Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 11, 2014

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THIS WEEK:

Out-of-time Appeal

Ware v. State, A14A0633 (6/20/14)

Appellant pled guilty to kidnapping and aggravated assault in August 2004. He then filed a timely, albeit pro se, notice of appeal in which he asserted ineffective assistance of counsel in the trial court and asked for an appointed appellate attorney because he was indigent. The superior court clerk's office did not transmit the notice of appeal and record to the Court of Appeals. Over the next few years, appellant filed two out-of-time motions for an appeal. This case involved the denial of the second motion.

The Court found that although the 2004 notice of appeal may not have been perfect in form, it sufficiently identified the judgment appealed from and should have been acted upon. Additionally, there was no indication in the record that the appeal was dismissed or withdrawn. Citing *Wetherington v. State*, 295 Ga. 172 (2014), the Court found that the timely direct appeal that was never acted upon by the trial court clerk remains pending. That pending appeal acted as a supersedeas, depriving the trial court of the power to affect the judgment appealed. The trial court therefore lacked jurisdiction to rule on appellant's motion for an out-of-time appeal because it involves the same judgment of conviction that was challenged in his September 2, 2004 notice of appeal. Therefore, the Court reversed the trial court's order denying appellant's motion for an out-of-time appeal because it was a mere nullity. It also directed the trial court that, upon receipt of the remittitur, it should rule upon appellant's 2004 request for appointed appellate counsel, order the defendant to serve the notice of appeal upon the State, and require the clerk's office to act upon the 2004 notice of appeal.

Discovery; Continuances

Calhoun v. State, A14A0154 (6/23/14)

Appellant was convicted of two counts of aggravated child molestation, two counts of child molestation, and one count each of aggravated sexual battery, false imprisonment, and enticing a child for indecent purposes relating to two girls. The evidence showed that the crimes came to light during Halloween when appellant made one victim give him oral sex and she threw up on her Halloween costume. The victim's mother called the police. A chemical test of the vomit on the Halloween costume revealed the presence of seminal fluid, but did not show spermatozoa that would be eligible for DNA testing.

Appellant argued that the trial court erred in denying his motion for a continuance after the State announced, on the eve of trial, that it would be admitting the results of the seminal fluid test the following day. Appellant argued that he had "no opportunity" to find rebuttal evidence and witnesses. The Court

stated that the grant or denial of a motion for continuance is within the sound discretion of the trial court, and will not be disturbed absent a showing of abuse of that discretion. Mere shortness of time for preparation does not in itself show a denial of the rights of the accused. Harmful error must also be shown.

The record showed that counsel for the State informed the trial court that although he had requested the testing earlier, the GBI initially told him it did not accept vomit for DNA testing. He later learned that he could request seminal fluid testing. He did so, but only learned that the test had been performed the day prior to trial, and he then notified defense counsel. The test results did not post until the day of trial. The trial court asked defense counsel how a continuance would benefit her client given appellant's incriminating admissions to police. Defense counsel responded that had she known of the seminal fluid report earlier, she could have investigated other possible perpetrators by interviewing people in the community. The trial court directed the State's counsel not to mention the test results in opening statements that day. The trial court also decided that, because the test results would not be introduced until the following day, the three investigators in defense counsel's office would have a day and an evening to interview witnesses from the crime lab and the community and to gather evidence.

The Court noted that as an initial matter, there was no contention that the State was acting in bad faith. Further, the record showed that at a pretrial hearing on April 17, 2012, well before trial on July 16-18, 2012, the State's attorney had stated that he was seeking DNA testing. The trial court prohibited the State from mentioning those results in its opening statement, thus giving the defense a day for investigation and one day has been held to be a reasonable opportunity to investigate and interview witnesses.

Finally, the Court found, there was no showing of harm. Appellant was required to specifically identify what evidence or witnesses he would have put forth in his defense if his counsel had been given more time to prepare; speculation and conjecture are not enough. At the motion for new trial hearing, appellant presented no evidence or testimony implicating a different perpetrator. His trial counsel testified, "I don't know if—how the expert [on the semen test] would actually have been helpful in this case, but it could have been." Appellant's new counsel at the hearing also stated that he had no expert to rebut the State's evidence. Accordingly, the Court concluded, the trial court did not abuse its discretion in denying the motion for continuance.

Voir Dire

Davis v. State, A14A0512 (6/2414)

Appellant was convicted of two counts of child molestation. He argued that the trial court erred by not allowing him to ask potential jurors a question concerning whether testimony from a child witness would impair their judgment in the case. The record showed that appellant, who appeared at trial pro se, asked the prospective jurors the following: "Next question I want to ask is that the testimony—from hearing testimony from a child, because I'm quite sure it's going to be children testifying, would that impair your judgment against myself, the defendant, or make you feel like that you should go towards the State, or would that impair your judgment in this case?" The trial court responded, "Well, that's kind of prejudging the evidence" and told appellant to ask another question.

The Court noted that O.C.G.A. § 15-12-133 provides "[C]ounsel for either party shall have the right to inquire of the individual prospective jurors examined touching any matter or thing which would illustrate any interest of the prospective juror in the case, including any opinion as to which party ought to prevail, the relationship or acquaintance of the prospective juror with the parties or counsel therefor, *any fact or circumstance indicating any inclination, leaning, or bias which the prospective juror might have respecting the subject matter of the action* or the counsel or parties thereto, and the religious, social, and fraternal connections of the prospective juror." (Emphasis supplied). The line between permissible inquiry into "prejudice" (a juror's fixed opinion that a certain result should automatically follow from some fact, regardless of other facts or legal instructions) and impermissible questions of "pre-judgment" (speculation about or commitment to the appropriate result based on hypothesized facts) can be hazy. And decisions as to what, if any, facts of a particular criminal case beyond the charges and sentencing options qualify as "critical" in terms of risking juror partiality can be difficult and context-specific.

Here, the Court found, based upon the reading of the indictment and the general voir questions posed to the jury by both the trial court and the State, the trial court did not abuse its broad discretion by denying appellant's' question seeking to expose bias based upon a child testifying. Specifically, the Court found, precluding this question did not create a real risk that juror partiality driven by a fact at issue would not otherwise be identified in voir dire.

Motions to Withdraw Guilty Pleas; Void Sentences

Gholston v. State, A14A0405 (6/27/14)

In January of 2010, appellant pled guilty to armed robbery and robbery by force, and the trial court sentenced him to two consecutive 15-year sentences, with the initial 15 years to be served in confinement and the remaining 15 years to be served on probation. In January, 2011, appellant filed a pro se "Extraordinary Motion to Withdraw Guilty Plea," contending that he should be permitted to withdraw his plea because his indictment failed to allege the essential elements of the crimes, including venue, and because the two crimes should have merged for purposes of sentencing. The trial court dismissed the motion as untimely. The Court agreed.

Appellant's motion was untimely, whether construed as a motion to withdraw his guilty plea or as a motion in arrest of judgment. Both sorts of motions must be filed within the same term of court at which the guilty plea or judgment being challenged was entered. Appellant's guilty plea and the resulting judgment were entered in January 2010, during the December 2009 term of court. A new term of court began on Monday, February 1, 2010. Hence, appellant's January 2011 motion was filed outside the term of court in which his plea and the resulting judgment had been entered, depriving the trial court of jurisdiction to consider it.

Nevertheless, appellant argued, his motion was timely because he was challenging his sentence as void, and a void sentence can be challenged at any time. But, the Court noted, appellant did not raise a proper void sentence claim. Rather, he claimed that

the indictment failed to allege the essential elements of the crime, including venue, and such a claim relates to the validity of his conviction, not his sentence. Likewise, his claim that his convictions for armed robbery and robbery by force should have merged was a claim challenging his convictions and not a claim that his resulting sentence was void. Furthermore, a sentence is not void if it falls within the statutory range of punishment, which appellant's sentence did. Therefore, the Court concluded, the trial court lacked jurisdiction to consider appellant's untimely "Extraordinary Motion to Withdraw Guilty Plea" and therefore, properly dismissed the motion.

Search & Seizure; Involuntary Mental Health Examinations

Boatright v. State, A14A0068 (6/27/14)

Appellant was convicted by a jury on two counts of obstruction of a police officer. The evidence showed that that during the early morning hours of his birthday, appellant was at home drinking alcohol and feeling depressed. He telephoned the police to request a person to speak with about his problems and/or a resource number to call, but was advised that no one was available. The police dispatcher reported appellant's call to the lieutenant on duty and relayed a "possible suicidal person at [appellant's] residence." Based upon that information, the lieutenant set up a temporary "command post" in appellant's neighborhood and assigned several other officers, as well as emergency medical personnel, to this post.

The lieutenant then telephoned appellant from the command post and had a "fairly lengthy" conversation with him. The lieutenant believed that appellant was "severely depressed" and having suicidal thoughts, and claimed that appellant wanted the lieutenant to "put him out of his misery." The lieutenant deduced from appellant's manner that he was "familiar with the concept of suicide by cop" and thus became concerned. The lieutenant's stated goal during the conversation was to "say anything" necessary to develop trust and rapport, so as to draw appellant out of his home and take him into custody for an emergency mental-health examination.

Eventually, appellant agreed to go outside to speak to the lieutenant on the condition that the lieutenant came to his home alone. Appellant walked down his driveway as the lieutenant drove up and, after approaching him alone and confirming that he did not have any visible weapons, the lieutenant immediately signaled for the other officers to take appellant into custody. The other officers quickly exited the lieutenant's vehicle and immediately placed appellant into handcuffs. Apart from repeatedly calling the lieutenant a liar, appellant was, by all accounts, calm and cooperative upon the lieutenant and the other officers' arrival at his residence. Appellant made no statements about hurting himself or others and it was undisputed that he had neither committed, nor was he suspected of committing, a crime. Appellant, though passively resistant, was placed in a patrol car to be taken to the hospital. However, during the ride, one of the two escorting officers noticed a flashlight in appellant's hand. The officer stopped the vehicle, got appellant out, and began to search him again. Appellant then resisted getting back in the vehicle and in doing so, he kicked each of the two escorting officers.

The Court stated that any seizure of a person—even the taking of a person into civil custody—is governed by the Fourth Amendment and Article I, Section I, Paragraph XIII of the Georgia Constitution. And specifically, when an officer takes a person into custody for an involuntary mental-health examination, the seizure must be supported by probable cause. In this context, probable cause exists only if there are reasonable grounds for believing that the person seized is subject to seizure under the governing legal standard. In Georgia, the governing legal standard for the lawful taking of an individual into custody for the purposes of receiving an involuntary mental-health examination is delineated in O.C.G.A. § 37-3-40 et seq. Specifically, O.C.G.A. § 37-3-41 requires a peace officer to act pursuant to (1) a physician's certificate stating that the physician "has personally examined [the] person within the preceding 48 hours and found that … [the] person appears to be a mentally ill person requiring involuntary treatment," or (2) a court order based upon either the above-referenced physician's certificate or "upon the affidavits of at least two persons who attest that, within the preceding 48 hours, they have seen the person to be taken into custody and … have reason to believe such person is a mentally ill person requiring involuntary treatment." In the absence of either of the foregoing, O.C.G.A. § 37-3-42(a) permits a peace officer to seize an individual for an involuntary mental-health examination "if (1) the person is committing a penal offense, and (2) the peace officer has probable cause for believing that the person is a mentally ill person requiring involuntary treatment."

Given the applicable statutory framework, the Court concluded that the officers were not acting within the scope of their lawful authority when they took appellant into custody. They did not have a physician's certificate or a court order as required by O.C.G.A. § 37-3-41, and it was undisputed that appellant had not committed, nor was he suspected of committing, a penal offense as mandated by O.C.G.A. § 37-3-42(a). Thus, despite the purest motives of the law-enforcement officers, appellant was not lawfully detained. Consequently, he was authorized to resist those attempting to take him into custody with all force necessary for that purpose, rendering insufficient the evidence against him to sustain his convictions on obstruction of a law-enforcement officer.

Expert Testimony; Fingerprint Evidence

Jarnigan v. State, S14A0190; S14A0191 (6/30/14)

Appellant and his co-defendant were convicted of murder and other related crimes. Appellant argued that the trial court improperly admitted hearsay testimony when it allowed Taylor, a GBI expert fingerprint examiner, to testify that another fingerprint examiner had "verified" her work. Before Taylor said that another examiner had "verified" her work, she explained that GBI fingerprint examiners use a methodology known as "ACE-V," a term that derives from the four steps of the process, "analysis, comparison, evaluation, and verification." The Court noted that other state courts and evidence treatises have opined that testimony about the verification of a fingerprint comparison is not inadmissible hearsay to the extent that the verification is part of a standard and accepted methodology and thereby forms a basis for the opinion of the testifying fingerprint examiner. But, the Court stated, it did not need to decide the full extent to which testimony about the verification process is permissible. Here,

appellant objected when Taylor said that another examiner "verified" her work, but he made no hearsay objection when Taylor later explained that the other examiner had employed the same examination process, and he made no hearsay objection when she implied that the other examiner had reached the same conclusions. Thus, the Court stated, it was satisfied that the testimony to which Davis objected—testimony merely about the fact of "verification," not about the details of the verification process or the independent conclusions of the verifying examiner—was properly admissible to explain the basis for the opinion of the testifying examiner, which is not hearsay. Accordingly, the trial court did not err in admitting this testimony over objection.

Appellant also argued that the trial court improperly restricted his cross-examination of Taylor. The Court stated that although the accused is generally entitled to a thorough and sifting cross-examination of the witnesses for the prosecution, the scope of cross-examination is not unlimited, and trial courts retain wide latitude to impose reasonable limits on cross-examination based on concerns about, among other things, interrogation that is only marginally relevant. Here, appellant contended that, when he asked Taylor about the precise standards applied by fingerprint examiners in certain other countries, the trial court sustained an objection to the relevance of the question. But, the Court noted, the trial court permitted appellant to elicit testimony that there is no national standard in the United States that identifies how similar two prints must be to amount to a match. Moreover, the trial court allowed appellant to elicit testimony that the degree of similarity is determined by each examiner, based on her own training and experience. Appellant also argued that when he tried to ask Taylor about a particular case in which the FBI mistakenly identified an Oregon lawyer as a terrorist based on a fingerprint match, the trial court sustained an objection. But, again the Court noted, as to misidentifications in fingerprint comparison, appellant never attempted to cross-examine Taylor about her general awareness of other cases in which faulty fingerprint analysis led to a misidentification. Moreover, appellant was permitted to cross-examine Taylor about the possibility of mistakes in fingerprint comparison. Accordingly, the Court found that the trial court did not abuse its discretion in the limitation of the cross-examination of Taylor.