court was required to act sua sponte only if there was a manifest necessity for a mistrial. And manifest necessity requires urgent circumstances and a trial court's decision whether to grant a mistrial based upon manifest necessity is entitled to great deference. The Court noted that although closing arguments were not transcribed, the State conceded that the prosecutor improperly commented on appellant's "future dangerousness." After sustaining appellant's objections to the prosecutor's remarks, the trial court instructed the jury to disregard the prosecutor's statement and confirmed that the jury understood the instruction and would follow it. Thereafter, appellant did not move for a mistrial or otherwise raise any further objection to closing argument or to the trial court's curative measures. Under these circumstances, the Court found appellant did not show that there was a manifest necessity for a mistrial, and thus, the trial court was not required to declare one sua sponte.

Search & Seizure

Martin v. State, A12A0063 (6/15/2012)

The Court of Appeals reversed the denial of appellant's motion to suppress methamphetamine evidence seized from his truck after a K-9 sniff test.

A videotape of the incident showed that at an officer spotted appellant's truck parked behind a closed funeral home with the engine running and the passenger door one-quarter open. The officer was initially concerned for the occupants' welfare—it was 19 degrees outside and neither person inside the truck appeared to be breathing—and he thought for a moment that appellant was dead. In fact, the occupants were asleep, and appellant woke up when the officer tapped on the window. Appellant then woke up the woman in the driver's seat. The officer testified that appellant and the woman appeared lethargic and sluggish, their speech was slurred, their eyes were glassed over, and they were not able to answer questions as quickly as the deputy would have expected a person to be able to do.

The officer confirmed the occupants' identities and asked what they were doing parked behind the funeral home. Appellant said that he lived in the truck, and he explained that the owner of the funeral home had given him permission to park there and rest. The deputy realized that he knew appellant had a pending charge of drug possession; he also had information "from another source" that appellant was possibly selling methamphetamine in another area of the county. But the dispatch center reported that a computer check revealed no outstanding warrants for appellant, and his license "came back clean." Yet the officer called for back-up. The officer then asked appellant and the woman if there were any narcotics in the vehicle and they responded no.

The officer then asked for permission to search; appellant replied that without a warrant he did not want the officer to search his truck. After the refusal, the officer inquired as to whether a K-9 unit was available. At about ten minutes into the stop, the officer asked the dispatch officer to contact the owner of the funeral home to confirm whether he had given appellant permission to park there. The officer then formally requested that a K-9 officer be called. Four minutes later, dispatch reported to the officer that the owner called and confirmed that appellant had permission to sleep there. The officer testified that at this point, however, appellant was not free to leave because he was continuing to investigate the possibility of the presence of narcotics. Appellant went back to sleep in his truck briefly while everyone was waiting on the K-9 officer to arrive. The K-9 officer arrived almost 53 minutes into the encounter. The dog alerted, and a subsequent search of the vehicle revealed suspected methamphetamine residue.

The Court stated that once the deputy confirmed that appellant had permission to park his truck at the funeral home, the deputy lacked an articulable suspicion or objective manifestation that appellant was, or was about to engage in criminal activity. The Court further concluded that a past arrest for possession, without more, is simply not enough to provide reasonable articulable suspicion that the person is currently in possession of narcotics. Finally, although the officer was aware of hearsay information that appellant had been selling methamphetamine, without any information about the reliability of the source of that information, it could not be considered. Thus, the Court held that the officer did not have sufficient information as a matter of law to establish reasonable suspicion that appellant was engaged in or about to be engaged in a violation of the law.

Theft by Taking; Venue

Bearden v. State, A12A0753 (6/15/2012)

Appellant was convicted of two counts of theft by taking arising from construction contracts. Appellant contended that the State failed to prove that he intended to unlawfully convert funds and failed to establish venue. The Court discerned no error and affirmed.

"A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated." OCGA § 16-8-2. Under the statute, the Court stated, the phrase "regardless of the manner in which the property is taken or appropriated" is a catch-all phrase rendering theft by taking broad enough to encompass theft by conversion, . . . or any other of the myriad and even yet-to-be-concocted schemes for depriving people of their property. The Court found that when the alleged taking occurs when a defendant fails to perform under a contract with the victim, the "real issue" is whether the defendant accepted or retained the victim's money with no intention to satisfy his obligations under the contract. Thus, the Court noted that shortly after appellant received checks for the purpose of starting construction of the victims' modular homes, appellant abandoned the respective projects without accomplishing any task towards completion of the modular homes. Significantly, despite receiving almost $55,000 for both projects, appellant failed to pay the requisite deposits to obtain the engineering plans for the modular homes. While he contended that he was not required to pay this fee since he was an "exclusive" provider

for Precision Homes, the company denied the existence of an "exclusive agreement" with appellant. Moreover, Precision Homes was not a party to the contracts and denied accepting any assignment from appellant to complete the modular home projects for the families. After informing the families that he "assigned" completion of the projects to Precision Homes, appellant refused to return the families' telephone calls. The evidence established that appellant had drawn $32,725 and $22,029 from the families' loans, but failed to construct the modular homes, and further failed to return any of their funds. Under these circumstances, the jury was authorized to infer that appellant acted with fraudulent intent and to find him guilty of theft by taking.

Appellant also contended that the State failed to prove venue in Cobb County.

In the trial of a theft by taking case, "the crime shall be considered as having been committed in any county in which the accused exercised control over the property which was the subject of the theft," OCGA § 16-8-11, and the State bears the burden of proving that the defendant exercised control over the property taken in the county where the case was prosecuted. Consequently, in the prosecution of theft by taking, venue is proper in the county where the checks were taken or deposited. The Court found that an agent testified that during her investigation, she discovered that the checks disbursed from the families' loans were sent to appellant at his mailbox located in Cobb County. Based on this evidence, the Court held that venue was sufficiently established.

Controlled Substance

Cantrell v. State, A12A0068 (6/20/2012)

Appellant was convicted of unlawful sale of a controlled substance, and unlawful distribution of a controlled substance within 1,000 feet of a "housing project," an act prohibited by OCGA § 16-13-32.5 (b). On appeal, no one disputed that the evidence adduced at trial was sufficient to sustain the former conviction, but appellant argued that the evidence was not sufficient to sustain the latter since there was no evidence that the nearby apartments were occupied by low or moderate-income families, which is necessary to prove that a housing complex is a "housing project," as that term is used in OCGA § 16-13-32.5 (b). The Court agreed that the evidence was insufficient to sustain the conviction for unlawful distribution of a controlled substance within 1,000 feet of a housing project, and therefore reversed the conviction.

For the purposes of OCGA § 16-13-32.5 (b), "housing project" means "any facilities under the jurisdiction of a housing authority which constitute single or multifamily dwelling units occupied by low and moderate-income families pursuant to Chapter 3 of Title 8." When the State prosecutes someone under OCGA § 16-13-32.5 (b), it must prove that the housing complex at issue is, in fact, a "housing project," and that requires, among other things, proof that the complex consists of dwelling units occupied by low and moderate-income families.

The record showed that appellant sold cocaine to a confidential informant and an undercover officer in front of a complex which had a sign designating that the apartments were "government housing" and that a sign posted at the apartments read "Gainesville Housing Authority." The Court stated that this testimony was sufficient to prove that the apartments were "under the jurisdiction of a housing authority" and consisted of "dwelling units." But, the Court found, it was not sufficient to prove that the apartments were occupied by low and moderate-income families. Since no other evidence appeared in the record concerning the nature of the apartments, the Court held that the evidence did not sustain the conviction under OCGA § 16-13-32.5 (b).

Collateral Order Doctrine

Braddy v. State, A12A0292 (6/20/2012)

The Court granted appellant's application for interlocutory appeal of the trial court's order denying his motion to recuse and concluded that the trial court erred in not assigning the case to another judge to rule on the motion. The record showed that appellant was charged with burglary and three counts of forgery in the first degree. After the judge to whom the case was first assigned, recused, the case was transferred to another judge. Appellant subsequently filed a motion to recuse that judge, claiming that she had ex parte conversations about his case and had voiced an opinion on what sentence she thought was appropriate for him before he ever appeared in front of her in court. Defense counsel's affidavit, filed with the motion, stated that after he became aware that the judge may have formed an opinion about the case, he requested a meeting with the judge and the district attorney. At that meeting, the judge "recited several alleged facts of the case," and expressed her opinion that appellant had lost his "moral compass" and had let people down who placed their trust in him; therefore, she was going to reject a joint recommendation of probation and was going to sentence appellant to at least three years in prison. The affidavit further stated that when counsel asked the judge whether she had learned these facts in any evidentiary hearing, the judge replied that she had not; rather, she had spoken about the case with the former judge in the case, and had spoken to the lead investigator in the case. The judge denied the motion to recuse because it was without merit.

Defense counsel requested a certificate of immediate review to appeal the order. The trial court denied the request. Defense counsel filed an application without the certificate, which the Court granted. The Court noted that as a general rule, a certificate of immediate review is a prerequisite to appellate review of a non-final order. When no certificate of immediate review is obtained, and the Court does not grant permission to appeal, the case must be dismissed. The Court found, however, that it may consider treating such orders under the collateral order doctrine. "The collateral order exception is to be applied if the order (1) resolves an issue that is 'substantially separate' from the basic issues to be decided at trial, (2) would result in the loss of an important right if review had to await final judgment, and (3) completely and conclusively decides the issue on appeal such that nothing in the underlying action can affect it." The Court found that the order in this case met this test since it concerned a matter wholly unrelated to the basic issues to be decided in the criminal case.

Regarding the motion to recuse, the Court noted that USCR 25.3 does not authorize a discretionary determination on the part of the trial judge presented with a motion and affidavit to recuse—the Rule states that another judge shall be assigned to hear the recusal motion if the motion is timely, the affidavit legally sufficient, and the facts set forth in the affidavit, when taken as true, would authorize recusal. The test is whether, assuming the truth

of the facts alleged, a reasonable person would conclude that a personal as distinguished from a judicial bias exists." Thus, the Court found that assuming all the facts as presented in the affidavit to be true, appellant's motion to recuse was legally sufficient. The Court stated that the affidavit met the criteria of USCR 25.2 because it contained definite and specific foundational facts of the trial judge's extra-judicial conduct demonstrating a purported lack of impartiality and was not stated in a conclusory fashion or as a matter of opinion. Therefore, the trial court judge was required to assign another judge to hear the motion to recuse. Because the court did not do so, the order on the recusal motion was vacated and the case remanded for disposition of the motion to recuse by a different judge.

Search & Seizure; "No Knock" Search Warrant

State v. Cash, A12A0404 (6/21/2012)

The State appealed the trial court's decision granting Melissa Cash's motion to suppress evidence seized during the execution of a "no knock" search warrant. The State contended that the trial court erred in finding that the information in the affidavit was insufficient to justify the "no knock" provision. The Court discerned no error and affirmed.

The evidence showed that a narcotics agent applied for and obtained a "no knock" search warrant to search the premises, vehicles, and curtilage of a residence. The affidavit in support of the warrant stated that the agents received information from an anonymous source that an individual was engaging in illegal drug sales at the residence and began an investigation. Surveillance was established at the residence shortly after receiving a second anonymous report of high vehicle traffic in front of the residence. However, "it met with negative results" and no drug activity was observed. The agents then searched the trash receptacle on the curb at the front of the residence and found marijuana. A magistrate issued the search warrant with the "no-knock" provision in accordance with the agent's request. In support of the "no knock" provisions of the warrant, the affidavit averred:

"It has been the experience of this affiant that subjects package the illegal narcotics in ways to be easily destroyed. Based on the affiant's knowledge, training, and experience that persons involved with illegal narcotic activity commonly have in their possession that is on their person, at their residence, firearms and ammunition, including but not limited to handguns, pistols, rifles, shotguns, and other weapons to protect and secure the proceeds from illegal narcotics and the illegal narcotics. The trash pull also revealed that [the drug suspect] is possibly in the military and therefore has knowledge on firearms and [their] use. In order to save the illegal narcotics from being destroyed and for the safety of the officers involved, the affiant would ask for a no-knock provision to be added to the search warrant."

Upon searching the residence, the agents found a small amount of marijuana in the bedroom. The return on the warrant did not reflect that any firearm was discovered at the residence. Cash was charged with misdemeanor possession of marijuana and filed a motion to suppress the evidence seized during the search. The Court stated that a "no knock" provision is permissible only when based on a neutral evaluation of each case's particular facts and circumstances, not on blanket provisions based on generalized experience. The fact that the warrant is issued in a felony drug investigation, standing alone, is insufficient to support a "no knock" provision. And an affidavit based on the general ease of destruction of drug evidence and an officer's prior experience is insufficient to support a "no-knock" provision. While the affidavit stated that the suspect had been in the military and likely had "knowledge" regarding firearms, there was no indication that the suspect or any occupant of the residence possessed a firearm.

The Court found that the affidavit and evidence failed to present any particular facts and circumstances justifying a "no-knock" provision, and instead, was based entirely upon generalizations. Further, the Court stated that the evidence did not give rise to a reasonable belief that the drug suspect had been engaged in the felony drug trade. Although the averments in the affidavit were sufficient to indicate that the drug suspect was involved in personal drug use, they were insufficient to indicate that the suspect had been selling, distributing, or trafficking drugs. Consequently, the information failed to present a reasonable ground to authorize the "no-knock" provision, and the motion to suppress was properly granted.

Insanity; Right to Self-Representation

Danenberg v. State, S12A0524 (6/25/2012)

Appellant was found guilty of malice murder. He contended that the trial court wrongfully denied him his constitutional right to represent himself at trial. The Court stated that a pre-trial unequivocal declaration of a defendant that he wishes to represent himself must be followed by a hearing at which it is determined that the defendant knowingly and intelligently waives "the traditional benefits associated with the right to counsel. The record showed that after excusing prospective jurors for lunch on the first day of voir dire, the court placed on the record its receipt of a communication from appellant in which the court was made aware of appellant's desire to dismiss his counsel. In the handwritten note addressed to the trial judge, appellant informed the court that defense counsel were presenting an insanity defense against appellant's "direct order" and that appellant "wish[ed] to dismiss them and be given a little time to hire other lawyers or utilize a public defender or proceed pro se." In a postscript, appellant notified the court that he would request "a little time and some subpoenas" if he proceeded pro se. The trial court noted that the note was dated as having been written at 10:00 a.m. that morning, one hour after jury selection had commenced. The trial court denied appellant's motion, stating that a defendant must make an unequivocal assertion of his right to self-representation prior to trial. Inasmuch as appellant's handwritten note sought to dismiss trial counsel and replace them with retained counsel, a public defender, or himself, appellant's communication was not an unequivocal assertion of his right to represent himself. Thus, the Court held that appellant was not wrongfully denied his constitutional right to represent himself.

Appellant also contended that the procedure involved in appointing an expert witness when an insanity defense is raised, violated due process because the appointed expert was an employee of the executive branch at Central State Hospital, was appointed at the suggestion of the assistant district attorney and testified, when cross-examined by the State, "as though she were another prosecution witness. . . ." The Court found that just because the expert's opinion—that appellant was not insane when he shot the victim—supported the position of

the State did not make the expert a witness for the prosecution and thus there was not violation of due process.

Hearsay Exception

Mathis v. State, S12A0126 (6/25/2012)

Appellant was convicted of malice murder and related offenses in connection with a shooting death. The evidence established that the victim was shot to death in the parking lot of the Park at Greenbriar apartment complex. The sole known eyewitness to the shooting, Larry Foster, testified that he and the victim, a friend of his who sold marijuana in the apartment parking lot, were in the parking lot on the evening of the shooting. Foster saw appellant, whom Foster knew from the neighborhood, approach the victim, and say "where is the money at?" to which the victim replied, "I don't got none." Appellant struck the victim in the face, knocking him to the ground, and then shot him. Foster further testified that co-defendant Bryant approached during the altercation and, after the victim was shot, helped appellant search the victim's clothing. After the shooting, both men drove away in a red car, which Foster testified he believed was Bryant's wife's car. Foster identified the shooters to police as "Payday" and "Ray-Ray." Trial testimony established that appellant's nickname was "Payday" and that Bryant's was "Ray-Ray." Another witness, who was acquainted with the victim, testified that she heard the gunshots from her apartment and ran outside to assist, and that, as she was tending to the victim, he mumbled the words "Ray-Ray" and "Payday." Another apartment resident testified that he heard the shots, looked out the window, and realized the victim was a close friend of his with whom he had just spent several hours. The resident also testified that the victim told him, a few days prior to the night of the shooting that "two dudes named Ray-Ray and Payday" had been threatening to kill him for selling marijuana in the Park at Greenbriar parking lot.

Appellant contended that the trial court erred in allowing the resident to testify about the victim's statement regarding threats he had received from "Ray-Ray" and "Payday" a few days before the shooting. The trial court held that the statement was admissible under the necessity exception to the rule against hearsay. To satisfy the necessity exception, the proponent must establish "a necessity for the evidence, a circumstantial guaranty of the statement's trustworthiness, and that 'the hearsay statements are more probative and revealing than other available evidence." The Court found that appellant failed to preserve this argument for review because, while Bryant's defense counsel vigorously opposed the State's request to elicit the hearsay statements, appellant's counsel failed to object, join in Bryant's objection, or argue in any way regarding this issue. Further, the requirements of the necessity exception were met, and thus the trial court did not abuse its discretion in admitting the testimony. It is undisputed that, because the victim was deceased and thus unavailable to testify, the first prong of the necessity exception was met. Regarding the second prong, the Court held that a statement is trustworthy when made to someone with whom the declarant enjoys a close personal relationship. Here, the resident testified that he and the victim were friends who saw one another almost every day and described himself as a confidante of and mentor to the victim, who often sought his advice. As to the final prong, appellant identified no alternative source of the information revealed in the statement, namely, that appellant and Bryant had been threatening the victim in the days before the shooting. Thus, the Court held the hearsay statements were properly admitted.

Future Dangerousness; Closing Argument

Holsey v. State, A12A0515 (6/21/2012)

Appellant was convicted of making a terroristic threat, simple battery, and family violence battery. Appellant contended that the trial court erred by failing to give curative instructions after he objected when, during closing argument, the prosecutor improperly: (1) argued that the jury should take the case seriously because a member of the jury panel—the person was not selected to be on the jury—had a daughter murdered by her boyfriend; and (2) referred to the "domestic violence cycle." Appellant argued that the foregoing arguments were outside the bounds of the evidence and prejudicial. He asserted that, pursuant to OCGA § 17-8-75, the court should 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.

The Court found that the prosecutor's comment regarding the member of the jury pool was arguably an improper violation of the prohibition against future dangerousness arguments. Further, the Court noted that there was no testimony admitted regarding the domestic violence cycle. However, this was subject to harmless error analysis. Thus, given the evidence, along with the trial court's instruction to the jury that closing arguments were not evidence, and the fact that the prosecutor's statements were brief and immediately objected to, the Court held the trial court's error in failing to perform its duty under OCGA § 17-8-75 was harmless.

Extraordinary Motion for a New Trial

Drane v. State, S12A0857 (6/25/2012)

Appellant was convicted of murder and sentenced to death. After several other unsuccessful appeals, appellant filed an extraordinary motion for a new trial in his original trial court, claiming that his co-defendant had confessed to a parole officer to being the sole perpetrator of the murder of the victim. The trial court denied appellant's extraordinary motion for a new trial and the Court granted appellant's application for discretionary appeal. The Court affirmed the trial court's denial of appellant's extraordinary motion for a new trial, holding that appellant's failure to demonstrate that he took diligent steps to ascertain what testimony his co-defendant might have been willing to give during the more than 17 years since trial was an independently sufficient basis to affirm.

In considering motions for new trial that are based on newly-discovered evidence, a new trial may be granted only if the defendant is able to show each of the following: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness. All six requirements must be complied with and the

failure to show one requirement is sufficient to deny a motion for a new trial. Furthermore, an extraordinary motion for a new trial, as contrasted with a motion for a new trial made within 30 days of a judgment, is not favored; consequently, a stricter rule is applied to an extraordinary motion for a new trial based on the ground of newly available evidence than to an ordinary motion on that ground.

Appellant's new evidence centered on testimony by his co-defendant, who was convicted for his role in the murder of the victim a year after appellant's conviction and approximately 17 years before appellant filed his extraordinary motion for a new trial. The co-defendant testified in the hearing held in the trial court that he revealed his current version of events for the first time in 2010, approximately 15 years after appellant's conviction, to his parole officer. The co-defendant testified that on the night of the murder, after appellant returned from raping the victim in the woods, appellant showed the co-defendant a knife and asked the co-defendant how he would like to have been stabbed with it. Appellant argued this suggests that his co-defendant killed the victim because he misunderstood appellant to have been claiming that the victim had been planning to stab the co-defendant. The co-defendant also testified that he was the one who shot the victim and the one who repeatedly cut the victim's throat, in an effort to sever her head and hands to make identification of her body more difficult rather than, as the State had contended at appellant's trial, in an effort to hasten her death. The Court stated that it was noteworthy that the testimony from the co-defendant in appellant's extraordinary motion for a new trial was inconsistent with the co-defendant's pretrial statements to investigators indicating that the crimes were a racially-motivated rape and murder, because the co-defendant's new version for the first time suggests that the co-defendant shot the victim only because he misunderstood appellant to have said that the victim had been planning to stab the co-defendant.

The trial court concluded that appellant failed to satisfy the requirements that the new evidence would probably have produced a different verdict in the guilt/innocence phase if it had been presented at trial. Particularly in light of the discretion afforded to the trial court in its assessment of appellant's new testimony from the co-defendant, which the trial court observed live in the courtroom, the Court concluded that the trial court did not abuse its discretion in finding that the new testimony would not have probably produced a different result in the *guilt/innocence phase*. The Court found that its review of the co-defendant's testimony in appellant's extraordinary motion hearing and the original trial testimony suggested that the trial court would not have abused its discretion if it had found that the co-defendant's new testimony would not have probably changed the jury's *sentencing verdict* if it had been presented at appellant's trial. However, the Court noted, its review of the trial court's order strongly suggested that the trial court believed that it was not authorized to consider granting a new trial solely on the issue of appellant's *sentence* for the murder, and the parties did not argue otherwise. This, Court found that, to the extent that the trial court concluded that it was not empowered to grant a new trial solely on the question of appellant's *sentence* for the murder, was error. Were there not an independently-sufficient basis for the Court to affirm the trial court's complete denial of appellant's extraordinary motion for a new trial, the Court stated that it would remand the case to the trial court for a clear finding on the materiality of the co-defendant's testimony with regard to the jury's sentencing verdict. However, as discussed below, the Court found such an independent basis.

The defendant must also show that he or she has been diligent in presenting his or her extraordinary motion for a new trial. Appellant presented evidence from which the trial court might reasonably have concluded that appellant diligently sought his co-defendant's testimony at the time of his trial but that his co-defendant's attorney would not allow him to testify on appellant's behalf at appellant's trial because the co-defendant was still facing trial and a potential death sentence himself. This excuse was the only reason appellant offered for not obtaining co-defendant's testimony, testimony that appellant claimed he believed from the start would be helpful to him. This excuse was eliminated a year after appellant's trial, however, when his co-defendant was convicted and received a life sentence. Appellant showed absolutely nothing to demonstrate that he took diligent steps to ascertain what testimony his co-defendant might have been willing to give during the more than 17 years since his co-defendant's trial. The statutes controlling extraordinary motions for new trial based on newly discovered evidence require a defendant to act without delay in bringing such a motion. OCGA §§ 5-5-23 and 5-5-41. The obvious reason for this requirement is that litigation must come to an end. Furthermore, the Court noted, the diligence requirement ensures that cases are litigated when the evidence is more readily available to both the defendant and the State, which fosters the truth-seeking process. The trial court's order did not clearly address whether appellant had failed to present evidence excusing his extremely long delay in filing his extraordinary motion for a new trial. However, the Court concluded, it was not necessary to remand the case for any findings of fact on this issue, because appellant presented no evidence at all in this regard. Accordingly, under the right for any reason principle, the Court affirmed the trial court's denial of appellant's motion as to appellant's guilt, and the Court also affirmed the denial of appellant's motion as to his sentence.

Severance; Photo Line Up

Green v. State, S12A0853 (6/25/2012)

Appellant was convicted of the malice and felony murder of one victim, a separate charge of aggravated assault against the same victim, and the rape and aggravated assault of a second victim.

The evidence showed that, in July of 2007, a witness saw appellant on top of the first victim in a filthy shed and was told to keep going. Shortly thereafter, appellant exited the shed, spoke with the witness, and started to run away. The witness checked on the victim, found her almost completely unclothed, realized that she was dead and later identified appellant in a photographic lineup and in court. The victim died of manual strangulation with multiple sharp force and blunt force injuries, and appellant's DNA was found on the genital, rectal, and buttocks areas of her body. Appellant admitted that he had consensual sex with this victim on several occasions.

In September of 2007, appellant grabbed the second victim, pushed her through a fence hole and onto some steps, held her neck with his hand to the point that she could not breathe, raped her, and fled. The second victim noticed and later identified appellant's skull's head belt buckle, which was found in

his bedroom and identified as his by his sister. Appellant's DNA was recovered in semen from this victims vaginal and rectal areas, and she identified him in court.

Appellant contended that the trial court erred in denying his motion to sever the offenses committed in July 2007 from those occurring in September 2007, arguing that the offenses were not sufficiently similar. The Court stated that if the charges are joined solely because they are of the same or similar character, a defendant has an absolute right to sever. However, offenses have not been joined solely because they are of the same or similar character when evidence of one offense can be admitted upon the trial of another, i.e., when they are so strikingly similar as to evidence a common motive, plan, scheme or bent of mind. To be admissible, an independent act does not have to mirror every detail of the crime charged, and may reflect only a portion of the acts that establish the crimes being tried. Instead of focusing on the similarities between the two incidents, appellant improperly focused on the differences, including the absence of a severe injury resulting in death in one incident and the fact that the other incident may have begun with consensual sex. Here, both incidents involved homeless victims with histories of prostitution and drug abuse, occurred within a short distance of one another, late at night less than three months apart, and had the same modus operandi of strangulation coupled with sexual activity in unpleasant locations. The trial court properly found not only that each incident would be admissible as a similar transaction upon trial of the other, but also that the trier of fact in this case would be able to judge each individual offense fairly and intelligently. Accordingly, the trial court did not abuse its discretion in denying the motion for severance.

Appellant also contended that the trial court erred by denying a motion to suppress identification testimony as based upon impermissibly suggestive photographic arrays which resulted in misidentifications. Testimony concerning a pre-trial identification of a defendant should be suppressed if the identification procedure was impermissibly suggestive and, under the totality of the circumstances, the suggestiveness gave rise to a substantial likelihood of misidentification. The taint which renders an identification procedure impermissibly suggestive must come from the method used in the identification procedure. An identification procedure is impermissibly suggestive when it leads the witness to an all but inevitable identification of the defendant as the perpetrator, or is the equivalent of the authorities telling the witness, "this is our suspect." Appellant argued that his photo in two different lineups shown to the witness and the second victim was more of a close-up shot and had more detail than the other photos, thereby causing both of those witnesses to select appellant. However, the Court stated, slight differences in the size, shading, or clarity of photographs used in an identification lineup will not render the lineup impermissibly suggestive. The Court concluded that the differences that appellant pointed out were indeed slight, that his photograph was not the only one in each array with as much clarity, and that appellant failed to show how the differences would have rendered either array unduly suggestive. Accordingly, the trial court was authorized to find the photographic identification procedures not to be impermissibly suggestive and therefore did not abuse its discretion by denying the motion to suppress.