Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 30, 2016

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Robert W. Smith, Jr.
General Counsel

Lalaine Briones
State Prosecution Support Director

Sheila Ross
Director of Capital Litigation

Sharla Jackson
Domestic Violence, Sexual Assault, and Crimes Against Children Resource Prosecutor

Gilbert A. Crosby
Sr. Traffic Safety Resource Prosecutor

Joseph L. Stone
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Kenneth Hutcherson
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

Sentencing; Jury Charges

Dubose v. State, S16A1299. S16A1300 (9/12/16)

Appellant was convicted of voluntary manslaughter as a lesser included offense of malice murder, two counts of felony murder, aggravated assault, the unlawful possession of a firearm by a convicted felon, and the unlawful possession of a firearm during the commission of a felony. The evidence showed that appellant and the victim lived together and one night, an argument ensued in their bedroom because appellant believed the victim was cheating on him. The victim's teen-aged daughter, who was in another room, heard gunshots. She immediately called 911, and she saw appellant walk out of the apartment, carrying her mother's Glock handgun.

At trial, the jury was charged on voluntary manslaughter as a lesser offense included of malice murder, and as to malice murder, the jury accepted that appellant killed the victim as a result of an irresistible passion arising from provocation and found him guilty of only voluntary manslaughter. Appellant argued that the trial court erred when it sentenced him for a felony murder of which the jury also found him guilty, rather than voluntary manslaughter. The Court noted that in *Edge v. State*, 261 Ga. 865 (1992), it adopted what has come to be known as the "modified merger rule," which holds that, when a defendant is found guilty of voluntary manslaughter, he cannot also be convicted of felony murder based on the same underlying acts. But, it has consistently limited the application of the rule to cases in which the felony murder is predicated on a felony that is itself integral to the killing, typically an aggravated assault, and has consistently refused to extend the *Edge* rule to cases in which felony murder is predicated on the unlawful possession of a firearm by a convicted felon. And here, the felony murder for which appellant was sentenced was predicated upon the unlawful possession of a firearm by a convicted felon.

Nevertheless, appellant argued, his unlawful possession of a firearm was not independent of the killing because he did not possess a firearm, except when he grabbed the victim's Glock to fire it at her. However, the Court found, the record showed that the victim was killed not with the Glock, but with appellant's own Browning 9-millimeter pistol. His possession of that gun was independent of the provoked passion that was the basis for the finding of guilt as to voluntary manslaughter, and it was independent of the killing. Accordingly, because the felony murder charge was predicated on the unlawful and independent possession of a firearm by a convicted felon, the *Edge* modified merger rule did not apply. As a result, the trial court properly sentenced appellant for felony murder.

Appellant also argued that the trial court erred when it instructed the jury about voluntary manslaughter. Specifically, the instruction was not sufficiently tailored to his case, and the trial court should have clarified that infidelity between unmarried persons could result in sufficient provocation to mitigate a killing under O.C.G.A. § 16-5-2(a). Appellant, however, acknowledged that he failed to object to the jury instruction at trial, but he argued that the instruction was plainly erroneous.

The Court stated that to show plain error, appellant must establish not only that the jury instruction was erroneous, but also that it was obviously so and that it likely affected the outcome of the proceedings. The Court found that even assuming that the jury instruction was obviously erroneous, appellant failed to show that the jury was confused about whether it could find him — as an unmarried person claiming to have been provoked by infidelity — guilty of voluntary manslaughter as a lesser-included offense. In fact, the jury accepted appellant's defense on one count, finding him guilty of voluntary manslaughter instead of malice murder. It was, therefore, evident that the jury charges in no way confused or hindered the jury in its ability to consider voluntary manslaughter as a lesser-included offense. Consequently, because appellant failed to show that any error in the jury charges affected the outcome of the proceedings, the charges were not plainly erroneous.

Statements; Miranda

Ellis v. State, S16A1251 (9/12/16)

Appellant was convicted of malice murder and related offenses. The evidence showed that appellant, who was 16 years old, was interviewed on three separate occasions by law enforcement – once on May 3, once on May 9, and then for a third time on May 16, 2009. In his last interview, he implicated himself and his accomplice in the victim's murder. He contended that the trial court erred in admitting his May 16 statement because he was not specifically re-read his Miranda rights. The Court disagreed.

The Court found that appellant made his first statement after voluntarily going to the police station and speaking with homicide detectives in the presence of his legal guardian; he was not in custody at this time and went home after this interview. Appellant again went to the police station voluntarily for his second interview; he was informed of his *Miranda* rights, and both he and his legal guardian reviewed and signed a waiver of rights form. Appellant indicated that he understood his rights, after which he gave a statement in the presence of his legal guardian. With respect to his third interview, appellant once again went to the police department voluntarily and was interviewed in the presence of his legal guardian. Prior to the start of the interview, officers showed appellant and his guardian the previously signed waiver form. Although they did not re-read each specific right to appellant, officers reminded him that his rights were still in full force and effect, and informed him that he was under no obligation to speak with them. Appellant indicated that he recognized the waiver form and wished to speak with law enforcement. It was during this interview that appellant implicated both himself and his accomplice in the victim's murder.

The Court stated that neither Federal nor Georgia law mandates that an accused be continually reminded of his rights once he has intelligently waived them. And here, prior to his May 16 interview, both appellant and his legal guardian were shown and reviewed the signed May 9 waiver of rights form. Appellant was informed that these rights were still in effect and that he was not obligated to speak with the officers. Thus, the Court concluded, based on the totality of the circumstances, the trial court did not err in finding appellant' May 16 statement to be freely, knowingly and voluntarily given and subsequently admitting the statement at trial.

Jury Charges; Voluntary Manslaughter

Harris v. State, S16A1188 (9/12/16)

Appellant was convicted of malice murder and other offenses in connection with the shooting death of his wife. The evidence showed that appellant shot the victim, walked over to where she was laying on the ground and then shot her again. He then placed a different gun next to the victim, walked away to make a phone call and then returned to the victim and shot her in the head. Appellant contended that the trial court erred in refusing to give a charge on voluntary manslaughter. The Court disagreed.

Appellant testified at trial. According to appellant, after he approached the victim and asked to speak with her, she pointed a gun at him. Appellant claimed that he was able to calm her and the she allowed him to go into house to tuck the younger children into bed. While he was inside his house, appellant retrieved his .380 caliber handgun from his bedroom closet, sent the children to bed, and went back outside with the gun in his pocket. When he approached the victim, she was still pointing her gun at him and told him "I should have killed you a long time ago," so he shot her in the chest in order to protect himself. He shot her a second time because he thought she was getting up to shoot him. And according to the appellant, as he tried to disarm her while she lay on the ground, his gun accidentally discharged, resulting in her being shot a third time.

The Court found that while appellant pointed to some proof of potential provocation, the evidence presented not even a pretense of passion, much less that he acted solely as the result of a passion that was "sudden" and "irresistible." Appellant's testimony was that — after he calmed the victim — he went into his house, retrieved a gun, sent the children to bed, and returned outside. There, he said, he saw that she was "still pointing the pistol at [him], said [to himself] at that point, 'it was either her or me,' and so [he] shot her." The Court stated that neither fear that someone is going to pull a gun nor fighting is sufficient alone to require a charge on voluntary manslaughter. Therefore, the failure to charge on voluntary manslaughter was not error.

Out-of-time Appeals; Ineffective Assistance of Counsel

Morris v. State, A16A1222 (9/14/16)

Appellant was convicted of child molestation. At trial and on the motion for new trial he was represented by retained counsel. Most of trial counsel's communications about the defense of appellant's case were with appellant's father, even though trial counsel acknowledged he needed to speak to appellant directly. The record showed that after the denial of appellant's motion for new trial, trial counsel specifically recalled speaking with appellant's father about appellant's appellate rights by telling the father that he "would be glad to do it," but he "didn't think it was a good

investment" because he "didn't think there was any error that an appellate court would use to reverse the jury's decision in th[e] case." Trial counsel further told appellant's father that he did not recommend utilizing the public defender's office because, in his opinion, "they [do] a very weak job on appeal." Defense counsel also testified that he *thought* he had a similar conversation with appellant. Appellant testified that no one told him of his right to appeal. Additionally, the record showed that the trial court did not inform appellant of his rights after his conviction or at sentencing.

Well after the time for filing a timely notice of appeal, appellant filed a motion for an out-of-time appeal, alleging that his counsel was ineffective in failing to advise him of his right to a direct appeal. The trial court denied the motion.

The Court stated that a criminal defendant who has lost his right to appellate review of his conviction due to error of counsel is entitled to an out-of-time appeal. The Court found there was simply no evidence to support the trial court's finding that trial counsel notified appellant of his appeal rights and that appellant voluntarily waived them. Further, there was no evidence that either appellant or his father was informed that appellant had only thirty days in which to pursue an appeal. Instead, the record clearly showed that trial counsel *assumed* that appellant's father would convey trial counsel's advice to appellant, and *assumed* that appellant's failure to take steps towards an appeal were the result of deliberation between appellant and his family. Consequently, the Court found that trial counsel bore the responsibility for the failure to timely appeal and thus, was constitutionally ineffective. Accordingly, the Court reversed the trial court's denial of appellant's motion for an out-of-time appeal.

In so holding, the Court noted that trial courts are permitted to rely upon testimony from trial counsel about what he or she invariably tells all clients about appeal rights, including deadlines, even when the attorney lacks specific recollection of the conversation. But here, trial counsel was unable to provide even that minimum level of specificity. Instead, trial counsel testified that he did not have a set "spiel" that he provided to clients except for the vague statement that he usually would "tell [clients] something about where they go from here."

Motions to Suppress; Venue

State v. Wallace, A16A0891 (9/15/16)

Appellant was indicted for VGCSA and traffic offenses. He filed a motion to suppress, challenging the basis for his traffic stop and alleging that law enforcement lacked probable cause to detain him and search his vehicle. The trial court granted the motion to suppress, but only on the basis that the State failed to establish venue at the pre-trial suppression hearing. The State appealed, contending that the trial court misapplied the law when it suppressed the evidence on the basis of venue. The Court agreed.

Georgia's exclusionary rule, codified at O.C.G.A. § 17-5-30, provides for the suppression of evidence obtained from an unlawful search. The exclusion of evidence is not a constitutional right; it is a judicially created remedy which acts as a deterrent to safeguard a person's Fourth Amendment right against unreasonable searches and seizures. Venue relates to the *place of the trial* because criminal actions are required to be tried in the county where the crime occurred, unless otherwise provided by law. Accordingly, venue is a jurisdictional fact and an element of the crime which the State must prove beyond a reasonable doubt at trial. Ultimately, it is up to the trier of fact at trial to determine whether venue has been sufficiently established. Thus, the Court found, the State did not need to establish venue at the pretrial hearing on appellant's motion to suppress as it was not relevant to the issues raised in his written motion.

Thus, the Court held, as the issue of venue has no bearing on whether the officers had a reasonable basis for the traffic stop or whether the resulting search of appellant and his vehicle were supported by probable cause, it was erroneous for the trial court to suppress the evidence on the basis of venue. Nevertheless, the Court noted, in reaching its decision on the narrow grounds stated in its written order, it was apparent that the trial court did not address the merits of the issues raised in appellant's written motion to suppress. Accordingly, the Court reversed the trial court's judgment and remanded with directions that the trial court determine whether the officers had a reasonable basis for the traffic stop and whether the resulting search was supported by probable cause, after considering the evidence that was presented at the hearing.

Hearsay; O.C.G.A. § 24-8-820

McMurtry v. State, A16A1142 (9/15/16)

Appellant was convicted of one count of sexual battery as a lesser-included offense to child molestation and two counts of child molestation. He argued that the trial court erred in admitting the testimony of the victim's mother and a police officer regarding the victim's prior out-of-court statements to them about his inappropriate sexual contact with her. Specifically, he contended, the statements failed to meet the criteria in O.C.G.A. § 24-8-820 because the officer's and mother's statements lacked specific indicia of reliability.

The Court initially noted that because appellant did not object at trial, its review was limited to whether it was plain error. O.C.G.A. § 24-8-820 provides as follows: A statement made by a child younger than 16 years of age describing any act of sexual contact or physical abuse performed with or on such child by another . . . shall be admissible in evidence by the testimony of the person to whom made if the proponent of such statement provides notice to the adverse party prior to trial of the intention to use such out-of-court statement and such child testifies at the trial . . . and, at the time of the testimony regarding the out-of-court statements, the person to whom the child made such statement is subject to cross-examination regarding the out-of-court statements." Thus, the Court stated, the version of O.C.G.A. § 24-8-820 applicable here, unlike its predecessors, contains no such indicia of reliability requirement. And the Court stated, "We decline to add judicially a requirement that the legislature did not include."

Moreover, the Court found, the State provided the statutorily required notice of intent. The other statutory requirements also were met, in that victim, who was under 16 years of age, testified at trial about the sexual abuse and both her mother and the police officer were available for cross examination about the out-of-court statements. Accordingly, the Court held, appellant failed to show error, plain or otherwise.

Arraignments; Waiver

Sapp v. State, A16A1425 (9/15/16)

Appellant was accused of two counts of speeding and after trial, was convicted of

one count and acquitted of the other. She contended that she received inadequate notice of her arraignment and was never formally arraigned. The Court agreed and reversed.

The record demonstrates that before jury selection, the trial court requested that appellant sign the accusation. Subsequently, the following exchange occurred: Appellant: "From what I'm reading its says defendant, [I], waive[] copy of the accusation. I do not. Waive list of witnesses, I do not. Waive formal arraignment, I do not." Court: "We've already gone through all that. We're going to trial now. . . . [Y]ou have a copy of this. We're going to trial today. We scheduled this case for trial today so you're not waiving anything."

The Court stated that generally, a person indicted for or charged with an offense against the laws of this state is entitled as a matter of right to be arraigned before pleading to the indictment. While, O.C.G.A. § 17-7-91(c) permits waiver upon "appearance and entering of a plea," it is reversible error for a trial court to require a defendant to go to trial on an indictment when she was not formally arraigned and refused specifically to waive such arraignment. And here, the State conceded that it could not demonstrate that appellant was formerly arraigned and that appellant refused to waive a formal arraignment. Consequently, the Court reversed appellant's conviction for speeding.

DUI; Implied Consent

Smith v. State, A16A0746 (9/16/16)

Appellant was convicted of DUI (less safe), DUI (per se), and impeding the flow of traffic. He contended that the trial court erred in admitting the results of his Intoxilyzer 9000 breath test because the officer provided him with misleading information concerning the consequences of his refusal to submit to the test. The Court agreed.

The record shows that appellant did not have a Georgia driver's license. He was licensed to drive in South Carolina, but at the time of his arrest, his license had been suspended. Appellant agreed to submit to the Intoxilyzer test, but only after he was advised by the arresting officer that, if he refused the test, "they will turn around and suspend your license for a year." The State conceded that the officer's statement was substantially misleading because the Georgia Department of Driver Services has no authority to suspend or revoke the driver's license of a non-resident motorist. Rather, the Department is only authorized to revoke or suspend the non-resident's privilege of driving in Georgia pursuant to O.C.G.A. § 40-5-51(a). Because this misleading information may have affected appellant's decision to consent to the Intoxilyzer test, the court's decision to admit the test results in evidence was error.

However, the State argued, given that appellant could be convicted of only one count of DUI, the State argued that the Court should reverse the conviction for DUI "per se" but affirm the conviction for DUI "less safe" because the admission of the Intoxilyzer test results was harmless error with respect to the less safe conviction. The Court agreed. Here, the Court found, the evidence showed that appellant slowed his vehicle to a stop at a green traffic light on a busy highway near a major expressway interchange, forcing traffic to move around him. The officer found appellant nearly asleep at the wheel, his foot resting on the brake while the truck was in drive. Video and photographic evidence submitted by the State supported the officer's testimony. Appellant told the officer that he had consumed a few beers, and the Alco-sensor test confirmed that he had, in fact, consumed an alcoholic beverage. The officer testified that appellant smelled strongly of an alcoholic beverage, that his eyes were red and watery, that his movements were sluggish, that he almost fell out of his truck, and he failed all of his field sobriety tests horribly. Under these circumstances, the Court found, it was unlikely that the improperly admitted Intoxilyzer evidence contributed to the judgment because the properly admitted evidence of appellant's guilt of DUI "less safe" was overwhelming. Therefore, the admission of the test results in this case was harmless error with respect to appellant's conviction for DUI less safe.

Statutes of Limitation; Tolling Provisions

State v. Crowder, A16A1184 (9/20/16)

On October 24, 2014, the State filed an indictment against Crowder, alleging that between January 1, 2004 and June 30, 2010 he committed the offenses of unlawful conversion of sales and use taxes, theft by taking, and false swearing. Crowder filed a motion for plea in bar, contending that the indictment was barred by the applicable four-year statute of limitation. After an evidentiary hearing, the trial court granted Crowder's motion. The State appealed.

The Court noted that O.C.G.A. § 17-3-1(c) provides, in relevant part, that prosecutions for felonies must be commenced within four years after the commission of the crime. But, O.C.G.A. § 17-3-2(2) pertinently states: "The period within which a prosecution must be commenced under Code Section 17-3-1 . . . does not include any period in which . . . the crime is unknown." Under O.C.G.A. § 17-3-2(2), the knowledge of the victim (here, the Department of Revenue ("DOR")) is imputed to the State. The determination of when the crime was discovered is a factual one. The burden is on the State to prove that the crime occurred either within the statute of limitation, or, if an exception to the statute is alleged, to prove that the case falls within the exception. Whether the State has met this burden is for the finder of fact. Moreover, exceptions will not be implied to statutes of limitation for criminal offenses, and any exception to the limitation period must be construed narrowly and in a light most favorable to the accused.

The State argued that the statute of limitation was tolled pursuant to O.C.G.A. § 17-3-2 because the crimes were unknown to the State until at least October 29, 2010. The Court found that the evidence showed that Crowder owned and operated Syntellus Dataworks, LLC ("Syntellus"), which sold computer hardware and information technology services. Crowder received a sales tax identification number from the DOR in 2003 for his business, showing his intent to collect sales tax; that Paris, a DOR employee/auditor, knew in July 2010 that no sales tax had been paid on Syntellus's account since the business opened in 2003; that Martin, a DOR employee/auditor, learned in August 2010 that Syntellus had sold goods to SunTrust Bank and collected sales tax on those sales; that the sales tax collected had not been remitted to the DOR; that Martin relayed that information to Paris, who had been conducting a sales tax audit of Syntellus since the spring; that in August 2010, Martin forwarded to Paris three waiver forms in which Crowder swore that he had collected the sales

tax and remitted the tax to the DOR; that on Syntellus's 2008 and 2009 Georgia corporate tax returns, filed on September 9, 2009 and September 17, 2010, Crowder disclosed to the DOR that the company sold computer hardware and that it had current sales tax liability exceeding $1 million; and that by early September 2010, Paris had "no doubt" that Crowder had collected sales tax and failed to remit the tax to the State. Although Paris testified that at the beginning of the audit he thought Syntellus was a service provider and therefore had no sales tax to return or remit, and that it was possible that Crowder was remitting the sales tax owed from a different account, the DOR had information before October 29, 2010 that contradicted those explanations. Thus, the Court concluded, the trial court's finding that the State had actual knowledge of the crimes before October 29, 2010 was not clearly erroneous.

Rule 404 (b) Evidence

State v. Spriggs, A16A0871 (9/21/16)

Spriggs was charged with attempted murder, armed robbery and other related crimes. The State's proffered evidence showed that Spriggs entered a convenience store, shot the cashier in the head, grabbed cash from behind the counter and fled. The State filed a notice of its intention to introduce two undated "selfie" cell phone videos in which Spriggs talked about making money by various means, including armed robbery. The State asserted that the evidence was admissible under O.C.G.A. § 24-4-404(b). The two videos were not in the record on appeal. However, the parties agreed that that in the first video, Spriggs says to the camera, "I sit back and think, man, of the ways I can make money. Shit. Nine to five, selling dope, or just straight robbing n******." In the second, Spriggs says, "Yea man, I'm an ATB azz, n***** man. Affiliated with the trap boy[,] man. N***** try me, man, they know what's happening, man. We stay strapped like a foo foo and I don't give a f***. I'll blow your f***ing head off, you hear me. Straight like that." The trial court found that the videos showed nothing more than a propensity to rob or injure others and denied the motion. The State appealed under O.C.G.A. § 5-7-1(a)(5).

The Court stated that to admit extrinsic or other acts evidence, the State must show that the proffered evidence (1) is relevant to an issue other than a defendant's character; (2) the probative value of the other acts evidence is not substantially outweighed by its unfair prejudice, i.e., the evidence must satisfy the requirements of Rule 403; and (3) there is sufficient proof so that the jury could find that the defendant committed the act in question. The Court found that the third part of the test was satisfied because it was undisputed that Spriggs made the videos.

The State argued that the two videos were relevant under the first part of the test to prove Spriggs's intent or motive to commit armed robbery. As to intent, the Court stated that the State would have to show that Spriggs had the intent to commit theft and did so with an offensive weapon or any device having the appearance of such weapon. Thus, the State might have obtained admission of the videos at issue if it had shown that Spriggs's extrinsic act of making the videos was "a similar act with the same sort of intent" as that of committing armed robbery. The State failed, however, to show that Spriggs's act of making the videos amounted to any criminal act, let alone that it required the same or similar intent as the charged offense of armed robbery. The acts of making the videos and of committing the armed robbery are thus not "similar acts" for purposes of Rule 403 because they do not share the same sort of intent. Furthermore, the State provided no evidence that the two acts of making the video and committing the armed robbery were committed close in time and in similar circumstances.

The Court also disagreed with the State's argument that the videos were admissible as extrinsic evidence to show motive in the armed robbery. Spriggs's act of making videotapes containing vague threats and showing him in possession of a gun did not demonstrate motive, as these acts were not in themselves criminal. And, citing Milich, the Court stated that "the fact that Spriggs possessed a gun in the armed robbery he allegedly committed 'do[es] nothing to distinguish [Spriggs] from most other robbers or to prove a specific motive for this crime.'" Instead, such facts showed only a mere propensity to commit armed robbery, and thus, were inadmissible.

Finally, the Court found, even assuming the State met its burden under the first part of the test, the trial court ruled that the evidentiary value of the evidence was substantially outweighed by its prejudicial value. Here, the State failed to introduce any evidence as to the time when the videos were made, and the videos themselves made no reference to any specific victim, so that they have only a tenuous "logical connection" to Spriggs's intent to commit the specific armed robbery at issue. Thus, the videos have little or no probative value as extrinsic evidence. Finally, the videos included statements as to Spriggs's involvement in drug dealing, an illegal activity which had no relevance to the charged crime of armed robbery, but references to which would have been highly prejudicial. Accordingly, the record further supported the trial court's discretionary determination that any probative value the videos might have had was substantially outweighed by their unduly prejudicial effect. Accordingly, the Court affirmed the trial court's exclusion of the videos under O.C.G.A. §§ 24-4-403 and 24-4-404(b).