Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 7, 2015

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THIS WEEK:

Medical Records; Jury Charges

Hartzler v. State, A15A0321 (6/30/15)

Appellant was convicted of two counts of homicide by vehicle in the first degree, DUI (less safe), DUI (per se), making false statements, and a seat-belt violation. He argued that the trial court's admission of his medical records, which revealed his blood-alcohol content, violated the Confrontation Clause because no one with personal knowledge of the testing testified at trial. The Court disagreed.

In *Crawford v. Washington*, the Supreme Court held that the admission of out-of-court statements that are testimonial in nature violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. And statements are testimonial in nature when the primary purpose of the statements is to establish or prove past events potentially relevant to later criminal prosecution. But statements made by witnesses to questions of investigating officers are nontestimonial when they are made primarily to enable police assistance to meet an ongoing emergency. Thus, appellant's medical records are not testimonial in nature because the circumstances surrounding their creation and the statements and actions of the parties objectively indicate that the records were prepared with a primary purpose of facilitating his medical care. Unlike other cases involving blood tests performed in a forensic lab at the request of law-enforcement officers, appellant's blood was not drawn and tested as part of an ongoing criminal investigation or for the purpose of aiding in his prosecution. In fact, the Court noted, a law enforcement officer sought appellant's consent to conduct such testing, but he flatly refused. Thus, under these particular circumstances, appellant's medical records and the testimony from a doctor regarding those records were not testimonial in nature, and therefore, the admission of this evidence did not violate his rights under the Confrontation Clause.

Appellant also argued that the trial court's instruction that, to convict him of first-degree vehicular homicide, the jury must find that his conduct was a "substantial factor" in causing the victim's death was overly broad and that the court erred by failing to explain that the jury must find a causal connection between his conduct and the victim's death. However, the Court stated, it has repeatedly held that a defendant's conduct is a proximate cause of a victim's death if it was a "substantial factor" in causing it and that it was either a direct result, or a reasonably probable result of the defendant's conduct. Appellant also asserted that the trial court erroneously instructed the

jury that any negligence on the part of the victim was irrelevant. But, the Court stated, if the defendant's conduct was a substantial factor in causing the victim's death, any negligence on the part of the victim is not relevant. Thus, the Court held, the trial court's instruction regarding causation was not erroneous because it was a correct statement of law and would not mislead a juror of average intelligence.

Search & Seizure; DNA Evidence

Mincey v. State, A15A0275 (7/1/15)

Appellant was convicted of a multitude of sexual offenses and robbery offenses in relation to five women. As to one victim, H. W., he contended that the trial court erred by denying his motion to suppress DNA evidence obtained from him pursuant to a search warrant, because the affidavit submitted in support of the warrant was insufficient. The warrant alleged, in pertinent part, as follows: "On 11-29-11, [Officer Q. L.] responded to … [a] Rape and Armed Robbery call. … Upon [his] arrival, he spoke with the victim [H. W.]. … The victim stated she had just been robbed and raped at her home. … The victim stated the suspect attempted to place his penis in her vagina. The suspect then told the victim to finger herself. The victim stated the suspect attempted to penetrate her again. The victim stated the suspect continued about thirty seconds trying to get his penis into her vagina. … The victim stated she does not know … why he could not penetrate her. The victim stated the suspect wiped her inner thighs off with an unknown cloth and told her to take a shower. … When the victim was in the shower the suspect told her to wash her body with some soap. The victim stated she was unable to find the soap, so she used hair shampoo. … The victim stated she stayed in the shower for approximately ten minutes before she exited the bathroom and went next door … to call for help. On 11-30-11, the victim's rape kit was taken to the G. B. I. Crime Lab for serology testing. This search warrant is being requested to obtain the defendant's Buccal Cells for DNA analysis. It will be compared to the victim's rape kit that was taken to the G.B.I. Crime Lab."

Appellant argued that the magistrate lacked probable cause to issue the search warrant to obtain a sample of his saliva because the incident described in the affidavit submitted in support of the warrant did not show a fair probability that law enforcement officials had obtained any biological evidence from H. W. to which his DNA sample could be compared. Specifically, he contended that the affidavit showed that there had been no vaginal penetration; that after the assault the assailant had wiped H. W.'s inner thighs with an "unknown" cloth and H. W. had taken a shower; and that, when the affidavit was made, there had been no showing that any seminal fluid was present in the samples taken from H. W. But, the Court stated, the affidavit included averments that H. W.'s assailant had attempted vaginal penetration repeatedly, and that a rape kit had been completed soon after the assault. By no means is probable cause to be equated with proof by even so much as a preponderance of evidence. Probable cause does not demand the certainty associated with formal trials. Taking a common sense approach to evaluating the affidavit, the Court concluded that there was a substantial basis for concluding that probable cause existed for the issuance of the search warrant. Therefore, the trial court did not err in denying the motion to suppress.

Drug Forfeitures; Innocent Ownership

Holiday v. State of Ga., A15A0591, A15A0593 (7/2/15)

Andrew Holiday was accused of selling methamphetamine. The State successfully forfeited real property, including a trailer and mobile home which was owned by Milton (Andrew's father), and a Honda Accord owned by Rosa Nelson (Andrew's sister). Briefly stated, the evidence showed that Andrew sold drugs out of the trailer, the mobile home, and Milton's home. Inside the Accord, police officers found a small bag containing methamphetamine residue, as well as $60,000 in cash in the trunk of the car, some of which Andrew admitted were proceeds from drug sales. Milton and Nelson appealed separately.

Milton argued that the trial court erred in finding that he knew or should have known of Andrew's drug sales. The Court disagreed. The evidence showed that Milton had visited the trailer on a few occasions. The trailer contained almost nothing but drug paraphernalia. Police officers found drugs all over Milton's property, including inside Milton's residence and in Andrew's mobile home. Police officers also found a substantial amount of methamphetamine in a truck parked outside of Milton's residence. The evidence also showed that Milton was aware of Andrew's prior drug-related arrest and yet allowed Andrew full access to the trailer and Andrew's mobile home. The trial court also specifically found that Milton was evasive in his testimony when he claimed to not know that Andrew sold drugs. Furthermore, the Court held, the trial court was not obligated to believe Milton's testimony, even if uncontradicted, that he had no reason to know that Andrew was engaged in selling drugs on his property.

Milton also contended that the trial court erred in finding that the forfeiture of his property was not an unconstitutionally excessive fine because he was not a direct participant in Andrew's crimes and thus, he was not culpable. The Court again disagreed. Using the gross disproportionality test of *Howell v. State of Ga.*, 283 Ga. 24, 25 (1) (2008), the trial court held that the forfeiture of Andrew's mobile home, the trailer, and the real property on which they were located did not constitute an excessive fine because (1) the offenses were very serious when compared to the forfeiture; (2) there was a clear nexus between the offenses and the property since Andrew was running an extensive drug operation out of his mobile home and the trailer; and (3) Milton was culpable because he knew of Andrew's involvement with drugs, and he had numerous opportunities to observe Andrew engaging in drug sales all over his property. The Court found that Milton's culpability, while not direct, stemmed from his "willful blindness" to Andrew's activities. Accordingly, the Court held, the trial court did not err in determining that the forfeiture was not constitutionally excessive.

Nelson argued that the trial court erred in finding that she was not an innocent owner of the forfeited Honda Accord and that she did not hold the vehicle "jointly, in common, and in community with" Andrew. However, the Court found, the evidence showed that officers found $60,000 in cash in Nelson's vehicle. Andrew also used the vehicle to sell and deliver methamphetamine. Moreover, Nelson testified that she knew Andrew had

been arrested and convicted for drug offenses, and there was evidence that she had notified Andrew about the presence of police officers at his residence throughout the years. Despite her knowledge of Andrew's prior arrest and conviction, Nelson allowed Andrew to use her vehicle any time he asked and would often allow Andrew to keep the vehicle for days at a time. Furthermore, Andrew was also in possession of a prescription bottle, in Nelson's name, for hydrocodone, and police discovered another prescription bottle, also in Nelson's name, filled with oxycodone tablets with Andrew's methamphetamine stash. And, the Court noted, the trial court specifically found that Nelson was evasive when she claimed to not know that Andrew sold drugs. Accordingly, the Court concluded, there was ample evidence to support the trial court's finding that Nelson knew or should have known of her brother's drug dealing.

Finally, the Court further held that the evidence showed that Nelson allowed Andrew to use the vehicle whenever he wished, and she considered it a "family car" because she had inherited it from their grandparents. Thus, there was evidence to support the trial court's finding that Nelson held the vehicle jointly with Andrew.

Miranda; Booking Information

Pinkney v. State, A15A0205 (7/2/15)

Appellant was convicted of two counts of attempted armed robbery, two counts of false imprisonment, and one count each of burglary, interfering with an emergency telephone call, and attempted burglary. He argued that the trial court erred in admitting into evidence his cell phone number and the records obtained from his cell phone carrier because his phone number was obtained in violation of *Miranda*.

The Court noted that the Fifth Amendment requires the exclusion of any statement made by an accused during custodial interrogation, unless he has been advised of his rights and has voluntarily waived those rights. Georgia law, however, provides for a limited booking exception to the *Miranda* rule for questions attendant to arrest, such as the suspect's name, age, address, educational background and marital status. Here, the evidence showed that after appellant was arrested, a detective sought to interview him. Before reading appellant his *Miranda* rights, the detective stated that he had a few housekeeping issues. The detective asked appellant his full name, date of birth, age, and level of education. The detective then noted the date and time, asked appellant if he was under the influence of anything that could affect his decision making, whether he spoke and wrote English, and whether he spoke any other languages. The detective also asked appellant for a "contact number" and appellant responded with his cell phone number. Immediately thereafter, the detective read appellant his *Miranda* rights. Appellant indicated that he understood his *Miranda* rights and he invoked his right to counsel.

The Court noted that whether a police officer may ask a suspect for his contact number under the booking exception to *Miranda* is not an issue that has been decided by the Court or the Supreme Court of Georgia. But, it stated, it need not decide this issue because the officers obtained appellant's phone number from their own investigation before placing appellant under arrest. Since the police were able to obtain appellant's phone number and records independently of any alleged *Miranda* violation, the evidence was properly admitted.

Expert Opinion; Jury Charges

Bowman v. State, A15A0424 (7/6/15)

Appellant was convicted of two counts of aggravated child molestation, two counts of aggravated sodomy, two counts of aggravated sexual battery, six counts of child molestation, and two counts of cruelty to children in the first degree. At the time of the offenses, the victim was 6 years old. Appellant argued that the trial court erred in allowing testimony regarding the victim's veracity, specifically in allowing the expert in forensic interviewing techniques to testify that the victim was "resistant to suggestibility." Specifically, he contended that whether the victim was resistant to suggestibility was a credibility issue that was not beyond the ken of the average layperson and not a proper topic for an expert's opinion.

The Court noted that the expert witness who conducted the forensic interview testified extensively regarding the interview techniques. One thing the interviewer considers is whether a child is resistant to suggestibility. If a person is "suggestible," she has a memory that is suggested by information and misinformation, and children under ten are highly suggestible, the expert said. She further related that "to prevent suggestibility, … you avoid leading questions. You also look when a child clarifies or corrects the interviewer. That's resistance to suggestibility. [Their answers are] not being suggested by information that I am providing, that I am giving to a child or someone else will give to a child. … [I]f I make a mistake and the child corrects me, that is an example of resistance to suggestibility." The expert further testified that some indications that the victim was resistant to suggestibility were her asking what a "doodle" was when the expert told her she could doodle with crayons while they talked; answering "no" when asked if there was something she did not like to do instead of making something up; clarifying who the expert was talking about when the expert asked, "Who is he?"; and responding "no" when asked if she knew the name of appellant's girlfriend or whether she said anything when the defendant pulled down his pants and held his "wicky whacker" (a term for penis she learned from a friend).

The Court found from the above evidence that the expert's responses were not statements about whether, in the expert's opinion, the victim had been molested or not. Thus, the trial court did not err in overruling appellant's objection to the expert's testimony in this regard.

Appellant also argued that that the trial court erred in declining to give his request to charge to the jury that the offenses of aggravated sodomy, aggravated child molestation, and aggravated sexual battery each carry a mandatory minimum of 25 years in prison without the possibility of parole, followed by probation for life. Specifically, he argued that "[t]he Georgia legislature has seen fit to take the sentencing function out of the hands of the judiciary for certain offenses, disallowing any consideration for the individual circumstances of the accused. The legislature has also increased the mandatory minimums in several of these offenses from 10 years with no parole to 25 years with no parole. Middle-aged defendants, for all intents and purposes, receive a life sentence when receiving a 25-year unparolable sentence. For a jury not to be informed of the consequences of their verdicts in cases where

there are mandatory minimum sentences flies in the face of the Due Process Clause of the U. S. Constitution (Amendment 14) and the Constitution of the State of Georgia, Art. I, Sec. I, Par. II."

However, the Court found, other than O.C.G.A. § 17-7-131(b)(3)'s limited exception to the general rule proscribing consideration of the consequences of a guilty verdict, our Supreme Court has held that it is improper for the court to give any instruction to the jury concerning possible sentences in a felony case before the jury has determined the question of guilt or innocence. Thus, since the Court is constitutionally bound by the decisions of our Supreme Court, the argument "cannot succeed."

Sentencing: Merger

Williams v. State, A15A0544 (7/7/15)

Appellant was convicted of aggravated assault and aggravated battery. He contended that the two crimes merged because they arose from the same course of conduct. The Court disagreed.

The Court found that after appellant initially pointed the gun at the victim's head, the victim pushed appellant's hand away. Appellant came back swinging and hit the victim with the pistol. The victim grabbed appellant and they tussled. Only then did appellant shoot the victim. Appellant' aggravated assault caused the victim to move defensively, and appellant then took a separate action of moving toward the victim, which led to the struggle that resulted in the victim getting shot in the spine. Therefore, the Court concluded, appellant's initial act of pointing the gun at the victim's head, an aggravated assault, was a separate act from the ensuing act of aggravated battery. Accordingly, the crimes did not merge.

Sufficiency of Evidence

Morales v. State, A15A0488 (7/7/15)

Appellant was convicted of trafficking methamphetamine, possession of methamphetamine with intent to distribute, possession of methamphetamine, possession of marijuana with intent to distribute, and felony possession of marijuana. Briefly stated, the evidence showed that the police were surveilling two houses: appellant's house and the Senft residence, directly across the street. Appellant and Senft entered the Senft residence a few minutes before the officers executed a no-knock search warrant of the Senft residence. Appellant fled out the back door and arrested the following day. All the drugs were located in a bedroom in the Senft residence. He contended that the evidence was insufficient to support his convictions. The Court agreed and reversed.

The Court stated that mere spatial proximity to contraband is not sufficient to prove constructive possession. Rather, the State must show that appellant had the power and intent to exercise control over the drugs, which requires evidence of some meaningful connection between the defendant and the drugs. Appellant did not own or lease the Senft residence, and had merely been a visitor there. Consequently, there was no presumption that he possessed the drugs found in the Senft residence. Furthermore, although appellant was in the Senft residence just before the officers conducted the search, he had arrived only minutes earlier; and there was no evidence that he had possessed the drugs while there, or had carried the drugs into the residence. Additionally, there was no evidence that the officers found anything in the residence that linked him to the residence such as clothing, bills, fingerprints, financial statements, photographs, records, books, or other personal belongings. Nor was there evidence that the officers found drugs, cash or other evidence on appellant's person linking him to the contents of the Senft residence. Indeed, the Court noted, several other people were present at the residence when the drugs were discovered, such that other persons had equal (or greater) access to the contraband and equal (or greater) opportunity to commit the crimes. There was no evidence that the marijuana and methamphetamine found in Ziploc bags (one bag was on top of a bedspread or pillow on the floor, and the other was "beside a blanket or something that was all jumbled up," under a chair on the floor in the cluttered bedroom), would have been plainly visible to appellant, or that appellant had the power and intention to exercise control over the drugs while he was in the bedroom.

Moreover, the Court stated, that fact that appellant fled when officers — who had not identified themselves as police officers — entered without knocking and threw a "flashbang" device into the Senft residence, was not sufficient evidence to support the guilty verdict, as it is well established that neither presence at the scene nor flight, nor both together, without more, is conclusive evidence of guilt. Finally, the Court stated, appellant's convictions could not be upheld on the ground that he was a party to the crimes because the State failed to present evidence that he intentionally caused another to commit the crimes, aided or abetted in the commission of the crimes, or advised or encouraged another to commit the crimes. There was no evidence that appellant had participated in the criminal activity that had occurred on the property. Consequently, the State's evidence did not show essential links between appellant's conduct and the drug possession, trafficking and intent to distribute charges. Therefore, his convictions were reversed.

Confessions; Fear of Injury

Burden v. State, A15A0621 (7/7/15)

Appellant was convicted of aggravated assault. He contended that the trial court erred in admitting his confession. The Court disagreed.

The Court noted that at the time of trial, O.C.G.A. § 24-3-50 provided that "[t]o make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury." The hope of benefit that would have rendered a confession involuntary under O.C.G.A. § 24-3-50 must relate to the charge or sentence facing the suspect. Here, the Court found, while the detective interviewing appellant told him that he might garner sympathy by being honest and forthcoming, the officer did not promise a lighter sentence or reduced charges. Such exhortations to tell the truth are not a hope of benefit that renders a confession inadmissible.

Moreover, the Court found, the detective's statement that he was getting "pissed off" did not amount to a threat of injury that rendered the confession inadmissible. The Court noted that at the hearing on the motion to suppress, the detective testified that appellant giggled when the detective used that phrase and thus he did not think appellant was intimidated. Physical or mental torture is the type of fear of injury that prevents a confession from being admissible pursuant to former O.C.G.A. §

24-3-50. Here, the Court stated, while it did not condone the detective's choice of words, there simply was no evidence that they amounted to a threat that would give rise to any such fear of injury, and the trial court's determination that the confession was not the result of any intimidation or threats was not clearly erroneous. Therefore, considering the totality of the circumstances, the trial court did not clearly err in admitting appellant's confession.

Theft by Receiving; Sufficiency of the Evidence

Tigner v. State, A15A0618 (7/7/15)

Appellant was convicted of four counts of aggravated assault; two counts each of armed robbery, criminal attempt to commit armed robbery, and theft by receiving stolen property; and one count of possession of a firearm during the commission of a felony. He contended that the evidence was insufficient to support his theft by receiving conviction. The Court agreed and reversed.

The evidence showed that the property at issue was a vehicle. On Sept. 10, it was stolen from the victim at gunpoint. The victim of the theft was unable to identify the two perpetrators. Two days later, it was used in an armed robbery. Appellant was a passenger in the vehicle and an accomplice in the armed robbery. At trial, one of appellant's co-defendants testified that he had obtained the car that was used on September 12 from a friend who was not involved in the case. There was no evidence presented at trial to show that appellant was involved in the previous theft of the vehicle or that he knew, or should have known, that the car had been stolen.

The Court stated that riding in a stolen automobile as a passenger does not support a conviction for theft by receiving unless the accused also, at some point, acquires possession of or controls the vehicle (i.e., has the right to exercise power over a corporeal thing), or there exists some evidence, either direct or circumstantial, that the accused was a party to the crime by aiding and abetting its commission. Here, there was no evidence to show that it would have been readily apparent to appellant that the car had been stolen, that he had taken items from the car that belonged to the vehicle's owner, or that he admitted doubts as to the car's ownership. Furthermore, there was no evidence that appellant exerted possession or control over the car or otherwise participated in the theft of the car. The evidence presented was that appellant was later a passenger in the car and had participated in the crimes that took place on September 12. As the evidence was insufficient to show that appellant knew or should have known the car was stolen, and because there was no evidence to show that he possessed or controlled the car or was involved in the theft of the car, his conviction for theft by receiving a motor vehicle was reversed.

Ineffective Assistance of Counsel

State v. Reynolds, A15A0072 (7/8/15)

Reynolds was convicted of two counts of aggravated assault, two counts of false imprisonment, armed robbery, burglary, theft by taking, possession of a firearm during the commission of a felony, possession of marijuana less than one ounce, and possession of a firearm by a convicted felon. The evidence showed that appellant and two accomplices committed a home invasion and then fled in the victims' vehicle. A short time later, an officer, responding to a BOLO, attempted to stop the vehicle. The vehicle stopped and the two occupants fled on foot. The driver was captured. The passenger was apprehended a short time later and identified as Reynolds. A thumbprint of Reynolds was lifted from the exterior of the stolen car near the right front-door handle.

At trial, Reynolds testified in his own defense and denied any involvement in the robbery, but admitted he was in possession of less than one ounce of marijuana. And as to a possible explanation for why his thumbprint was found on the stolen car, he testified that, two days before the robbery, he sold drugs to an acquaintance who was driving the same car. He further testified that, during this transaction, he leaned into the passenger-side window, and that he "probably touched [the] car more than once." His defense attorney then elicited testimony from Reynolds that he had been convicted twice in Delaware for selling crack. Furthermore, in his closing argument, defense counsel emphasized Reynolds's testimony that his thumb came into contact with the stolen car during a drug transaction and reminded the jury that "[he] was selling drugs, [he] was selling marijuana, [he] sold cocaine back in Delaware."

The trial court granted Reynolds' motion for a new trial. The court found that defense counsel rendered ineffective assistance by presenting evidence that he had two prior convictions for intent to distribute cocaine. The State appealed, and the Court reversed.

Citing *Henderson v. State*, 285 Ga. 240 (2009) and *Einglett v. State*, 283 Ga.App. 497 (2007), the Court found that trial counsel's strategy—eliciting testimony regarding Reynolds's history of drug-related offenses in an attempt to exculpate him from the more serious charges related to the armed robbery—was not so unreasonable that no competent attorney would have pursued it under similar circumstances. And while the Court must defer to the trial court's credibility determinations and findings of fact unless they are clearly erroneous, no testimony or other evidence was presented at the motion-for-new-trial hearing that required findings of fact or credibility determinations. Thus, the trial court necessarily determined, as to the deficiency prong of *Strickland*, that trial counsel's chosen trial strategy was deficient as a matter of law, and the Court owed no deference to that conclusion. In so holding, the Court acknowledge that, in evaluating whether Reynolds was prejudiced by counsel's allegedly deficient conduct under the second prong of *Strickland*, the trial court noted that it had considered the evidence presented at trial and judged the credibility of the witnesses. But, the failure to satisfy either prong of the *Strickland* test will defeat an ineffective assistance of counsel claim. And because Reynolds failed to show that his counsel's trial strategy was deficient as a matter of law, the Court concluded that the trial court erred in granting Reynolds's motion for a new trial.