

## THIS WEEK:

- **Severance; Jury Instructions**
- **Habeas Corpus; Mootness**
- **Ineffective Assistance of Counsel; Voir Dire**

### Severance; Jury Instructions

*Doleman v. State, S18A1155 (12/10/18)*

Appellant was convicted of murder and related crimes. The evidence showed that appellant and his two co-defendants planned and executed a series of crimes spanning approximately eight weeks. Appellant contended that the trial court erred by denying his motion to sever the offenses of the murder and robbery of Charlie Artis from all other offenses included in the indictment because several of the offenses applied only to appellant's co-defendant Lee, and several offenses did not occur on the same day as the murder and robbery. The Court disagreed.

The Court found that severance was not mandatory because all of the offenses involving appellant, including the ones which did not occur on the day of the murder, reflected a continuous crime spree and a defendant is not entitled to severance where a series of similar crimes constituted parts of a single scheme or plan, even though acts occurred over a period of time. Here, the crime spree consisted of an eight-week period during which the co-defendants committed a series of robberies and assaults using the same weapons and stolen vehicles from previous offenses. Further, because appellant failed to prove he was prejudiced by the refusal to sever any of the related offenses, he could not show that the trial court abused its discretion in denying the motion. Also, because appellant failed to seek severance of his trial from that of Lee's, he forfeited the option to seek severance from those offenses that involve Lee, but not appellant. The remaining count that did not include appellant was the rape charge against co-defendant Scott. However, because appellant was never charged with the rape in the indictment, the jury was unable to convict him of this charge and, in any event, Scott pled guilty and admitted full responsibility for the rape charged in the indictment, and testified at trial, taking full responsibility for the rape. Thus, while neither Lee nor appellant were involved in this act, there was no confusion or prejudice in the trial court's refusal to sever this offense.

Appellant also argued that the trial court committed plain error by failing, sua sponte, to instruct the jury that, if it returned a verdict of guilty as to either of the murder counts, a sentence of life in prison would be mandatory. Specifically, he contended that the rationale behind the well-established practice of withholding sentencing information in non-capital felony cases before the jury has reached a verdict should not apply here because the jury's decision itself legally mandates a specific punishment, and withholding that amounts to a denial of due process. But, the Court noted, appellant failed to cite any controlling legal authority that demonstrates that not instructing the jury about sentencing prior to their determination is an error that is "clear or obvious rather than subject to reasonable dispute." In fact, the Court stated, in *Johnson v. State*, 276 Ga. 57, 59 (2) (2002), it held otherwise. Therefore, the Court held, there was no error, much less a clear and obvious one.

## Habeas Corpus; Mootness

*Hart v. Burford*, S18A1642

Appellant was charged with two counts of disorderly conduct, a misdemeanor, under a city's municipal code. He filed a demand for jury trial in the Municipal Court, which the judge denied. In September 2014, following a bench trial, the judge found appellant guilty and sentenced him to six months of probation on each count to run consecutively, a \$1,000 fine on each count, and 30 days in jail to be served on 15 consecutive weekends. After appellant's appeal to the superior court was dismissed, he filed a habeas petition against the judge and other municipal officers alleging the denial of his right to a jury trial and that his appellate counsel rendered ineffective assistance. The habeas court denied the petition.

The Court noted that in misdemeanor cases, a habeas petition becomes moot if the petitioner has completed his sentence and fails to demonstrate on the record that he is still suffering adverse collateral consequences from the misdemeanor conviction. Here, there was no real dispute that appellant completed his sentence. With respect to appellant's 30-day jail sentence, the record contained an order remanding appellant into custody on consecutive weekends starting on July 17, 2015, and appellant's counsel informed the court at oral argument that it was his understanding that appellant had served that sentence. And although appellant's counsel contended at oral argument that appellant was suffering an adverse collateral consequence because he had not yet paid his \$2,000 fine, appellant offered no record evidence on that point. In fact the Court stated, even assuming that an outstanding fine could constitute an adverse collateral consequence in a misdemeanor case in which the prison term has expired (and in which the prosecuting authority has admitted the discharge of the sentence and apparently has disavowed any future efforts to collect the fine), adverse collateral consequences must be demonstrated in the record and appellant offered none.

Accordingly, because appellant failed to demonstrate on the record any adverse collateral consequence from his misdemeanor conviction, the Court dismissed the appeal as moot.

## Ineffective Assistance of Counsel; Voir Dire

*Welbon v. State*, S18A1143 (12/10/18)

Appellant was convicted of malice murder and other offenses. He contended that his trial counsel rendered ineffective assistance by failing to move to strike a certain prospective juror for cause, thereby forcing counsel to use one of appellant's peremptory strikes to remove the juror. The Court disagreed.

The Court stated that assuming, without deciding, that counsel's failure to move to strike the prospective juror for cause was deficient, appellant failed to establish prejudice. Relying on *Kirkland v. State*, 274 Ga. 778, 779 (2002), *Nwakanma v. State*, 296 Ga. 493, 500 (2015), and *Fortson v. State*, 277 Ga. 164, 165-166 (2003), appellant argued that because counsel did not seek to excuse the prospective juror for cause, he was deprived of a full panel of qualified jurors to which he was entitled to direct his peremptory strikes. But, the Court stated, *Kirkland* and *Fortson* relied on *Harris v. State*, 255 Ga. 464, 465 (1986). And in *Willis v. State*, \_\_\_ Ga. \_\_\_, \_\_\_ & n.3, 2018 Ga. LEXIS 685, \*40-42 and n.3 (Case No. S18P0915, 2018 WL 5116568 \*14-15, decided October 22, 2018), the Court recently overruled *Harris* and *Fortson* — and disapproved *Nwakanma*, *Kirkland*, and other cases that referred to the relevant holdings in *Harris* and *Fortson* —

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and held that it is harmless error where a defendant's motion to excuse a prospective juror is erroneously denied but the juror is subsequently removed from the defendant's twelve-person jury by his or her use of a peremptory strike.

Accordingly, the Court found, even if appellant had moved to strike for cause the prospective juror at issue here, any error in denying the motion would have been harmless because appellant used one of his peremptory strikes to remove that same prospective juror from the panel from which the twelve-person jury was chosen, and he failed to show that any challenged juror who served on his jury was unqualified. In other words, appellant did not show that the number of qualified jurors would have been different had his counsel moved to strike the prospective juror for cause. Nor did appellant show any other basis for a finding of prejudice under the circumstances of his case. Therefore, because appellant failed to show that there was a reasonable probability that the outcome of his case would have been different but for trial counsel's alleged deficiency, his claim of ineffective assistance of counsel failed.