

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 14, 2012

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THIS WEEK:

- **Jury Charges; Felony Murder**
- **Right to Privacy**
- **RICO; In Personam Forfeiture**
- **Murder; Sentencing**
- **Right to Remain Silent; Guilty Plea**
- **Effective Assistance of Counsel**
- **Sentencing; Burglary**
- **Guilty Plea; Aggravated Assault**

Jury Charges; Felony Murder

Terry v. State, S12A0788 (9/10/2012)

Appellant was found guilty of felony murder and possession of a firearm during the commission of a felony. He contended that the trial court erred in its instructions to the jury. Specifically, appellant contended the trial court's presentation of the concepts of justification, and passion resulting from provocation that could reduce murder to voluntary manslaughter, was done in such a manner that a reasonable juror would not understand the distinction between the two principles. Citing *Russell v. State*, 265 Ga. 203 (3) (1995), appellant asserted plain error in the trial court's failure to advise the jury that it could not find appellant guilty of felony murder if it found provocation and passion with respect to the act which caused the killing. The appellant asserted that the jury instructions should have been similar to those suggested by the Court in *Edge v. State*, 261 Ga. 865, 867 n.3 (1992). Appellant pointed out that the failure to provide these jury instructions was found to be reversible error in *Russell*. In *Russell*, the

Court found reversible error to exist because the jury was not informed that it could not find the defendant guilty of felony murder if it found that the aggravated assault of the victim, the crime serving as the underlying felony of the felony murder charge, was the result of provocation or passion. Nevertheless, the Court noted that since the decision in *Russell*, it has determined that a trial court need not instruct the jury expressly that a finding of passion or provocation precludes a conviction for felony murder. The Court stated that instead of giving the jury an instruction on the legal effect a finding of mitigating passion or provocation has on a felony murder charge, the trial court is required only to instruct the jury that, before making a decision on a felony murder charge, it must consider whether passion or provocation mitigates the killing. Thus, the Court overruled *Russell* to the extent that a trial court must instruct a jury that it is precluded from finding a defendant guilty of felony murder if it finds the defendant's act of killing the victim was the result of passion or provocation.

Right to Privacy

Dunn v. State, S12A1139 (9/10/2012)

Appellant was convicted of malice murder, possession of a firearm during the commission of a crime, and five counts of felony obstruction in connection with a shooting death. The Court affirmed.

Appellant contended privacy guarantees in the Georgia Constitution precluded the admission into evidence of testimony of a jail nurse concerning statements made by appellant to her. The evidence showed that officers attempted to administer a gunshot residue

test on appellant's hands at the jail and in doing so, they observed a hand injury which included blood and black powder residue consistent with appellant having recently discharged a firearm. After the booking process was completed, officers took appellant to see a jail nurse so she could evaluate his hand injury. Appellant told the nurse the injury was due to a gunshot wound. Appellant argued that the nurse's testimony was inadmissible because his medical records were obtained in violation of his right to privacy and the State would not have known about his statement to the nurse but for its improper receipt of the medical records.

The Court found that even assuming that the nurse's testimony was admitted in violation of appellant's right to privacy and that appellant did not waive this right by placing the nature and extent of his injuries at issue, the Court concluded that the error was harmless beyond a reasonable doubt because the other evidence properly admitted against appellant was overwhelming. Specifically, the Court noted that appellant was discovered alone with the victim in the vehicle where he was beating the victim; he was covered with the victim's blood; the victim was shot six times by a gun found in the vehicle; evidence of appellant's blood and DNA were found on the gun; and he admitted to another inmate that he shot the victim.

RICO; In Personam Forfeiture *State of Georgia v. Singh, S12A0852; S12X0973 (9/10/2012)*

The State of Georgia filed an in personam action pursuant to the Georgia Racketeer Influenced and Corrupt Organizations Act (Georgia RICO Act), OCGA § 16-14-1, et seq., against Hargurtag Singh and his company Rajan Singh, LLC (collectively, "Singh"), seeking equitable relief afforded by OCGA § 16-14-6(a)(1)-(4), including injunctive relief to stop the alienation of Singh's property and the appointment of a receiver over Singh's business and property. The complaint also sought the forfeiture of certain property as defendants in rem pursuant to OCGA § 16-14-7. As the basis for relief, the State's complaint alleged that Singh was engaging in illegal gambling activity at its gas station, by paying out cash winnings to persons who played electronic gaming devices located in the gas station's

convenience store. The State also alleged that the business was an underground commercial gambling establishment as defined by OCGA § 16-14-3(9)(A)(xvii). On the same day the action was brought, the trial court granted the State's request that cash and equipment be seized and that certain assets be frozen; granted the State's request for a temporary restraining order; and granted the State's request that a receiver be placed in control of the business. The State and Singh subsequently entered into a consent agreement whereby Singh was allowed to resume operating the business under certain conditions and under the receiver's supervision. Hargurtag Singh later moved to dismiss the action on two grounds: (1) the complaint failed to state a claim under RICO; and (2) the State's in personam forfeiture claims were unconstitutional. On May 11, 2011, the trial court declined to dismiss the complaint pursuant to OCGA § 9-11-12(b)(6) for failure to state a claim upon which relief could be granted, reasoning that the State had sufficiently alleged violations of OCGA §§ 16-12-22 and 16-12-28. Relying on this Court's decision in *Cisco v. State of Georgia*, 285 Ga. 656 (2009) and Chief Justice Hunstein's concurrence in *Pittman v. State*, 288 Ga. 589 (2011), the trial court dismissed the State's in personam claims because it determined that all civil in personam claims under the RICO statute were unconstitutional.

The State contended that the trial court erred when it dismissed the OCGA § 16-14-6 claims against the in personam defendants on the grounds that such claims under RICO were unconstitutional. The Court reversed. Approximately two months after the trial court issued its ruling in this case, the Court decided *Patel v. State*, 289 Ga. 479 (2011). In *Patel*, which the Court noted has nearly identical facts to this case, the Court concluded that "in a RICO action, a trial court may properly exercise its discretion to appoint a receiver and enjoin the parties who would otherwise control property that is the subject of an in rem forfeiture proceeding." The fact that these remedies are sought in conjunction with an in rem forfeiture does not convert such a proceeding into the type of in personam forfeiture action under OCGA § 16-14-7(m) which the Court found to be unconstitutional in *Cisco*. The Court found that since the equitable remedies allowed by OCGA § 16-14-6(a) were available to other aggrieved parties as well as to the State,

an action for such remedies was uncharacteristic of a criminal matter. The Court noted that none of the subsections of OCGA § 16-14-6 require proof of criminal conduct on the part of the in personam defendants, but the statute allowed the superior court to enjoin any violations of OCGA § 16-14-4, which generally prohibits racketeering activity, until the case is resolved. Accordingly, the Court reversed the trial court's dismissal of the claims against the in personam defendants.

Murder; Sentencing

Gamble v. State, S12A1223 (9/10/2012)

A jury convicted appellant of murder. He contended that the evidence was insufficient and the trial court erred in its jury instructions. The Court affirmed because the evidence was sufficient and there was no error in the jury charge, but vacated the conviction and sentence for felony murder due to a sentencing error. Specifically, following the jury's verdict, the trial court sentenced the defendant to concurrent sentences of life imprisonment for malice murder and felony murder. However, since there was a single victim, the Court held that appellant could not be convicted and sentenced for both murder counts. See OCGA § 16-1-7(a)(1)(j); *Malcolm v. State*, 263 Ga. 369(4) (434 SE2d 479) (1993). Accordingly, the Court vacated the separate judgment of conviction and sentence for felony murder and remanded the case to the trial court for resentencing.

Right to Remain Silent; Guilty Plea

Burns v. State, S12A0944 (9/10/2012)

Appellant entered a negotiated guilty plea to a murder charge stemming from his indictment for a shooting death. Appellant's other charges were placed on a dead docket and he was sentenced to life in prison for murder. Appellant moved for an out-of-time appeal which the trial court denied. Appellant timely appealed and the Court affirmed. Appellant stated that, during the plea hearing, he was informed of his right to remain silent, but not informed of the right against self-incrimination and, as such, his plea was not knowing and voluntary under *Boykin v. Alabama*, 395 U.S. 238 (89 SC 1709, 23 LE2d 274) (1969). The Court disagreed and

noted that *Boykin* requires the State to show that a defendant was informed of the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront one's accuser's in order to establish that the defendant's guilty plea was voluntarily, knowingly, and intelligently made. The plea hearing transcript showed that appellant was admonished by the district attorney as follows: "[Y]ou have a right to a jury trial where you would have the right to testify, [the] right [to] remain silent. You'd have the presumption of innocence, the right to have the State prove your guilt beyond a reasonable doubt, right to call witnesses, right to cross-examine the State's witnesses, present any evidence you wished and the right to an attorney at trial." The Court found that nothing in the *Boykin* decision required "magic words" to convey the defendant's rights during a guilty plea proceeding. The terms "right to remain silent" and "right against self-incrimination" are interchangeable as long as there is understanding that the rights apply at trial. The Court found that since appellant was advised about his right to remain silent or testify on his own behalf at trial, his right to a trial by jury, and his right to cross-examine the State's witnesses, he was made sufficiently aware of his *Boykin* rights before waiving them.

Appellant further argued that since the right to remain silent and the right against self-incrimination are mentioned separately in Rule 33.8 of the Uniform Superior Court Rules, that each right should have been read to him as part his due process rights under Georgia's Constitution. However, the Court stated, the fact that a trial court does not read every right enumerated in Rule 33.8 does not render the plea involuntary or constitutionally invalid under the Georgia Constitution. Thus, the Court held that the record showed that appellant's plea was valid under both the federal and state constitutions.

Effective Assistance of Counsel

Humphrey v. Riley, S12A0910; S12X0945 (9/10/2012)

A jury convicted William David Riley of murdering his three children and of first degree arson, and the jury imposed death sentences for the murders. The Court unanimously affirmed Riley's convictions and sen-

tences in 2004. Riley filed a petition for a writ of habeas corpus on September 8, 2005, and he amended his petition on July 31, 2007. The habeas court held an evidentiary hearing on March 24-27, 2008. The habeas court granted Riley's petition in an order filed on January 20, 2012, vacating both Riley's convictions and his sentences. The Warden appealed in case number S12A0910, and Riley cross-appealed in case number S12X0945. The Court reversed the habeas court's decision to vacate Riley's convictions and sentences in the Warden's appeal, and affirmed the habeas court's denial of relief on the grounds addressed in Riley's cross-appeal, and remanded for the consideration of Riley's ineffective assistance of appellate counsel claim.

To prevail on his ineffective assistance of trial counsel claim, Riley must show that his trial counsel rendered constitutionally deficient performance and that actual prejudice of constitutional proportions resulted. *Strickland v. Washington*, 466 U. S. 668, 687 (III) (1984). To show sufficient prejudice, Riley must show that there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The Court concluded that the habeas court erred by concluding that there was a reasonable probability that Riley's trial counsel's deficiencies changed the outcome of his trial and, therefore, erred by granting relief based on Riley's ineffective assistance of trial counsel claim. The Court went through an extensive analysis of Riley's claims, which are too detailed to describe in this format, and found that any deficient performance by trial counsel was not significantly prejudicial when considered in the context of Riley's overall ineffective assistance of counsel claim. Further, the Court found that because the habeas court had already granted relief, albeit erroneously, on Riley's ineffective assistance of trial counsel claim, it explicitly declined to also address Riley's ineffective assistance of appellate counsel claim. Therefore, the Court remanded the case to the habeas court for it to consider that claim.

Sentencing; Burglary

Smarr v. State, A12A1171 (9/6/2012)

Appellant was convicted on one count of

burglary and one count of criminal attempt to commit burglary. Appellant asserted that the trial court impermissibly increased his sentence after he began serving it. The Court agreed that the trial court erred in increasing appellant's sentence and therefore vacated that order and remanded the case for resentencing. The trial court's original order sentenced appellant to a thirty-year sentence—ten years to be served in incarceration and the remaining twenty years to be served on probation—and on its face indicated that appellant was being sentenced "as a repeat[] offender under OCGA § 17-10-7(c)." Appellant subsequently filed a motion for correction of sentence in which he requested that the trial court omit the reference to OCGA § 17-10-7(c) on the basis that, at the time that he had committed the acts at issue in this case, he was not a fourth offender, but had at most two prior felony convictions. At the hearing on appellant's motion, counsel emphasized that he was "not seeking anything regarding the equities of the sentence" or "seeking any other sentence modification" at that time, but requesting only that the trial court remove the reference to OCGA § 17-10-7(c). The trial court then issued a new sentencing order deleting the reference to OCGA § 17-10-7(c) but, in so doing, increased the incarceration component of appellant's sentence from ten years to fifteen years, such that his new sentence was thirty years, fifteen years to serve in incarceration and the remaining fifteen years to be served on probation. It was undisputed that at the time the trial court issued the modified order, appellant had already begun serving his incarcerated sentence. Further, the Court noted that the Georgia Supreme Court has made it abundantly clear that once a defendant begins serving his sentence, that sentence can only be increased through resentencing where (a) such resentencing is allowed by law, and (b) the defendant has no reasonable expectation in the finality of the original sentence. In the absence of such circumstances, the limitation on the court's sentencing authority stems from the double jeopardy provisions of our constitutions. The Court stated that nothing in the burglary statute authorized the manner of resentencing imposed by the trial court in this case. Moreover, the Court rejected the State's contention that by requesting that the trial court omit the improper reference to OCGA § 17-10-7(c) on the face of the sentencing order,

“he was seeking modification of his sentence . . . [and] cannot claim that he had a reasonable expectation that his sentence was final.” The Court noted that counsel emphasized on more than one occasion during the hearing on his motion that appellant was neither challenging the equity of, nor seeking any modification of, the sentence itself. The Court therefore vacated the order imposing the increased sentence and remanded the case to the trial court for resentencing in accordance with its opinion.

Guilty Plea; Aggravated Assault

Mahone v. State, A12A1280 (9/7/2012)

The trial court accepted the guilty plea tendered by appellant to two counts of aggravated assault, and possession of a firearm during the commission of a crime against or involving the person of another. Appellant then filed a motion to withdraw his guilty plea. After a hearing, at which appellant was represented by new counsel, the trial court denied his motion, and he appealed pro se. He contended that there was not a factual basis for his plea, that the trial court erroneously refused to replace his appointed counsel, and that his plea was not knowing and voluntary, due to the ineffective assistance of counsel and because he was taking mental health medication when he entered his plea. The Court vacated and remanded for a new hearing.

While the State ultimately bears the burden of showing that a guilty plea was voluntarily, knowingly, and intelligently made, a defendant who pleads guilty and seeks to overturn his conviction because of counsel’s errors must show both that counsel’s performance was deficient and that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial. The record showed that appellant’s written motion to withdraw his guilty plea did not specify the grounds for his motion. At the hearing on his motion to withdraw his guilty plea, appellant’s new post-conviction counsel began by stating that appellant felt that his original, appointed counsel had coerced him into pleading guilty, which would be shown by appellant’s testimony. After swearing in appellant, the judge questioned him directly, asking how his trial counsel coerced him. Appellant responded that his attorney told him that a jury would find him guilty and that he would be sentenced

to 30 to 50 years in prison. In the only instance during the hearing in which the State’s attorney spoke, the prosecutor mentioned that the State had filed a notice of intent to seek aggravation of punishment. When the judge expressed doubt that such advice could constitute coercion, appellant tried to give other reasons he felt that his trial counsel had provided ineffective assistance, specifically that she refused to investigate whether there were any potentially helpful witnesses and that she refused to act on his disclosure that he believed he was incompetent to stand trial because of the psychiatric medication (Elavil) that he was taking. The judge expressed doubt that Elavil could impair a person’s judgment, then asked appellant’s own counsel to direct him to the page in the plea hearing transcript that had “the magic question.” He read that question, “Has anyone forced you, threatened you or coerced you to cause you to plead guilty?” Appellant conceded that he had responded “no” at the plea hearing. Without inquiring whether the State or appellant had any further evidence, the judge abruptly terminated the hearing, saying, “This [motion to withdraw guilty plea] is totally without merit. Take an order denying it.”

The Court found that the record as a whole showed that the judge ruled on appellant’s motion without allowing his post-conviction counsel to articulate the grounds for his motion to withdraw his guilty plea, to examine appellant, or to otherwise present evidentiary support for the motion. In addition, the record created the appearance that the judge believed that appellant’s motion need not be considered on the merits simply because appellant had responded negatively during the plea hearing to a single “magic question.” Consequently, the Court found that the record did not permit a meaningful appellate review of the denial of appellant’s motion. Accordingly, the Court vacated the trial court’s order and remanded for further proceedings, wherein appellant has the opportunity, represented by counsel if desired, to present the grounds for his motion and any supporting evidence.