Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 18, 2017

THIS WEEK:

Criminal Appearance Bond Forfeitures

Don Johnson Bonding Co. v. State, A17A0469, A17A0692 (6/21/17)

Don Johnson Bonding Co. Inc. appealed from final judgments on two criminal appearance bond forfeitures. In both cases, the trial court failed to sign orders forfeiting bonds on the same day that the defendant failed to appear. Appellant therefore contended that it was relieved of liability on the bonds. The Court disagreed.

OCGA § 17-6-71 (a) provides: "The judge shall, at the end of the court day, upon the failure of the principal to appear, forfeit the bond, issue a bench warrant for the principal's arrest, and order an execution hearing not sooner than 120 days but not later than 150 days after such failure to appear. Notice of the execution hearing shall be served by the clerk of the court in which the bond forfeiture occurred within ten days of such failure to appear by certified mail or by electronic means as provided in Code Section 17-6-50 to the surety at the address listed on the bond or by personal service to the surety within ten days of such failure to appear at its home office or to its designated registered agent. Service shall be considered complete upon the mailing of such certified notice. Such ten-day notice shall be adhered to strictly. If notice of the execution hearing is not served as specified in this subsection, the surety shall be relieved of liability on the appearance bond."

Appellant concedeD that in *Easy Out Bonding v. State*, 224 Ga. App. 706, 706-707 (1) (1997), the Court held that the "end of the court day" language is directory. But, it argued, since that case was decided, the Court has held that a 2009 amendment to the statute mandates strict compliance with the statute's time requirements. However, the Court found, the 2009 amendment added the last two sentences to the statute, mandating strict compliance with the time requirements for giving notice to the surety of the execution hearing on the forfeiture for the failure to appear. The amendment did not alter the first sentence of OCGA § 17-6-71 (a), in which the "end of the court day" language appears. Thus, the Court stated, the clear meaning of the statute as amended effective May 5, 2009, is that upon a failure to send notice of the execution hearing within ten days of the failure of the principal to appear, the surety is released and discharged of any further obligation to ensure the appearance of the principal and of any further liability on the bond. Thus, the Court found, *Easy Out Bonding*, in which the Court held that the "end of the court day" language is directory, was not superseded by the 2009 amendment to the statute. And, since appellant did not dispute that it was given timely notice of the execution hearings, the trial court did not err by entering final judgment on the forfeiture of the bonds.

Co-conspirator Statements; Jury Charges

Lawrence v. State, A17A0117 (6/23/17)

Appellant was convicted of armed robbery, kidnapping, rape, aggravated sodomy, and pos-

session of a firearm during the commission of a felony, involving two successive victims on the same night. The evidence showed that appellant and Allen were co-conspirators. Prior to their arrest, Allen told his girlfriend, McDaniel, that he got caught up in something with appellant, that a girl was robbed and raped, and that it was appellant who raped the girl.

Appellant argued that the trial court erred by allowing McDaniel to testify that Allen told her that appellant raped the women, arguing that the statements were hearsay and not subject to the co-conspirator exception under OCGA § 24-8-801 (d) (2) (E), which provides that "[a]dmissions shall not be excluded by the hearsay rule," and defines an "admission" as including a statement offered against a party which is [a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy, including a statement made during the concealment phase of a conspiracy. A conspiracy need not be charged in order to make a statement admissible under this subparagraph." The Court disagreed.

First, the Court found that nothing in the text of the statute requires that McDaniel as the testifying witness also be a co-conspirator for the exception to apply. Next, the Court addressed whether the statement was in furtherance of the conspiracy. Appellant argued that it was not because Allen merely sought to assign blame to someone else for the crimes. However, the Court found, Allen made the statement to his girlfriend after she became suspicious of his involvement in the crime. By attempting to minimize the extent of his involvement, Allen was trying not only to mollify his girlfriend but also to dissuade her from going to police, which in turn furthered the aim of covering up both men's involvement in the crime. Thus, the Court found, it could hardly be doubted that concealing their identities was one of the primary aims of the conspiracy as demonstrated by the fact that they blindfolded the victims and took great efforts to remove any DNA from the victims' bodies. Accordingly, the Court concluded, Allen's statement was properly admitted under OCGA § 24-8-801 (d) (2) (E).

Appellant also contended that the trial court erred by failing to instruct the jury on the necessity of accomplice corroboration under OCGA § 24-14-8 because the only direct evidence that he committed the crimes was McDaniel's testimony that Allen told her that appellant committed the rapes. Appellant acknowledged that although he objected when the trial court indicated its refusal to give the charge at the charge conference, he did not voice any objection to the failure to charge following the trial court's instructions to the jury, and thus the refusal to charge could be reviewed only for plain error.

The Court noted that it is true that case law and statutory law plainly require a charge on corroboration when an accomplice is the only witness testifying about an inculpatory fact. And appellant correctly noted the failure to do so may under certain circumstances constitute plain error necessitating a retrial. However, the Court found no direct authority, and appellant cited none, in which our appellate courts have held that an accomplice corroboration charge must be given when, as here, Allen's statement was introduced by another witness and he does not testify at trial. And OCGA § 24-14-8, upon which the accomplice corroboration charge is based, applies by its own terms when "the only witness is an accomplice," and thus also does not clearly answer the question of whether a corroboration charge is required under the circumstances of this case. Therefore, the Court held, because it is not "obvious beyond reasonable dispute" from either controlling precedent or the clear text of a statute, appellant failed to establish that the trial court plainly erred by failing to give this charge.

Accomplices; Ineffective Assistance of Counsel

Burns v. State, A17A0333 (6/27/17)

Appellant was convicted of aggravated assault and theft by receiving stolen property. The facts, briefly stated, showed that appellant and Palmer tried to sell the victim a car that had been stolen. Appellant and Palmer met the victim at the victim's bank. After the victim obtained the funds, the three got into an argument over documentation. They drove off and parked in nearby parking lot. The victim was in the back seat, Palmer was in the passenger side seat and appellant was in the driver's seat. Testimony showed that the victim got out of the back seat and was pursued by a man who was firing a gun at the victim. The victim was hit; the shooter ran away and the driver drove off. Appellant and Palmer were arrested shortly thereafter.

At trial, the bank manager positively identified Palmer as the shooter and that the shooter had been in the passenger seat of the vehicle. Palmer testified at trial and claimed that appellant was the shooter. The jury convicted both of theft by receiving, but only appellant of aggravated assault.

Appellant contended that trial counsel's failure to request a jury charge on the requirement that accomplice testimony be corroborated constituted ineffective assistance of counsel. The State conceded that the failure was deficient performance, but contended that there was no prejudice. First, the Court rejected the trial court's finding that because evidence independent of Palmer's testimony supported appellant's conviction as a party to the crime of aggravated assault, appellant was not prejudiced by his lawyer's failure to request the jury charge at issue. The Court found that the flaw in this reasoning was that it failed to acknowledge that the *same jury* that convicted appellant of aggravated assault acquitted Palmer of that crime. Thus, the jury found that appellant alone perpetrated the crime of aggravated assault against the victim, and that Palmer was not even a participant in that crime. Accordingly, the jury's verdict foreclosed the possibility that it convicted appellant as a party to the crime of aggravated assault committed by Palmer.

Second, the mere fact that there was some evidence corroborating Palmer's testimony did not prevent appellant from proving he suffered prejudice as a result of counsel's failure to request the jury instruction at issue. With respect to prejudice resulting from the absence of this jury instruction, the question is not whether there was sufficient corroboration of the accomplice testimony to allow the jury to rely on that testimony when determining the defendant's guilt. Rather, the question is whether, under the circumstances, the absence of an instruction on the necessity for corroboration of accomplice testimony undermines confidence in the outcome of trial. Here, viewing the record — including the charge to the jury — as a whole, and weighing the evidence as it would expect reasonable jurors to do, the Court found that appellant has demonstrated prejudice resulting from trial counsel's deficient performance.

Specifically, Palmer's identification of appellant as the sole shooter was directly contradicted by the testimony of the bank manager,

who affirmatively identified Palmer as the shooter. Additionally, other circumstantial evidence pointed to Palmer as the assailant, including the eyewitness description of the clothing worn by the shooter, which matched the clothing Palmer was wearing at the time of the crime. And the bank manager's testimony that the shooter had been seated in the front passenger seat of the car, in conjunction with Palmer's admission that he had been the front seat passenger, also served to undermine Palmer's claim that appellant alone committed the aggravated assault. Moreover, although the victim stated that both defendants shot him, that testimony also indicated that appellant never left the car and implied that Palmer was the man who pursued the victim and delivered the shot that injured him. Given this evidence, the absence of an instruction on the requirement that Palmer's testimony be corroborated, when coupled with the trial court's instruction that the testimony of a single witness is sufficient to establish a fact, impermissibly empowered the jury to disregard any conflicting testimony and to find appellant] guilty of aggravated assault based solely on Palmer's accomplice testimony. And the Court stated, it must presume the jury accepted the authorization to establish a fact based solely on Palmer's accomplice testimony. Accordingly, the Court found that under the circumstances of this case, trial counsel's failure to request a jury instruction regarding the requirement that accomplice testimony be corroborated constituted ineffective assistance of counsel.

DUI; Williams

In re C. W., A17A0084 (6/28/17)

The state filed a delinquency petition against C. W. for DUI, underage possession of alcohol, reckless driving, and speeding. The juvenile court granted C. W.'s motion to suppress evidence of his blood-alcohol level obtained through a warrantless blood test, finding that the State did not show C. W. voluntarily consented to the blood test. The State appealed.

The evidence showed that after the officer arrested C. W., he read C. W. the implied consent notice for persons under the age of 21. C. W. agreed to submit to a state-administered chemical test. The officer drove C. W. to a police precinct to undergo a blood test. More than an hour passed between the reading of the implied consent warning and the blood test. The officer testified that he was "very stern" while interacting with C. W. A paramedic drew C. W.'s blood at the precinct. The paramedic had the officer sign the consent form on C. W.'s behalf because C. W. was a minor, their protocols prohibit a minor from consenting, and C. W. was in the officer's custody. C. W. did not read the consent form and neither the paramedic nor the officer read it to him. C. W.'s parents were not present when his blood was drawn; the paramedic did not recall that C. W.'s parents had been notified that his blood would be drawn; and C. W.'s father arrived after his blood had been drawn. Based on these facts, the juvenile court found that C. W.'s consent to the blood test was not voluntary. The court concluded that although C. W. was not threatened with physical harm, "given his youth and the other circumstances, a reasonable person would not have felt free to decline the [officer's] request to submit to the blood test."

The State argued that the fact the officer read the implied consent notice to C. W. does not per se mean that his consent was coerced. It also argued that, contrary to C. W.'s contention, a juvenile may consent to a blood test. But, the Court found, the juvenile court did not rule that C. W.'s consent was coerced, as a matter of law, due to the reading of the implied consent notice. Nor did the court rule that C. W.'s age meant that, as a matter of law, he could not consent to a blood test. So those issues were not before the Court.

The State also argued that the evidence supported a finding of voluntary consent. But, the Court noted, if it was reviewing a denial of a motion to suppress, this argument might be persuasive. But since it was reviewing a grant of a motion to suppress, and the evidence did not demand a finding contrary to the trial court's decision, it must affirm.