

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 25, 2017

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THIS WEEK:

- **Prosecutorial Misconduct; Special Demurrers**
- **9-1-1 Calls; Judicial Commentary**
- **Miranda; Right to Remain Silent**
- **Statutory Rape; Rape Shield Statute**
- **Guilty Pleas; Range of Sentencing**

Prosecutorial Misconduct; Special Demurrers

McGlynn v. State, A17A0370 (6/28/17)

Appellant was convicted of misdemeanor marijuana possession. The evidence showed that he was a passenger in his co-defendant's car. After initiating a traffic stop, police discovered marijuana in three separate places in the vehicle, including directly under appellant's seat.

On the morning the trial was to begin, appellant made an oral motion to recuse any member of the district attorney's office from prosecuting the case, alleging prosecutorial misconduct. He alleged that an ADA had "confronted" the co-defendant, who appellant planned to call as a witness at trial. Appellant alleged that the ADA "threatened" and "intimidated" the co-defendant, suggesting that the co-defendant would be prosecuted for perjury if he elected to testify in the trial on appellant's behalf. Clarifying the facts surrounding this claim, appellant's attorney stated that the ADA who had handled the co-defendant's case for the State had spoken to the co-defendant in a room outside the courtroom and asked him what his testimony would be in appellant's trial. The co-defendant told the ADA that he planned to claim ownership of

all of the marijuana seized from the vehicle. The ADA replied that she did not believe him and indicated to him that false testimony could subject him to a perjury charge, that it would violate the terms of his First Offender probation, and that he could be sent to jail. The co-defendant spoke with his counsel, who advised him that he could be subject to indictment for perjury if he testified falsely in the trial. The co-defendant was advised by his counsel that he should assert his Fifth Amendment right against self-incrimination.

Appellant, citing *Webb v. Texas*, 409 U. S. 95 (93 SCt 351, 34 LE2d 330) (1972), argued that he was denied due process by the ADA's intimidation of his co-defendant. The Court stated that it takes seriously its role both in addressing attorney misconduct and in holding those who allege such misconduct to a high standard of proof. The Court noted that although *Webb* dealt specifically with statements made by a trial judge, either judicial or prosecutorial intimidation that dissuades a potential defense witness from testifying for the defense can, under certain circumstances, violate the defendant's right to present a defense. However, such analysis must be undertaken on a case-by-case basis. Here, nothing in the record suggested that the statements made by the ADA to the witness were legally inaccurate or misleading. In fact, the ADA's comments seemed to have been confirmed by the witness's own attorney, who, unlike the ADA, is charged with acting on the witness's behalf and protecting his right and interests. The potential for unconstitutional coercion by a government actor diminishes when a defendant's witness has consulted with an independent attorney. The Court stated that whether these statements by the ADA were

later perceived by the witness as threatening was wholly irrelevant to its consideration of this matter. The Court is duty bound to inform the witness of the possible consequences of admitting under oath facts that could place the witness in legal jeopardy, including notifying the witness that the criminal law would be fully enforced to the fullest extent against those who violate it. Moreover, the Court failed to see how appellant's due process rights were in any way abridged by the witness's decision to assert his Fifth Amendment privilege following his conversation with the ADA and his own counsel. A criminal defendant's right to present his defense is not absolute, as it must give way to other considerations in the judicial process, including a witness's right to assert testimonial privileges. Although appellant's defense may have been hampered by the witness's eve-of-trial decision not to testify regarding ownership of the marijuana and associated paraphernalia, appellant was obliged to find other means of making the argument to the jury that he did not own, and was not in possession of, those materials at the time of the arrest. Accordingly, the Court agreed with the trial court that the record did not establish sanctionable conduct on the part of the ADA and consequently, it affirmed the trial court's denial of appellant's motion to disqualify.

Appellant also argued that the trial court erred by denying his special demurrer with regard to the marijuana possession charge. He contended that because marijuana was found in various locations and containers throughout the vehicle and because the co-defendant was also charged with marijuana possession in a separate count using identical language, the indictment failed to adequately apprise him of which marijuana the State claimed he possessed at the time of the traffic stop. The Court noted that appellant's argument essentially asked it to require, in drug possession cases where multiple items of contraband are seized from multiple defendants, that the language of an indictment identify with specificity the exact items of contraband the State believes a particular defendant to have possessed. The Court found no support in our case law for this proposition.

Instead, the Court found that the language of the indictment adequately described the elements of the charged offense, as it specifically identified the specific code section under which appellant was charged. Also, the Court found that this language sufficiently

apprised appellant of the charge he would be required to meet at trial. Under Georgia law, possession of any amount of marijuana is punishable as an offense. Thus, a jury's finding that appellant was in possession of any of the marijuana found in the vehicle would have been sufficient to convict him, and his only viable defense was to deny possession of all of the marijuana found in the vehicle. And here, the Court noted, in the record and his briefs before the Court, appellant indicated that he planned to defend the allegations of the indictment by claiming that all of the marijuana found in the vehicle belonged to the co-defendant. Appellant called the co-defendant to the stand with the intention of having him claim responsibility for, and ownership of, the marijuana and to exonerate appellant. The co-defendant's choice to exercise his Fifth Amendment privilege and not respond to questions on these issues did not change the fundamental strategy that appellant employed. The Court therefore failed to see how additional clarification of the indictment would have altered appellant's defense.

9-1-1 Calls; Judicial Commentary

Gregory v. State, A17A0209 (6/28/17)

Appellant was convicted of aggravated battery. The evidence showed that Andrews made a 9-1-1 call shortly after appellant beat her up. Andrews died before trial. The State did not call anyone from the 9-1-1 center to testify regarding her call. Instead, a redacted 9-1-1 recording was played before the jury in conjunction with testimony from the police officer who arrived at Andrews' house following the call. The recording was accompanied by several documents relating to the call, including a records certification from the 9-1-1 center and a copy of the dispatch report (known as a CAD report).

Appellant contended that the 9-1-1 call was inadmissible under Crawford. The Court disagreed. Citing *Thomas v. State*, 284 Ga. 540, 542-45 (2) (2008), the Court found that even though the 9-1-1 call was made several minutes after appellant had fled the premises, the statements made by Andrews were not testimonial because they were made while appellant remained at large and because they provided information that could aid authorities in his capture.

Appellant also argued that the trial court erred in admitting the recording of the 9-1-1 call because it was not a business record and because the State failed to authenticate the caller's voice prior to playing the recording to the jury. He also argued that admission of the recording was in error because it contained hearsay. However, the Court found, the recording could properly be admitted as a self-authenticating business record under Rules 803 (6) and 902 (11). Here, the recording of the call was made by the county 9-1-1 center, and it was accompanied in the record by a written declaration from the 9-1-1 operations center certifying that it met the requirements of Rules 803 (6) and 902 (11). Furthermore, the Court rejected appellant's attempts to analogize 9-1-1 recordings to accident or incident reports made in anticipation of potential litigation. The redacted version of the 9-1-1 recording played for the jury contained no additional information other than the conversation that unfolded between Andrews and the operator. More importantly, it did not contain the verbal or written impressions of an investigator or statements by any other parties made after the incident in question, that might undermine the recording's credibility. Therefore, the Court agreed with the trial court that the 9-1-1 recording was admissible as a business record pursuant to Rules 803 (6) and 902 (11), and, as such, additional extrinsic evidence of authenticity other than the certification by the records custodian was not required.

Finally, appellant argued that the trial judge improperly commented on what the evidence in the case had proven when the judge instructed the jury that it would be hearing a 9-1-1 call made by "the alleged victim" in the case. The Court again disagreed. The record showed that at trial, appellant objected to the introduction of the recording, arguing that Andrews' voice had not been properly authenticated. The trial court overruled this objection and instructed the jury regarding the 9-1-1 recording, as follows:

"[Y]ou're about to hear an audio recording of a telephone call of the alleged victim in this case. As you hear the audio recording, you will hear the interviewing 911 operator make certain statements to the alleged victim. I caution you that the declarations or statements of the 911 operator are not evidence, and you should not consider such statements as evidence unless

such statements are proven to you by other competent evidence.”

The Court found meritless appellant’s argument that, by identifying the caller as the alleged victim, the trial court impermissibly relieved the State of its burden to establish facts authenticating the caller’s voice. The trial judge had already ruled on the admissibility of the recording (a ruling which did not necessitate any further action by the State to make the call admissible). Thus, the Court found, appellant could not now attack that prior ruling by suggesting that the judge’s comment on a fact which was not in dispute — that Andrews was the alleged victim in the case or that she was the caller on the 9-1-1 recording—is “an opinion as to what has or has not been proven.” The purpose of OCGA § 17-8-57 is to prevent the trial court from invading the province of the jury, either by expressing its views on the credibility of a witness or by indicating what facts it believes have or have not been established by the evidence. And here, the Court found, neither occurred. The judge’s statement did not express an opinion as to the veracity of the statements made in the call or as to Andrews’ credibility, nor did the judge’s statement indicating that the alleged victim (which, by that point, was known by the jury to be Andrews) was the person who placed the 9-1-1 call resolve any factual dispute that would aid the jury in determining whether appellant had committed the charged offense. The only dispute seemed to have been whether the State had laid the proper evidentiary foundation in order to admit the recording. As this is a question for the judge, not the jury to resolve, OCGA §17-8-57 did not apply.

Miranda; Right to Remain Silent

State v. Andrade, A15A0092 (6/30/17)

Andrade was indicted for three counts of rape and one count of first-degree burglary. The record showed that Andrade was 17 years old. Andrade was advised of his Miranda rights, both orally and in writing, and signed a waiver of those rights, including his right to remain silent. Immediately thereafter, the officer asked Andrade whether he wanted to make a statement. Andrade’s response was unintelligible on the recording, and the officer, who evidently could not understand the response, stated, “I’m sorry?” Andrade looked down, shook his head

slightly, and mumbled something that could have been “no,” but also could have been, “I don’t know.” At that point, the officer stated: “Alright. We - we need to talk about this, alright? I - I’ve got some things I - I’ve got some questions I need to ask you. Are you - are you going to talk to me?” Andrade replied, “yeah,” and proceeded to speak with the officer. The interview continued, and Andrade made incriminating statements. The trial court suppressed Andrade’s incriminating statements after finding that Andrade “indicat[ed] on the video that he did not wish to speak with” the officer. According to the trial court, the officer “stated to [Andrade] in negative question form, words to the effect of - you don’t want to talk?” to which Andrade “appeared to respond with voice and head gestures in the negative.” The State appealed.

A divided whole Court reversed. The Court found that the video recording belied the trial court’s findings, which were thus clearly erroneous. The officer did not say anything resembling, “you don’t want to talk?” Instead, he affirmatively asked Andrade whether he would give a statement, and Andrade offered unintelligible responses until, on further clarification, he explicitly stated that he would speak with the officer. The officer testified at the suppression hearing that Andrade never invoked his right to remain silent or indicated that he did not wish to talk with police. And, the Court found, Andrade admitted at the hearing that he agreed to speak with the officer. Although he vaguely asserted that at some point during his two interviews, he told the officer that he “wasn’t going to tell him, talk to him,” he offered no testimony establishing when he made the statement, the circumstances surrounding it, or whether it constituted an unambiguous invocation of his right to remain silent.

Therefore, the Court found, the record revealed nothing that would lead a reasonable police officer to understand that Andrade was exercising his right to remain silent. Neither the video nor Andrade’s testimony showed that he unambiguously and unequivocally invoked the right before making his incriminating statements. Instead, he signed a waiver of rights and, when asked whether he would make a statement, gave several unintelligible responses before stating, “yeah.” Thus, Andrade did not unambiguously and unequivocally invoke his right to remain silent. Consequently, the trial

court erred in suppressing his statements to police.

Statutory Rape; Rape Shield Statute

Atkins v. State, A17A0240 (6/30/17)

Appellant was convicted of statutory rape and aggravated child molestation. The evidence, briefly stated, showed that the victim was 13 years old when she got pregnant around September, 2010. At first, the victim told her mother that the father was “some boy in the neighborhood.” Then the victim called appellant and told him she was pregnant with his child and wanted funds for an abortion. Appellant then called Surles, a father-figure to the victim, and told him what the victim said, but denied any wrongdoing as to the victim. The victim subsequently identified appellant as the father to her mother. Appellant had an abortion thereafter and DNA testing showed that appellant was not the father. In a police interview and a forensic interview, the victim stated she had sex with appellant.

Appellant argued that the trial court erred in denying his motion for directed verdict on the charge of statutory rape because the evidence was insufficient to corroborate the victim’s allegations. The Court disagreed. A victim’s own prior statements to police, if found to be consistent with her later trial testimony, satisfies the corroboration requirement. Here, a jury could find that the victim’s report to the police as well as the statements she made in her forensic interview were consistent with, and corroborated, the testimony she provided at trial. At trial, the victim indicated that appellant had sex with her on August 15, 2010. This was corroborated by a statement she made in her initial report to the police to the same effect. The victim also made an identical statement in a later forensic interview. These consistent prior statements to police provided sufficient corroboration. Thus, the whole Court agreed with the trial court that the State introduced sufficient evidence of each element of the statutory rape charge, including sufficient evidence of corroboration, such that the jury was permitted to find appellant guilty beyond a reasonable doubt on that charge.

Appellant also argued that the trial court erred in ruling that the Rape Shield Statute, OCGA § 24-4-412, prohibited him from inquiring about the paternity of the victim’s

baby at trial. A divided whole Court disagreed. Here, the Court noted, appellant sought to ask the victim about paternity even though, as the trial court explained, evidence had already been introduced to the effect that "she was pregnant, that the pregnancy was aborted, and that the fetus was tested and your client [was] excluded as the father." As a result, the trial court held, "any logical person" could conclude that the victim had had sex with someone besides appellant, such that the identity of that other person was both irrelevant and was evidence as to her past sexual behavior and thus inadmissible.

The Court stated that the statute clearly provides that evidence as to a victim's past sexual history is admissible only if the court "finds that the past sexual behavior directly involved the participation of the accused[.]" OCGA § 24-4-412 (b). The defendant's right to confront and cross-examine witnesses concerning the victim's past sexual behavior with others must bow to accommodate the State's interest in the Rape Shield Statute. And a trial court does not err in granting a motion in limine as to a victim's sexual history with a person other than the defendant. It is also well-settled that the Rape Shield Statute supersedes all evidentiary exceptions, including the *res gestae* rule or any other rule tending to impeach a sex crime victim. Thus, the Court found, appellant's requested line of inquiry concerned the identity of the father, which could not involve appellant's participation. Rather, the identity of the victim's former sexual partner, which could be prejudicial to the victim in a number of ways, was precisely the information as to her "past sexual behavior" that the statute is designed to bar. Accordingly, the trial court did not err in preventing this line of questioning.

In so holding, however, the Court stated as follows: "While we are satisfied that the evidence sought in this case falls behind the wall erected by the Rape Shield Statute, we note potentially serious concerns regarding the notion that the act is so broad as to exclude all evidence 'relating to' a victim's past sexual behavior with the sole exception being evidence related to activity which included the defendant. In so doing, we contemplate a scenario where the prosecution asserts the Rape Shield Statute to exclude evidence of the DNA results in a fact pattern similar to that in this case (i.e. where the DNA results

conclusively refute a claim of the defendant's paternity) where the evidence would be highly probative of innocence, directly related to the honesty of a witness, yet clearly related to the past sexual behavior of the victim. The possibility of this scenario unfolding in a criminal case raises myriad questions related to the Confrontation Clause and Due Process protections of our constitutions. But this is not the case before us."

Guilty Pleas; Range of Sentencing

Gay v. State, A17A0060 (6/30/17)

Appellant was initially charged with malice murder, armed robbery, two counts of possession of a firearm during the commission of a felony, and possession of a firearm by a first offender probationer. After plea negotiations, Appellant agreed to plea to voluntary manslaughter and armed robbery with the remainder of the charges to be dismissed. The State and appellant, however, were not able to agree to a sentence recommendation to present to the trial court. At the guilty plea hearing, it was undisputed that the trial court asked appellant with respect to the armed robbery charge: "Do you understand that carries a penalty range of ten to 20 years in prison?" to which appellant responded in the affirmative. After the guilty plea hearing but before sentencing, trial counsel realized that the trial court had omitted the potential of a life sentence in describing the sentencing range for armed robbery. Counsel also testified that he told appellant that the omission of the life sentence may indicate that the trial court was not going to impose a life sentence. At the sentencing hearing a month later, the trial court told appellant that "...armed robbery carries a minimum mandatory of ten years and not more than twenty years or life. I just want to make sure I properly advised you of the sentencing range for both offenses." The Court then sentenced appellant to life on the armed robbery and twenty years on the voluntary manslaughter. Two days later, appellant moved to withdraw his plea, which the Court denied.

A divided whole Court reversed. The Court found that appellant's sentence was not negotiated and this was not an "omission" or failure to inform case. Instead, the trial court misstated appellant's sentencing range for armed robbery, which led trial counsel to

speculate and raise the hope in appellant that the trial court would not impose life imprisonment at sentencing. Although the trial court then referred to the correct sentencing range at the sentencing hearing, it was clear from the face of the transcript that the trial court did not acknowledge the error and instead appeared to compound the misstatement by asking appellant to confirm that the trial court stated the correct sentencing range at the guilty plea hearing. And even though it is true that appellant knew from a previous hearing that he could withdraw his plea at any time before he was sentenced, the trial court did not reiterate that right to appellant at the time the court "corrected" its earlier mistake. Further, the trial court in its order denying the motion specifically relied on the testimony that appellant had been advised accurately by his counsel about the sentencing range. But, the issue in this case was not appellant's knowledge of the sentencing range. Instead, the misstatement gave appellant the false impression that the trial court, who had the discretion to sentence within that range, may have been inclined to sentence him to twenty years instead of life. According, the Court held, appellant should have been allowed to withdraw his guilty plea to correct a manifest injustice. Accordingly, the judgment of the trial court was reversed and the case remanded for further proceedings.