Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING DECEMBER 14, 2018
Issue 50-18

THIS WEEK:

- **Rule 404 (b); Rule 403**
- **Judicial Impropriety; Recusal**
- **Search & Seizure; Parolees**
- **Right to Counsel; Judicially Imposed Conditions**

Rule 404 (b); Rule 403

Arrington v. State, A18A0829 (10/24/18)

Appellant was convicted of armed robbery, aggravated assault, kidnapping with bodily injury, and possession of a firearm by a convicted felon. The crimes occurred in 2012. At trial, the State was allowed to introduce evidence of appellant's two 1989 Alabama convictions for robbery in the first degree under Rule 404 (b). Appellant contended that the trial court erred in admitting these two convictions. In a 2-1 decision, the Court disagreed.

Appellant argued that the State failed to show that the other acts evidence was relevant to the issues of motive, opportunity, knowledge, and preparation, or that the probative value outweighed the undue prejudice. However, the Court noted, he conceded that the evidence was relevant to the issue of intent. Appellant also did not argue that the State failed to offer sufficient proof that he committed the other acts.

The Court stated that where the extrinsic offense is offered to prove intent, its relevance is determined by comparing the defendant's state of mind in perpetrating both the extrinsic and charged offenses. Thus, where the state of mind required for the charged and extrinsic offenses is the same, the first prong of the Rule 404 (b) test is satisfied. In both of the other acts, appellant was alleged to have used a gun or an apparent gun to rob others. In one of the other acts, appellant was convicted of robbery in the first degree for using a handgun to rob a woman at a convenience store of $422. In the second act, appellant was convicted of robbery in the first degree for pretending to have a handgun and robbing a cashier at a Burger King restaurant of $40.

Under OCGA § 16-8-41 (a), "[a] person commits the offense of armed robbery when, with intent to commit theft, he or she takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon." Thus, appellant's other acts involved the use of a weapon or an apparent weapon "with intent to compel acquiescence to the taking of or escaping with … property." Ala. Code § 13A-8-41.

Consequently, the Court found, both of the other acts involved the same intent as required to prove crimes appellant was charged with here. Thus, the other acts were relevant, and satisfied the first prong for the admission of such evidence. Moreover, appellant conceded that the other acts were relevant to show intent, which is one of the purposes for which other acts may properly be offered into evidence under OCGA § 24-4-404 (b).

1590 Adamson Parkway, Fourth Floor, Morrow, Georgia 30260 ▪ (770) 282-6300 ▪ www.pacga.org ▪
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Furthermore, the Court found, the probative value of the evidence of appellant's prior convictions was not substantially outweighed by any undue prejudicial impact because there was no physical evidence of appellant's presence at the scene of the crimes, indicating his involvement. Thus, the State's need for the evidence of his prior convictions to prove its circumstantial case that appellant participated in the crimes and to negate his defense that he was not a participant was more probative than prejudicial.

Accordingly, the Court concluded, the trial court did not clearly abuse its discretion in admitting appellant's prior convictions for the purposes of establishing his intent in this case. In so holding, the Court further stated that it did not need to address whether the other acts were also admissible for the purpose of showing motive, opportunity, preparation, or knowledge.

Judicial Impropriety; Recusal

Cromer v. State, A18A0828 (10/25/18)

Appellant was convicted of armed robbery, aggravated assault, criminal trespass and possession of a firearm by a convicted felon during a felony. He contended that his due process right to a fair trial was violated when the trial court judge failed to sua sponte recuse himself due to alleged ex-parte communications with the State revealing a bias against appellant. The Court disagreed.

At the motion for new trial hearing, which hearing was heard by a different superior court judge, appellant presented evidence that after his conviction in this case, his trial counsel was contacted by another attorney who, while doing unrelated work, happened to encounter courtroom video depicting the trial judge in this case speaking informally with the State's attorneys in open court about the schedule for the next week's trial (i.e., appellant's trial). In the conversation, the trial court remarked about the case having seventeen witnesses and stating, "Well hopefully this jury does the right thing. Had some unusual cases lately, unusual juries." The prosecutor then stated that "it's hard to get a fair shake" in the county. The judge then stated, "God, that was crazy. That one was crazy. … [T]he whole time I was saying you're putting too much evidence on, you're making a mountain out of a mole hill. I couldn't believe … they weren't going to convict on the [testimony from the] cop. I did not believe it on the EMT. I was really surprised by that. That was kind of … crazy."

Appellant contended that this exchange, which occurred without the presence or knowledge of defense counsel, revealed the presence of actual bias against appellant that deprived him of his right to a fair trial under the Due Process Clause. However, the Court stated, there was no allegation nor any evidence that the trial judge had a personal or pecuniary interest in the case or any relationship to a party such that appellant's due process interest was implicated. With respect to these particular comments, the Court stated that the better practice would be to avoid such discussions, particularly with attorneys appearing before the court. Nevertheless, the trial judge's comments essentially addressed certain witness testimony in an unrelated trial that already had concluded. Even if the judge's comments reflected his view on the credibility of a particular police officer's testimony in the unrelated trial, the comments did not amount to an opinion that all law enforcement testimony should be believed or that it should be believed in appellant's case. Likewise, the comments about the jury doing the "right thing" did not state what the "correct" outcome should be with respect to any

particular case, including appellant's case. Accordingly, the Court concluded, despite appellant's "well-made argument" to the contrary, the record did not reveal an unacceptable risk of bias such that the average judge in this circumstance is not likely to be neutral.

Search & Seizure; Parolees

Burkes v. State, A18A0821 (10/25/18)

Appellant was convicted of trafficking in methamphetamine following a bench trial on stipulated facts. The evidence, briefly stated, showed that in March 2015, based on a tip from another officer of suspicious activity, an officer was looking for probable cause to stop appellant's vehicle. The officer stopped the vehicle for a tinted window violation. Although the window tint was illegal, the vehicle was discovered to be a rental which the officer concluded made the vehicle exempt from the statute's tint limits. Nevertheless, the officer ran a GCIC check and discovered that appellant was a parolee. Appellant reluctantly admitted to the officer that he was on parole for a drug distribution conviction. The officer contacted the parole officer and learned that appellant had a Fourth Amendment waiver. Based on the officer's observations, and the waiver, the officer conducted a search which led to the discovery of the contraband.

Appellant contended that the trial court erred by denying his motion to suppress based on the Fourth Amendment parole waiver. As part of the bench trial, the parties stipulated that the vehicle search was conducted "pursuant to [appellant's] parole Fourth Amendment Waiver," and they attached to the "Stipulations" pleading a copy of the parole conditions certificate containing the consent to search provision. The parole conditions certificate (which showed effective parole dates beginning in August 2013 and ending in July 2015) provided: "My parole officer or any other parole officer may, at any time, conduct a warrantless search of my person, papers, and place of residence, automobile, or any other property under my control." Thus, appellant contended, the waiver at issue only allowed searches by parole officers, and his parole officer could not consent to a search by or transfer that authority to a police officer. The Court disagreed.

The Court noted that in *Samson v. California*, 547 U. S. 843, 853 (III) (126 SCt 2193, 165 LE2d 250) (2006), the U. S. Supreme Court concluded that "the Fourth Amendment does not prohibit a police officer from conducting [even] a suspicionless search of a parolee." And requiring a parolee's consent to a search of his property as a condition of parole is not unreasonable. Furthermore, a search made pursuant to a special condition of parole that is based upon a reasonable or good-faith suspicion of criminal activity is permissible.

Here, the Court found, the police officers had reasonable grounds to believe that the vehicle driven by appellant contained illegal drugs. There was no evidence that the police or parole officers acted in bad faith, in an arbitrary and capricious manner, or solely to harass appellant. The Court also emphasized that as a condition of his parole, appellant agreed to waive his Fourth Amendment rights and consented to searches of property under his control by parole officers, and that his parole officer told the police officer that appellant had waived his Fourth Amendment rights. Therefore, under the circumstances of this case, the fact that police officers conducted the search did not remove it from the "consent-waiver" exception to the probable cause and warrant requirement of the Fourth Amendment.

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Finally, the Court stated, a warrantless search based on unauthorized consent can be upheld if the law enforcement officer conducting the search reasonably (albeit erroneously) believed the consent given was valid. The facts available to the officer at the time of the search led him to reasonably believe that appellant, a parolee, had signed a Fourth Amendment waiver validly consenting to a search of the vehicle under his control. Accordingly, the Court upheld the search of appellant's vehicle.

Right to Counsel; Judicially Imposed Conditions

Strozier v. State, A18A1179 (10/25/18)

Appellant was convicted of battery after a bench trial in which he appeared pro se. The record showed that at his arraignment, appellant applied for appointment of counsel and in support, averred that he had no take-home pay. Appellant stated that he understood "there is a $50.00 charge to apply for or receive a court appointed attorney. (O.C.G.A. 15-21A-6 (C))," but moved for a waiver of the application fee, stating that he was indigent and unable to pay the fee because he was unemployed. The trial court appointed counsel and approved the fee waiver the same day. During the arraignment, however, the trial court orally conditioned waiver of the fee on appellant contacting the county office of workforce development about employment within ten days.

At a calendar call six weeks later, the trial court asked appellant if he was representing himself, to which he responded that he had a public defender. The public defender then offered that he had not received "proof of enrollment from the Workforce Development." In response to questioning by the court, appellant stated that he did not have any paperwork with him to show either payment of the fee or enrollment with workforce development. The trial court then stated, "All right. Then I'm going to have you go ahead and waive your opportunity to work with the public defender's office. You haven't met the requirements, so you're going to be self-represented in this matter. All right?" Nevertheless, the court informed appellant that the public defender would be "assisting as a friend of the court."

Appellant contended that the trial court erred in requiring him to pay an application fee or to enroll in the workforce development program in order to be represented by the public defender's office after determining that he was indigent. The Court agreed.

The Court stated that the application fee for the appointment of indigent counsel is governed by OCGA § 15-21A-6 (c). The plain language of the statute shows that the only requirement for waiver of the application fee is a finding that the defendant is unable to pay or that the fee will result in a measurable hardship. Here, appellant moved for appointment of counsel and waiver of the fee at his arraignment. The trial court's simultaneous orders granting these motions plainly showed that the trial court accepted that appellant was unable to pay or would suffer a measurable hardship if the fee were imposed. Thus, under the statute, the court was required to waive the fee. But at the same arraignment, the trial court orally conditioned waiver of the fee on appellant enrolling in a workforce development program. Thus, at the arraignment, the court took an action not authorized by OCGA § 15-21A-6 (c) and erred as a matter of law by so doing.

At the ensuing calendar call, after determining that appellant had not satisfied that condition, the court ordered appellant to waive his right to counsel and represent himself. But absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at

his trial. And, the Court found, the State made no effort to show that appellant waived his right to counsel, and its review of the record showed no voluntary or intelligent waiver of appellant's right to counsel, nor that he was apprised of the dangers of proceeding without counsel. Accordingly, the Court concluded that the court erred by ordering appellant to waive his right to counsel.

Nevertheless, the State argued, appellant's counsel induced these errors by informing the court at the calendar call that he had not received proof that appellant had enrolled in a workforce development program. But, the Court stated, the trial court first erred at the arraignment, not at the calendar call. And even at the calendar call, counsel did not induce the error by proposing or taking any action upon which the Court relied; he merely informed the court about the status of the condition erroneously set by the court at the arraignment.

Finally, the State argued, appellant "forfeited" his right to counsel by his "unethical conduct." In support, the State noted that appellant stated that he worked every day, had several employment contacts in his phone, and was scheduled to be on a job site in the near future. Thus, the State argued, appellant was dishonest with the court and, accordingly, was not entitled to appointed counsel. In support, the State cited case law from other jurisdictions for the idea that, separate from a knowing waiver of the right to counsel, a defendant may "forfeit" the same right by engaging in certain bad behavior.

The Court disagreed. The Court noted that the State cited no Georgia law in support, and it found none. Rather, citing several Georgia cases, the Court held that the concepts of forfeiture and waiver of the right to counsel are not distinguished.