Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 2, 2013

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THIS WEEK:

Indictment; Verdict Form

Newsome v. State, A13A0569 (7/15/13)

Appellant was conviction of "drug possession, sale, manufacture, with the intent to distribute." He contended that the jury's verdict was illegal because it found him guilty on counts with which he was not charged. The Court agreed. The record showed appellant was indicted for trafficking in cocaine. After the close of evidence, the trial court instructed the jury on the charged offense and the lesser-included offenses of possession of cocaine and possession of cocaine with intent to distribute, and gave complete instructions on the presumption of innocence and the State's burden of proving guilt beyond a reasonable doubt. The jury was presented with a pre-printed jury form that provided that the jurors could find appellant guilty or not guilty of trafficking cocaine, but the form did not provide for the lesser-included offenses charged by the trial judge. After deliberating for some time, the jury asked: "[h]ow do we record a lesser charge on the verdict sheet?" The trial court instructed the jury that if they wished to find appellant guilty of the charged lesser-included offenses, they were to strike out the words "trafficking in cocaine" from the pre-printed verdict form and hand-write either "possession of cocaine with intent to distribute" or "possession of cocaine." The jury was sent back for further deliberations, and they then returned a partially hand-written verdict form stating: "[W]e the jury, find the Defendant . . . Guilty [of] drug possession, sale, manufacture, with the intent to distribute." The jury foreman orally stated that the jury found appellant not guilty as to the offense of trafficking in cocaine. Counsel for both the defense and the prosecution were allowed to examine the verdict form. No objections were made by the prosecution or the defense counsel, and it was published in open court. The trial Court then dismissed the jury.

The Court stated that jurors have a duty to take the law from the trial court's instructions and apply it to the facts which they determine from the evidence adduced at trial and it is the duty of the trial court not only to tell the jury what the law is, but to insist that they apply it and either render a verdict on some issue submitted or else declare a mistrial. Further, a trial court has a duty to insist on a legal verdict, that is, a verdict responsive to the issues as framed by the indictment or accusation and the evidence, and specified in the trial court's charge to the jury.

Here, appellant was not charged with the sale or manufacture of cocaine. Although the trial court evaluated the jury's verdict form and determined that the jury meant to convict appellant with possession of cocaine with intent to distribute, a lesser-included offense that was properly charged to the jury, the method of resolving the jury's verdict was improper. Ad-

ditionally, the Court noted that it was the role of the trial court to review the verdict prior to its publication in open court, and if the verdict was not proper in that it found the defendant guilty of an offense with regard to which the trial court did not instruct the jury, the trial court should have sent the jury to deliberate with instructions to return a verdict consistent with the jury instructions provided at the close of evidence. Because the trial court failed to properly conduct this review, the Court reversed and remanded for a new trial.

Venue; Theft by Deception

Davis v. State, A13A0151 (7/12/13)

Appellant was convicted of two counts of theft by deception in connection with his receipt of funds by wire transfer in Morgan County. The evidence showed that the victim was contacted by phone to collect a prize by transferring "fees and taxes" via money wire transfer. The unknown caller then directed the victim to wire the funds to several individuals in the Atlanta area. In September 2009, from drug stores in Morgan County, the victim sent two wire transfers of funds to appellant. Appellant, who resided in Marietta, picked up the funds in grocery and check cashing stores on Delk Road in Marietta and on Cobb Parkway in Smyrna. After wiring the money, the victim never received the prize as promised.

Appellant contended that the State failed to establish venue in Morgan County. The Court stated that venue is a jurisdictional fact and is an essential element in proving that one is guilty of the crime charged. Like every other material allegation in the indictment, venue must be proved by the prosecution beyond a reasonable doubt. Venue is a matter to be decided by the jury, and the jury's decision will not be set aside if there is any evidence to support it. As with the crime charged, a person commits the offense of theft by deception when he obtains property by any deceitful means or artful practice with the intention of depriving the owner of the property. Further, in a theft by deception case, the crime shall be considered as having been committed in any county in which the appellant exercised control over the property which was the subject of the theft. Hence, the State had the burden of proving that the defendant exercised control over the property taken in the county where the case was prosecuted.

At trial, the prosecutor asked an investigator "[w]hat county and state did [the victim] wire the money pursuant to the instructions she received on her telephone?" and the investigator testified: "Cobb County, Georgia." The prosecutor then clarified: "No. I mean what county and state did [the victim] wire it from?" The officer replied, "Oh. Morgan County, Georgia. I'm sorry." The Court held that the exchange between the State and the investigator failed to prove that appellant controlled any of the funds in Morgan County, and thus, the State failed to prove that venue was proper in that county. However, the Court noted, the failure to establish venue did not bar appellant from being retried in a court where venue would be proper and proven.

Motion for New Trial; Pre-trial Demurrer

State v. Graves, A13A0355 (7/11/13)

The State appealed from the trial court's grant of a new trial to Graves after he was convicted of one misdemeanor count of "loitering or prowling" in violation of O.C.G.A. § 16-11-36. The record showed that Graves was charged with two counts of violating O.C.G.A. § 16-11-36 arising out of the same conduct. The State's evidence showed that Graves was seen by an adult female jogger driving his car slowly through a residential area while using one hand to apparently masturbate underneath his pants without exposing himself. Three days after the jogger reported the incident, a sheriff's deputy used the reported tag number to locate Graves and interview him. Graves initially denied driving in the area of the incident, but then admitted to the officer that he had been masturbating under his pants while driving in the area of the reported incident. But Graves claimed he was doing so in the privacy of his car and was not masturbating at the jogger.

Sitting as the trier of fact, the trial court found that Graves did not intend to follow the jogger—finding rather that "they were both in the wrong place at the wrong time." Accordingly, the trial court found Graves not guilty of the charge in count two that he was "loitering or prowling" in violation of O.C.G.A. § 16-11-36 by "masturbat[ing] in the presence of another while driving in a residential area." Nevertheless, the trial court found that Graves's conduct was alarming to the jogger, and found him guilty of the charge in count one that he was "loitering or prowling" in violation of O.C.G.A. § 16-11-36 by "masturbating while driving a motor vehicle in a residential area."

After the trial court entered a judgment of conviction on the guilty verdict, Graves filed an "amended motion for new trial" in which he sought a new trial on the ground that O.C.GA. § 16-11-36, as applied to defendant's conduct, was unconstitutionally vague. The trial court agreed and granted a new trial on the ground that the State failed to show that defendant's conduct of driving while masturbating in a residential area rose to the level of Loitering or Prowling as defined in O.C.G.A. § 16-11-36(a).

The Court of Appeals reversed. The Court noted that the motion for new trial was, in substance, a claim that the accusation was fatally defective because Graves could admit the allegation that he was "masturbating while driving a motor vehicle in a residential area" and still be innocent of the charge that, by this conduct, he violated the loitering or prowling statute set forth in O.C.G.A. § 16-11-36. Hence, this was a claim that could only be made by a pre-trial general demurrer or by a motion in arrest of judgment after conviction, and a motion for a new trial is not a viable procedural substitute for a motion in arrest of judgment. Accordingly, the Court held, because the trial court lacked authority to consider or grant a claim seeking to arrest the judgment of conviction brought before the trial court in the motion for new trial, the trial court's order granting Graves's motion was void and vacated and the trial court was directed to reinstate the judgment of conviction.

Expert Witness; Intent

Dillard v. State, A13A0108 (6/19/13)

Appellant was convicted of burglary and attempted burglary. He contended the trial court erred in sustaining the State's objection to testimony from appellant's proffered expert witness on relevancy grounds. The evidence showed that the first victim saw appellant standing in front of the first victim's 42-inch plasma TV, which was on the floor and had been disconnected from the DVD player, satellite dish, and PlayStation. When the first victim alerted appellant of her presence, he ran toward the back bedrooms and the victim's son began grappling with him. The son testified that appellant punched him in the face during

the struggle, but he ultimately forced appellant out of the house and saw him jog away. The second victim testified that he heard appellant outside his home and when he turned on his home floodlights, he observed appellant at the back door. After appellant ran away, the victim discovered that the screen on his garage window had been removed and his gate had been opened.

Appellant contended that the trial court erred in sustaining the State's objection to testimony from his proffered expert witness on relevancy grounds. Appellant testified that he had "fallen off the wagon" and mistakenly entered the dwelling of the first victim thinking it was his overnight residence. Appellant sought to call a licensed professional counselor focused on addiction to testify about alcoholic blackouts, "not for the purposes of showing intent or lack of intent, but for the purpose that it would help the jury understand that a person in a blackout condition still maintains their motor functions . . . [and] to educate the jury." The Court noted that the admissibility of expert testimony was a matter within the trial court's sound discretion and it would not reverse the trial court's ruling on such evidence absent an abuse of that discretion. Further, evidence that appellant might have been walking around in an alcoholic blackout could only have been relevant to whether he had formed the specific intent to commit a felony or theft when he entered or attempted to enter the victims' houses. Here, appellant's trial counsel specifically stated that the expert was not being offered to address the issue of intent. Consequently, the Court held that the trial court did not err in sustaining the State's objection to the expert testimony.

Equal Access; Sole Possession

Maddox v. State, A13A0795 (7/11/13)

Appellant was found guilty of possession of cocaine and marijuana. The evidence showed that an officer observed a vehicle backed into the driveway of an abandoned home. Appellant was sitting in the front passenger seat. No one was sitting in the driver's seat. There were also three occupants in the back seat of the vehicle. When appellant saw the officer, he immediately got out of the vehicle, but was told by the officer to get back in the car. Upon requesting the passengers' identification, the officer noticed the smell of marijuana emanating from the vehicle. Appellant provided the officer with false information and revealed that he had two bundles of cash and two cell phones on his person. During a search, officers found cocaine, marijuana and electronic scales inside the vehicle's center console. This center console, which opened from the front to the back of the car, was easily accessible from the front passenger and driver seats, but was not easily accessible from the car's back seat. The State's contention was that appellant, who was seated in the front passenger seat of the car, had constructive possession of the drugs found in the center console. No possession charges were brought against the driver of the car, against its owner, or against the rear seat passengers.

Appellant claimed that the trial court erred by refusing his request to instruct the jury that, where evidence shows another occupant of the car with equal access jointly possessed the contraband, but the State did not charge the other occupant, the State had the burden to prove that he was in sole constructive possession of the contraband. The Court noted that this instruction requested by appellant was based on a line of cases originating with *Reid v. State*, 212 Ga.App. 787 (442 S.E.2d 852) (1994). As here, *Reid* dealt with contraband hidden in a car with multiple occupants. *Reid* held that when more than one occupant has equal access to hidden contraband, but only one occupant is prosecuted for possession of the contraband, the State has the burden of proving that the prosecuted occupant "was in *sole* constructive possession" of the contraband. (emphasis in original). However, the Court stated, while circumstantial evidence that multiple occupants of a car had equal access to hidden contraband may support the theory that all the occupants were guilty as parties to the crime and had joint constructive possession of the contraband, the State may elect to prosecute the occupants jointly or separately or may elect to prosecute only one of the occupants for directly committing the crime, but nevertheless prove the sole prosecuted occupant was guilty as a party to the crime. Thus, the Court stated, "We find no basis for the holding in *Reid* that the State is required under these circumstances to prove that the prosecuted occupant had sole constructive possession of the contraband." Instead, the settled rule is that the failure of the State to prosecute one party to a crime ordinarily offers no defense to other parties to the crime. See O.C.G.A. § 16-2-21 (party to a crime can be convicted even if the principal has not been prosecuted). Whether another occupant of the car was also in constructive possession of the hidden contraband, so that the defendant's constructive possession was joint instead of sole, was irrelevant to whether the evidence was sufficient to find the defendant guilty. Therefore, the State was not required to prove that appellant was in sole constructive possession of the contraband in order to obtain a conviction, but could produce evidence proving beyond a reasonable doubt that appellant had sole or joint constructive possession of the contraband.

Moreover, the Court concluded, because the holding in *Reid* had no reasonable basis, it must be overruled. And, because that holding was restated in many subsequent cases, those cases must also be overruled in part, including: *Warren v. State*, 254 Ga.App. 52, 54 (2002); *Turner v. State*, 276 Ga.App. 381, 383-384 (2005); *Benitez v. State*, 295 Ga.App. 658, 660 (2009); *Xiong v. State*, 295 Ga.App. 697, 699 (2009); *Millsaps v. State*, 300 Ga.App. 383, 385 (2009); *Molina v. State*, 300 Ga.App. 868, 871 (2009); *Rogers v. State*, 302 Ga.App. 65, 67 (2010); *Fyfe v. State*, 305 Ga.App. 322, 326-327 (2010); *Bodiford v. State*, 305 Ga.App. 655, 656 (2010); *Wheeler v. State*, 307 Ga.App. 585, 586-587 (2011); *Jefferson v. State*, 309 Ga.App. 861, 862-863 (2011); *Holiman v. State*, 313 Ga.App.76, 79 (2011); *Mercado v. State*, 317 Ga.App. 403, 405 (2012); and *Clark v. State*, 319 Ga.App. 880 (2013).

Ineffective Assistance of Counsel; Jury Selection

Barmore v. State, A13A0691 (7/15/13)

Appellant was convicted of three counts of child molestation and three counts of sexual battery. The evidence showed that upon learning of the victim's encounter, the sheriff's office began an investigation. As protocol, the sheriff's office arranged for a forensic interviewer for The Friends of the GreenHouse, Inc. ("GreenHouse") to interview the victim about the incident. The GreenHouse is a county child advocacy corporation in which Charles Eicholtz acts as the president of the Board of Directors. He also served as the foreperson on the jury that convicted appellant. According to the Secretary of the GreenHouse Board, GreenHouse was formed under a prior county

district attorney and was considered a government agency under the Victim Assistance Program of the district attorney's office. The Board is the financial and fund-raising arm of GreenHouse, while the district attorney's office operates the center including all administrative functions, staff, policies and procedures. Also, all GreenHouse employees are employed by the district attorney's office. Generally, Board meetings discuss the management of the center, management of staff, and no active voting takes place. Board members, including Eicholtz, do not receive compensation and Board members remain separate from investigations conducted by GreenHouse.

During voir dire, Eicholtz acknowledged being the president of the Board for GreenHouse. Defense counsel inquired about his position, to which Eicholtz replied, "oversight of operations of The GreenHouse." According to Eicholtz, oversight included hiring and interviewing standards, but he did not say the Board actually did the hiring or interviewing. Eicholtz also acknowledged knowing the prosecutor in the case, the interviewer who interviewed the victim at GreenHouse, and an investigator in the case. However, Eicholtz said even though he worked with law enforcement often, he could be an impartial juror.

Appellant, relying on *Beam v. State*, 260 Ga. 784 (1991), contended that his trial counsel was ineffective when he did not move to strike Eicholtz for cause. Specifically, appellant argued that because Eicholtz was the president of the Board of Greenhouse, which interviewed the victim in this case, Eicholtz should be considered in essence an employee of the district attorney's office and stricken for cause. The Court stated that under O.C.G.A. § 15-12-164(d), "[t]he court shall also excuse for cause any juror who from the totality of the juror's answers on voir dire is determined by the court to be substantially impaired in the juror's ability to be fair and impartial. The juror's own representation that the juror would be fair and impartial is to be considered by the court but is not determinative." A juror can be disqualified for cause only if it can be shown that an opinion held by the potential juror is fixed and definite such that the potential juror would be unable to set aside the opinion and decide the case on the evidence or the court's charge upon the evidence. In the context of an ineffective assistance of counsel claim, the question is whether considered from the perspective of voir dire and not from hindsight, counsel's failure to move to strike the juror for cause was objectively unreasonable.

The Court found that trial counsel did not provide ineffective assistance and that appellant's reliance on *Beam* was misplaced. *Beam* held that it was error to fail to strike a juror for cause who was a full-time employee of the district attorney's office. However, the Court noted, *Beam* was limited to full-time employees of the district attorney's office. Additionally, our courts have refused to extend *Beam* to other contexts even when the juror knew members of the district attorney's office or had a professional relationship with them. Here, Eicholtz was president of the Board of GreenHouse, a separate, duly formed corporation, operating under the district attorney's Victim Assistance Program. Neither GreenHouse nor the district attorney's office compensated Eicholtz for his work as president of the Board of GreenHouse, and appellant produced no evidence either during the trial or at the motion for new trial hearing that Eicholtz had any day-to-day operational role within GreenHouse or worked with victims in any way. Further, while Eicholtz knew several individuals involved with the case professionally, his acquaintance with members of the district attorney's office and law enforcement was not sufficient to strike him for cause. Furthermore, Eicholtz unequivocally stated during voir dire that he could be impartial. Thus, the Court held, Eicholtz was not subject to be stricken for cause solely because of his position at GreenHouse.

Next, appellant contended that trial counsel was ineffective for not using one of nine peremptory strikes against Eicholtz. Specifically, appellant claimed that had his counsel properly counted the number of peremptory strikes he had used, he would have saved one for Eicholtz instead of mistakenly using all nine on other potential jurors. O.C.G.A. § 15-12-165 provides that in a non-death penalty case, each side may use nine peremptory strikes of jurors. Which, and how many, prospective jurors to strike is a quintessential strategic decision.

The Court found that appellant had not overcome the strong presumption that his counsel's decisions on which prospective jurors to strike and which to keep were anything other than strategic. The trial transcript indicated that when the trial judge suggested to appellant's counsel that he had used all nine of his strikes, he replied that he had only used eight. But as the trial court indicated to counsel, and as the record made clear, the defense actually had used all nine of its strikes at that time, and thus had no strike left for Eicholtz. Nevertheless, appellant's counsel admitted at the hearing on the motion for new trial that he had valid tactical and strategic reasons for the nine strikes he made. And although counsel indicated that he had intended to strike Eicholtz, but miscounted his strikes, the test for ineffective assistance of counsel calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Accordingly, the trial court properly denied appellant's motion for new trial on this ground.

Jury Charge; Presumption of Validity

Bailey v. State, A13A1084 (7/26/13)

A jury found appellant guilty of DUI (per se). Appellant contended that the trial court erred in charging the jury. The Court agreed and reversed. The record showed that the jury was charged as followed: "[n]ow, ladies and gentlemen, I'm going to give you the law as it relates to the inspection of the Intoxilyzer 500[0]. A chemical analysis of a person's breath *shall be considered valid under Georgia law* if it has been performed according to methods approved by the Division of Forensic Sciences of the Georgia Bureau of Investigation on a machine which was operated with all of its electronic and operating components described by its manufacturer properly attached in a good working order and by an individual possessing a valid permit issued by the Division of Forensic Services for the Sciences for this purpose." (Emphasis supplied.) After the trial court instructed the jury, it asked the parties for exceptions. Appellant objected to the foregoing charge and complained that the instruction improperly shifted the burden of proof in that "[t]he jury was told that the State's test had a conclusive presumption of validity."

The Court agreed with appellant that the issue was controlled by *Muir v. State*, 248 Ga.App. 49 (2001). The language of the charge in this case, as in *Muir*, was generally derived from O.C.G.A. § 40-6-392(a)(1)(A), which deals with the admissibility of chemical test results. As given, the charge implied that the

analysis or result for a particular individual shall be considered valid, and mandated that the jury find valid the test results showing that appellant's blood alcohol level exceeded the legal limit. Accordingly, as in *Muir*, the Court found the trial court's charge both erroneous and harmful.

The State nevertheless argued that appellant acquiesced to the charge as given, and that any error was induced from the conduct of appellant's trial attorney. The Court stated that generally, one cannot complain of a result he procured or aided in causing, and induced error is not an appropriate basis for claiming prejudice. Here, however, it did not appear that appellant was the source of the erroneous charge. A discussion between defense counsel and the trial court showed that the trial court indicated that it was going to give the law under O.C.G.A. § 40-6-392 during an off-the-record bench conference following defense counsel's closing argument. Defense counsel did not then object, but it was not necessarily error for a trial court to give an instruction that touched on the foundational requirements for the admission of the chemical analysis of a person's breath under O.C.G.A. § 40-6-392. After the trial court gave the actual instruction, however, defense counsel made an appropriate objection. Therefore, the Court could not conclude that the trial court's error in charging the jury was induced by defense counsel.

Baston; Jury Array

Tyre v. State, A13A0652 (7/15/13)

Appellant was convicted of rape, aggravated assault with intent to rape, armed robbery, and possession of a knife during the commission of a felony. The record showed that appellant is a black male, and that out of sixty potential jurors, sixteen were black. The State used a total of seven of its nine allotted peremptory strikes, and four of those seven were used against a black person.

Appellant contended that the trial court erred when it concluded that the State did not violate *Baston* when it used four peremptory strikes to remove black jurors and by denying his motion for new trial based on the *Baston* challenge. To analyze a *Baston* challenge, a court must employ a three step analysis. First, the opponent of a peremptory challenge must make a prima facie showing of racial discrimination. Then, the burden shifts to the proponent of the strike to provide a race-neutral reason for the strike. The trial court then decides whether the opponent of the strike has proven discriminatory intent.

Here, the Court found, the record supported the trial court's conclusions. The State's strikes were race-neutral and not pretextual. In one instance, a prospective black juror was struck after she testified that her nephew had been convicted of murder. Prior convictions or arrest histories of family members are a sufficiently race neutral reason to exercise a peremptory strike. Another prospective black juror was struck after he stated that he had previous bad experiences with law enforcement and that he believed that minorities were treated unfairly by the criminal justice system. Similarly, another prospective juror was struck after he stated that both he and his brother had been treated unfairly by police and the criminal justice system. The Court found both strikes proper because a sufficiently neutral reason exists to justify a peremptory strike when a prospective juror has had a prior negative experience with law enforcement, or indicates that the juror may distrust the police. The final peremptory strike was used against a prospective black juror who testified that she had a friend who had been charged with murder and another who had been a victim of sexual assault. The State explained that it struck this prospective juror based upon these acquaintances and because her bag had the phrase "Jesus is the final answer" written on it, which indicated that she could be inclined to avoid judging others. The Court stated that a strong religious point of view is a valid race-neutral reason for striking a juror. Therefore, the Court held, the trial court did not err because the State offered racially-neutral reasons for its strikes and appellant failed to establish that the reasons given were pretexts for racial discrimination.

Next, appellant argued that the trial court erred in denying his challenge to the array. Specifically, he argued that there was a disparity between the percentage of black persons in the array sent to the courtroom for voir dire purposes and the percentage of black persons in the community. However, the Court noted, the correct inquiry concerns the procedures for compiling the jury lists and not just the composition of a particular jury. In other words, it is the pool of jurors from which the jury array sent to be voir dired is drawn that must be representative of the community, not the individual array sent to a courtroom for voir dire purposes. Additionally, the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. Because appellant's complaint was centered solely on the compositions of the jury panel subject to voir dire in his particular case, it was defective and thus, without merit.