

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 8, 2012

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THIS WEEK:

- **Jury Charges; Mere Presence**
- **Appeals; Due Process**
- **Expert Witness; Hearsay**
- **Voluntary Manslaughter; Jury Charges**
- **Appeals; Due Process**
- **Merger**
- **Guilty Plea; Sentencing**

Jury Charges; Mere Presence

Flowers v. State, S12A0155 (5/29/2012)

Appellant was convicted for murder and for possession of a firearm during the commission of a crime. The evidence showed that the police, who were responding to a 911 call reporting a possible death, arrived at a vacant house, where they discovered the victim's dead body, still bleeding from several gunshot wounds. Waller testified that he made the anonymous 911 call which led officers to the scene. Waller said the day after the shooting, he flagged down a police officer and told the officer that he had information about the victim's murder. Waller testified that in the early morning hours, he and appellant were using drugs. Appellant told Waller that he believed the victim was trying to "set [him] up." When appellant began brandishing a gun and acting "weird," Waller told appellant to leave. At around 5:30 a.m. that same morning, Waller left his apartment intending to sell drugs in the neighborhood. As he was walking up the street, he saw a man running from the vacant house. Based on his conversation with the man, Waller entered the house and discovered

appellant and another man holding the crying victim at gunpoint and arguing with the victim over a drug debt. Waller said he pleaded with appellant to spare the victim's life by offering money and drugs, but appellant still shot the victim. After seeing appellant shoot the victim, Waller said he ran down the stairs, exited the back door of the house. According to the testimony of the medical examiner, the victim died from gunshot wounds to his head and torso.

Appellant contended the trial court erred when it refused to give his requested charge on mere presence. The Court disagreed since the evidence at trial showed that appellant pointed a gun at the victim and shot him during an argument over a drug debt. There was no evidence that appellant was merely present when the victim was shot. Since the uncontroverted evidence showed that appellant took an active part in the victim's death, there was no basis for the trial court to give a charge on mere presence. Therefore, the Court held this enumeration of error could not be sustained.

Appeals; Due Process

Whitaker v. State, S12A0640 (5/29/2012)

Appellant was found guilty of felony murder and cruelty to children. Appellant appealed after the denial of a motion for new trial on February 8, 2000. However, over ten years passed before the first hearing on this motion took place. Appellant asserted that he was denied his constitutional right to due process because the long delay prevented him from presenting an adequate appeal. The Court noted that substantial delays experienced during the criminal appellate process implicate due process rights and conducted an analysis based on the four speedy trial factors set forth in *Barker v. Wingo*, 407 U. S. 514

(1972), which are “length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”

Appellant contended that his appeal was prejudiced by the long delay because he was unable to assert ineffective assistance of counsel claims due to trial counsel being unable to remember details of the case. He asserted that trial counsel was ineffective by failing to raise a preexisting medical condition of the victim, by failing to object to the use of a Styrofoam head by the prosecutor to reenact the State’s version of what occurred, by failing to request a polygraph examination for appellant, and by failing to call witnesses who would testify that the victim’s mother physically abused the victim.

However, the Court found, a thorough review of the transcript of the hearing on the motion for new trial revealed that trial counsel remembered sufficient details of the case to reply to appellant’s assertions of ineffectiveness. With regard to the prior medical condition, trial counsel testified at the motion for new trial hearing that appellant’s own medical expert agreed with the forensic pathologist who testified at trial that the cause of the victim’s death was a homicide and not some alleged mysterious condition of the victim. Moreover, appellant had not put forth any evidence of what type of medical condition the victim had and how that medical condition would have contributed to the victim’s severe, multiple injuries. With regard to the Styrofoam head, trial counsel testified that he believed that the use of the Styrofoam head for demonstrative purposes was not objectionable, and, in any event, he testified that his strategy was not to object to every little thing but only to that which he felt was of great import, and, in his view, the use of a Styrofoam head did not meet that standard. Additionally, trial counsel testified that the reason for not administering a polygraph is that he believed appellant would fail and counsel would have had to turn the results over to the State during the discovery process. Finally, as to failing to call certain witnesses, any evidence that the mother abused the child in the past would have been irrelevant because the injuries were acute and appellant was the only adult present during the time the relevant injuries were administered. Moreover, appellant failed to show that the witnesses were available, the substance of the testimony, and whether the testimony would

have been admissible. Therefore, because the errors that appellant claimed he would raise on appeal were meritless, the Court held appellant was not prejudiced by the delay. Accordingly, appellant’s constitutional right to due process was not violated

Expert Witness; Hearsay

Sharpe v. State, S12A0677 (5/29/2012)

Appellant was convicted of malice murder and felony murder while in the commission of arson. Appellant alleged trial court erred in allowing an expert witness to express an opinion regarding an ultimate issue in the case, and in excluding exculpatory evidence. The Court noted that generally witnesses are prohibited from expressing opinions on an ultimate issue where jurors can come to their own conclusion from factors within their understanding. However, the Court stated that here the medical examiner based his opinions on his specific expertise and training as a pathologist and on evidence presented to him by law enforcement regarding the fire. Testifying that it was part of his job to determine both the cause and manner of death, the witness clarified that his classification of the manner of death as a homicide was limited to the medical aspect for the autopsy report and was not a legal charge. As the medical examiner’s testimony regarding the manner of death did not improperly invade the province of the jury on the ultimate issue of whether the deaths were intentional killings or accidents, the trial court did not err in allowing him to explain his classification. Further, the Court did not agree with appellant’s unsupported assertion that simply by using the arson investigator’s testimony as a basis for his conclusion, the medical examiner improperly “bolstered” the investigator’s opinion. The Court concluded that even had the trial court erred in permitting this testimony, such error was harmless where the plain and overwhelming inference to be drawn from the evidence presented at trial was that the fire was intentionally set and there was no evidence presented to the contrary. Appellant additionally complained that the trial court erroneously excluded exculpatory evidence when it refused to admit a recording of a 911 call appellant made to report the fire. However, appellant chose not to testify at trial and was not subject to cross-examination, thus the trial court did not err in holding that

the 911 call was a self-serving declaration and inadmissible hearsay. Although appellant argued that the 911 call could have been admitted under the res gestae exception to hearsay pursuant to OCGA § 24-3-3, a determination of admissibility under this exception is left to the trial court’s sound discretion.

Voluntary Manslaughter; Jury Charges

Scott v. State, (5/29/2012) S12A0764

Appellant was convicted of felony murder, aggravated assault and possession of a firearm during the commission of a crime in connection with the shooting death of the boyfriend of appellant’s sister. Appellant contended the trial court erred by excluding evidence that the victim had been molesting appellant’s niece and refusing to charge the jury on the lesser included offense of voluntary manslaughter. For the reasons that follow, the Court reversed.

Appellant contended the trial court erred by refusing to charge the jury on the lesser included offense of voluntary manslaughter. Voluntary manslaughter occurs when one kills another human being under circumstances which would otherwise be murder, if the killer “acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person.” OCGA § 16-5-2 (a). Further, the Court noted that “on the trial of a murder case, if there be any evidence, however slight, as to whether the offense is murder or voluntary manslaughter, instruction as to the law of both offenses should be given the jury.”

In this case, appellant proffered evidence supporting an inference that he shot the victim in the heat of passion during a confrontation about the victim’s molestation of appellant’s niece. Appellant testified he learned of the molestation one or two hours before the shooting. Immediately prior to the shooting, appellant’s sister, when informed about the molestation, stated she did not believe her daughter. Appellant stated he then retrieved his gun for his own protection and went outside to talk to the victim. Appellant asked the victim why he did it, and the victim taunted him by saying “she’s my b — —, I can do whatever I want.” At that point, appellant stated he “lost it,” “blacked out,” and started shooting. In light of this testimony, the Court concluded the slight evidence necessary to show provocation to sup-

port a charge on voluntary manslaughter was present. The Court noted that it adhered to the view that “words alone, regardless of the degree of their insulting nature, will not in any case justify the excitement of passion so as to reduce the crime from murder to manslaughter,” but here, slight evidence existed from which a jury could conclude the victim’s words in connection with his conduct served as the “serious provocation sufficient to excite . . . a sudden, violent and irresistible passion.” Accordingly, the Court held it was error not to instruct the jury on the lesser included charge of voluntary manslaughter and under the circumstances of this case, the trial court’s ruling that appellant could not introduce evidence relevant to prove provocation was harmful error as well.

Appeals; Due Process

Glover v. State, S12A0682 (5/29/2012)

Appellant was found guilty of malice murder. A motion for new trial was denied almost eleven years after it was filed, and appellant contended that he was denied due process because a hearing on the motion for new trial was not held for over ten years after it was filed even though he asserted his rights during that period of time.

The Court stated that it recognized that substantial delays experienced during the criminal appellate process implicate due process rights. Thus, the Court assessed the claim under the four factor analysis utilized for speedy trial claims set forth in *Barker v. Wingo*, 407 U. S. 514 (1972), which balances the length of the delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.

The Court stated that it agreed with the trial court’s determination that the length of the delay in appellant’s post-conviction review was excessive. With regard to the second *Barker* factor, “[t]he reason for the delay is unclear from the record” and, as the trial court held, “where the record reveals no reason for delay, such delay will be held attributable to the negligence of the State.” Nearly five years after the motion for new trial was filed, appellant wrote two letters to the clerk of the trial court inquiring as to the status of his case. After almost three more years passed, appellant inquired of the clerk whether a hearing on the motion for new trial had been scheduled. After another two years, appellant requested and was

appointed new appellate counsel. Thus, as to the third *Barker* factor, the record reflected that appellant eventually took some steps to obtain a swifter resolution of the motion for new trial. However, appellant failed to show that he asserted his appellate rights for much of the more than 10-year delay. Nor did he assert that the delay violated his due process rights until new counsel raised the issue in the amended motion for new trial. Accordingly, the Court found that appellant’s failure to vigorously assert his appellate rights for several years weighed against him

Further, the Court stated that appellant failed to show that he was prejudiced by the delay, and that considering all the *Barker* factors together, his due process claim must fail. Appellant provided no evidence of prejudice arising from the delay and did not advance any argument that the appeal was hampered by the delay in any way. Instead, he argued only that the extraordinary delay should raise a presumption of prejudice to his appeal, as well as to his ability to mount a defense on any retrial. However, in determining whether an appellate delay violates due process, prejudice, “unlike in the speedy trial context, is not presumed but must be shown.” Hence, the Court found that appellant failed to offer the specific evidence required to show that the delay prejudiced his appeal or that the result of the appeal would have been different but for the delay. Weighing all four *Barker* factors together, the Court concluded that the delay in resolving the motion for new trial did not violate appellant’s right to due process but noted it did not approve of the delay occasioned here.

Merger

Brockington v. State, A12A0465 (5/31/2012)

Appellant was convicted of aggravated assault and aggravated battery. He contended that the trial court erred in imposing separate sentences for each count, arguing that the offenses merged as a matter of law and fact. The Court found no error and affirmed the convictions.

Under OCGA § 16-1-7 (a) (1), when the same conduct establishes the commission of more than one crime, a defendant may be prosecuted for both crimes, but cannot be convicted of more than one crime if one crime is included in the other. For purposes of merger, one crime is included in another if either it is established by proof of the same or less than

all the facts or a less culpable mental state than is required to establish the commission of the other crime charged or if the included crime differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person or a lesser kind of culpability suffices to establish its commission. Offenses which require proof of different facts do not merge.

The Court found that in this case the offenses required proof of different facts, which the State presented. The State presented evidence that appellant assaulted the victim by striking her on her leg with a hammer and rendering her unable to walk, and also presented evidence that afterward, as the victim crawled up the stairs to the landing, he struck her on her head with such force that he crushed her skull. Because each offense required proof of a fact that the other offense did not, the crimes did not merge legally or factually.

Appellant also argued that because the State alleged that he hit the victim with a hammer first on her leg and then on her head, the blows constituted a single transaction for which he could be sentenced only once. The Court noted that multiple blows during the commission of a crime may constitute a single offense and not separate crimes. However, the Court stated that appellant’s offenses did not constitute a single attack, but were separate incidents in separate locations against different parts of the victim’s body. After he hit the victim in the leg with a hammer and rendered her disabled, he had completed the aggravated assault. He then waited until the victim had crawled up the stairs to the landing to hit her in the head with a hammer and crush her skull. Since the evidence authorized a finding that appellant committed an initial aggravated assault, then after a deliberate interval, committed an aggravated battery in a different location of the house and on a different part of the victim’s body, the Court held that separate judgments of conviction and sentences for each offense were authorized.

Guilty Plea; Sentencing

Benford v. State, A12A0665 (6/1/2012)

Appellant was arrested and charged with possession of powder cocaine with intent to distribute. Appellant was on probation on another charge of trafficking in cocaine at the time of his arrest. Appellant initially entered a

plea of not guilty in this case, but he withdrew that plea and entered a plea of guilty. The trial judge accepted appellant's plea and held a sentencing hearing. The State requested that appellant be sentenced to 30 years, to serve a minimum of 12, with a cap of 15 years of jail time. Appellant requested that he be sentenced to thirty years, with five to serve, and he presented testimony from a long-time friend and from a co-worker in support of his request for reduced jail time. After considering this testimony, the trial court sentenced appellant to 30 years, with 15 to serve, based on appellant's past criminal history and the seriousness of the charge. The trial court denied a Motion to Reduce/Modify Sentence filed by appellant. He then, acting pro se, filed an appeal. The Court affirmed.

Appellant argued that the trial court erred in failing to conduct any pre-sentence investigation prior to sentencing him. He asserted that he was harmed because "the court had no positive evidence that would have at least offered [him] a chance of a more lenient sentence." But the record showed that the trial court conducted a hearing prior to sentencing, in which the court considered not only appellant's prior criminal history (two prior drug convictions, two prior burglary convictions and a prior trafficking conviction), but also heard testimony from two defense witnesses as to appellant's work skills and work history, his family connections and responsibilities, as well as his church involvement and charitable work. And in sentencing appellant, the trial judge acknowledged that appellant had "accomplished a great deal in your life that's positive. You have friends that will come and speak for you and, you know, given our circumstance, that's quite surprising. And it really speaks well of you, you know. And you've come today and you've expressed remorse, and that's also positive." The trial court also acknowledged that appellant acted based upon what he thought were "compelling, economic reasons" in committing the crime. Accordingly, the Court stated, it was clear that the trial court considered positive evidence presented by appellant and weighed it with evidence of appellant's prior criminal history and the seriousness of the charge before pronouncing the sentence in this case. Thus, this enumeration was without merit.

Appellant also asserted that the trial court erred in failing to consider the arguments he raised in his motion with regard to his family

connections, his employment, his membership and contributions to the community and the church, the nature of the crime, and his age without, at least, holding a hearing on his motion. But the Court noted that the trial court considered these factors in accepting his plea and in issuing the original sentence in this case. Moreover, the Court held that since appellant's sentence was within the statutory limitations, no modification of the sentence was mandated; therefore, no hearing was required.