Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING FEBRUARY 15, 2019
Issue 7-19

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Hearsay; Coconspirators

Chavers v. State, S18A1236 (1/22/19)

Appellant was convicted of malice murder, violation of the Georgia Street Gang Terrorism and Prevention Act, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon in connection with the shooting death of Armstrong. Very briefly stated, the evidence showed that Armstrong was a member of a gang called the "Rollin' 20s". Towns was a leader of the gang in Cordele and appellant, who lived in Bainbridge, was his superior: the head of the Rollin' 20s in Georgia. Armstrong's first cousin, Hicks, was in a different gang and, when members of the two gangs played a basketball game, a fight between the gangs broke out after Hicks elbowed a Rolling 20's member, cutting his eye. But instead of fighting with his gang against his rival gang—which included his cousin—Armstrong tried to break up the fight. This greatly upset appellant. There was a discussion among the gang members that Armstrong had to be dealt with and appellant basically told Towns to kill Armstrong. Eventually, appellant drove up from Bainbridge in gang member Harper's car, and took Armstrong for a ride. Appellant stopped the car and asked Armstrong to get out and help him with something. When the two got out of the car, appellant executed Armstrong.

Appellant contended that the trial court erred by allowing Henton, a Rolling 20's gang member, to testify over a hearsay objection about certain statements that Jackson, another Rolling 20's gang member, made to Henton on the night of the crimes. According to Henton's testimony, after appellant and Harper drove away with Armstrong on the night of Armstrong's murder, Jackson said that appellant was "talking crazy" and "talking about killing" Armstrong. Specifically, appellant objected that the State had not shown that Jackson was a co-conspirator at that stage, and that Henton's testimony about Jackson's statements was therefore inadmissible hearsay. The Court disagreed.

Under OCGA § 24-8-801 (d) (2) (E), the hearsay rule does not exclude "a statement offered against a party which is … [a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy . …" To admit a co-conspirator's statement under Rule 801 (d) (2) (E), the State is required to show by a preponderance of the evidence that a conspiracy existed, the conspiracy included the declarant and the defendant against whom the statement is offered, and the statement was made during the course and in furtherance of the conspiracy.

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Here, appellant argued only that the evidence was insufficient to prove that appellant conspired with Jackson and others to kill Armstrong—i.e., that appellant and Jackson were not co-conspirators. But, the Court stated, in determining the existence of a conspiracy, the trial court may consider both the co-conspirator's statements and independent external evidence, although the co-conspirator's statement alone does not suffice. And in considering whether a conspiracy was established for purposes of the rule, it is not required that the conspiracy be proven prior to the admission of the evidence in question, but only that the conspiracy was proven at trial. Here, Court found, the State sufficiently proved the existence of a conspiracy that included appellant, the defendant against whom the statement is offered. The State also showed that Jackson, the declarant, was part of the conspiracy to murder Armstrong by presenting evidence that Jackson fought against the rival gang in the basketball-related fight, criticized Armstrong for not fighting and at the same time discussed targeting someone to be beaten or killed, told another gang member on the day of the murder that Armstrong did not know "how real the s*** is about to get," and was present in the parking lot to meet and talk with appellant just before Armstrong was taken away and killed. The State established by a preponderance of the evidence that Jackson conspired with appellant and other gang members to murder Armstrong. In fact, the Court found, the evidence showed that as fellow members of the Rollin' 20s gang, appellant and Jackson were "part of a larger criminal conspiracy." Accordingly, appellant's argument was meritless.

Habeas Corpus; Judicial Coercion

Kennedy v. Hines, S18A1391 (1/22/19)

A jury found Hines guilty of four counts of identity fraud and the court sentenced her to an aggregate of 45 years to serve 20. Thereafter, the State and Hines agreed to a plea deal. Hine's sentence would be reduced to 45 to serve 15 in exchange for the dismissal of the motion for new trial and an agreement by Hines not to seek a direct appeal or habeas relief. At the sentencing, the trial court asked Hines how she pleads to the four charges. Hines replied, "I'm pleading guilty, but actually, I don't want no trial, but I'm not guilty for these charges." The trial court then stated, "[N]ow look, if your not – you've already been found guilty – by a jury and I don't want to play any games with you her today. Do you want to enter your guilty plea?" Hines replied yes and admitted her guilt.

Four years later, Hines filed a habeas petition alleging that her plea was not voluntarily, knowingly and intelligently made because the trial court improperly inserted itself into the plea negotiations and made coercive statements that intimidated her into entering the guilty plea. After a hearing, the habeas court found that it was the State's burden to prove that the plea was not voluntarily made; the trial court violated USCR 33.5 (A) by participating in plea discussions and that the comments made by the trial court were unduly coercive. It therefore granted the habeas petition and the Warden appealed.

The Court stated that contrary to the habeas court's order, it is the petitioner, not the habeas respondent, who bears the burden of proving that the plea was not voluntary, knowing, or intelligent. Also, claims regarding the mere violation of a court rule generally are not cognizable in habeas, which is available only to address a substantial denial of a prisoner's rights under the Constitution of the United States or of this state. Thus, any argument the habeas court or Hines relied on with respect to USCR 33.5 (A) failed as a matter of law.

The Court then addressed Hine's constitutional claim. The Court stated that to show that a trial court participated in plea discussions to such a degree that it rendered a plea involuntary, a criminal defendant generally must show that a trial judge

communicates, either explicitly or implicitly, that his sentence will be harsher if she rejects a plea deal and is found guilty at trial. But there is no constitutional violation when a judge gives an "explanation of the potential maximum sentence that is carefully expressed in conditional language, avoiding any positive statement of what sentence might be imposed after a trial or plea, and there is otherwise no record evidence that the defendant was coerced or that the plea was involuntary.

And here, the Court found, the record showed that the trial court's statements during the exchange at issue did not reference sentencing, let alone suggest that the judge would impose a harsher sentence if Hines did not accept a plea. Instead, the record showed that when Hines equivocated about whether she was going to plead guilty and said "I don't want no trial," the court replied with an accurate, factual statement: "you've already been found guilty . . . by a jury," which Hines agreed was correct. Hines had indeed already been found guilty by a jury, and the court's statement of that fact does not approach the kind of coercion required to implicate constitutional due process. Furthermore, although the rest of the court's statement, "I don't want to play any games with you here today," perhaps indicated a preference for Hines to make a decision one way or the other, there was no evidence that the trial court pressured Hines to accept the plea offer, and its comment simply is not comparable to the types of threats, statements about a trial court's desire to sentence a defendant harshly, or statements coaxing defendants to plead guilty, that would render a guilty plea involuntary. Moreover, the trial court immediately followed up with a direct, non-suggestive question: "Do you want to enter your guilty plea?" Thus, the Court found, far from intimidating or coercing Hines, the trial court did not indicate whether it wished for Hines to plead or not; it simply asked a "yes or no" question, to which Hines replied, "Yes, sir." Consequently, viewed as individual statements and as a whole, the trial court's exchange with Hines did not threaten Hines with a particular sentence, did not reveal the judge's preference about whether Hines pleaded guilty, and did not imperil—let alone violate—Hines's right to due process. Accordingly, the Court reversed the grant of the habeas petition.

Habeas Corpus; Right to a Full and Fair Hearing

Bishop v. Hall, S19A0153 (1/22/19)

Appellant was 76 years old when he was arrested for murder and aggravated assault. Representing himself, he pled guilty and was sentenced to life plus twenty years. Three years later, he filed a habeas petition. He also filed a "motion for assistance" in which he recited that he was 81 years old, he suffered from macular degeneration, he was "already 50% blind" when he entered his guilty plea, he was unable to read even with the assistance of glasses, and he had approximately 40 questions to ask the attorney who had assisted him at his plea hearing (two public defenders consulted with appellant, but did not represent him). Because of his visual impairment, appellant asked the court "to provide assistance in order to ensure a full and fair evidentiary hearing."

Though the habeas court acknowledged appellant's eye problems, it initially treated appellant's request as one for the appointment of counsel and found that appellant was not entitled to any such appointment. The court, who was concerned that the 40 questions may have been written by a "jailhouse lawyer" also declined appellant's request to have someone read the proposed questions on appellant's behalf.

Appellant contended that the habeas court denied him a full and fair hearing and the ability to properly develop the habeas record by denying his written and oral requests for assistance in reading his prepared questions. The Court stated that a fundamental requirement of due process is the opportunity to be heard.
And under the circumstances of this case, as belatedly conceded by the Warden, the Court held that the appointment of a reader for appellant, given his undisputed visual impairment, was necessary to satisfy his due process right to a full and fair hearing. In so holding, the Court stated that it did not consider the propriety or admissibility of the questions which appellant wishes to use, an issue that clearly troubled the habeas court. On remand, the Court stated that if the Warden raises any objections to particular questions, the habeas court may fully consider this issue, and should it find any valid reason to exclude any or all of the questions, it may do so. The habeas court should, however, make a clear ruling explaining its reason for taking any such action.

Severance; Right to Be Present

Mims v. State, S18A1208 (1/22/19)

Appellant was convicted of malice murder, and other crimes related to the armed robbery of a gas station convenience store in March 2014 and theft by bringing a stolen vehicle into the state in early February, 2014. The evidence, briefly stated, showed that on January 30, 2014, Sears drove his girlfriend's car, a 2012 Kia Soul to work in Detroit where it was stolen. Sears did not get a good look at the thief, who wore a hoodie, but described the 6 ft. tall thief as a white male with "blondish-brown, crinkly, curly" hair. Appellant, a black woman, lived in and around Detroit at the time of the theft. She announced on Facebook shortly thereafter, that she had moved to Atlanta.

In March, 2014, appellant killed the clerk of the convenience store during an armed robbery. The police located appellant at her residence and saw the Kia parked outside. Inside the vehicle the police found appellant's wallet containing a MasterCard belonging to Sears; a Michigan State University license plate frame in the back hatch; and Sears's wallet and driver's license in the hatch. Police also discovered that the license tag number had been altered. The Kia also contained personal items belonging to appellant, including documents and receipts issued to appellant before January 30, 2014, that were from Michigan, and documents and receipts bearing later dates that were created in Georgia.

Appellant contended that his trial counsel was ineffective by not moving to sever the theft charge from the charges relating to the armed robbery and murder. The Court agreed. There was no showing or argument that the theft offense and the murder-related offenses were parts of a single scheme or plan or that the offenses were of a similar character. The crimes were committed about a month apart and involved different victims in different states. Although it was undisputed that appellant's possession of the Kia Soul connected her to the murder, the fact that the car was stolen or that appellant brought the stolen vehicle to Georgia from another state had no bearing on any of the murder-related offenses. Because the evidence of theft was not so intertwined with evidence of the murder such that it would not be possible to present evidence of one without the other, the joinder of the offenses was not authorized. Trial counsel was therefore deficient for failing to move to sever the theft count.

The Court then turned to a determination of prejudice. As to the murder-related offenses, the Court found that appellant had not demonstrated that she was prejudiced by counsel's failure because of the overwhelming evidence of guilt. Thus, it was highly unlikely that the evidence that the Kia Soul was stolen affected the outcome of the murder-related charges.

However, the Court reached a different conclusion as to the theft offense. Although the evidence was sufficient to support the theft conviction, it was hardly overwhelming. In particular, the evidence that appellant knew or should have known the vehicle was stolen was not very strong. First, given Sears's report that the thief was a white male, there was not overwhelming evidence that appellant stole the vehicle. Second, though there was sufficient evidence to support the inference that Appellant knew or should have known the vehicle was stolen — such as the altered vehicle tag and the presence of another person's (Sears's) personal belongings — the inference created by this evidence was also not overwhelming. On the other hand, the evidence of appellant's participation in a gruesome murder was very prejudicial to the jury's consideration of the theft offense. Accordingly, the Court reversed appellant's theft conviction.

Appellant also contended that the trial court erred in denying her request to be present at the hearing on her motion for new trial. Specifically, she argued that her testimony was needed to support her ineffective assistance of counsel claims. Appellant acknowledged that she had no unqualified right to be present, but argued, based on case law from our Court of Appeals that in turn relies on case law from the Eleventh Circuit considering federal due process concerns, her presence was required because it would have contributed to the fairness of the hearing. But, the Court stated, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by her absence, and to that extent only.

And here, the Court found, she failed to show any due process violation from her absence at the hearing because her ineffective assistance of counsel claims failed for reasons independent of her absence at the hearing. Therefore, there was no harm in denying her request to be present for the motion for new trial hearing.

Recidivist Sentencing; Right of State to Appeal

State v. Yohman, A18A1695 (1/11/19)

Yohman was indicted for one count each of felony fleeing or attempting to elude a police officer (OCGA § 40-6-395 (b) (5) (A)) and other offenses. The State also sought recidivist sentencing. Yohman ultimately elected to enter a non-negotiated guilty plea. Citing OCGA § 17-10-7 (a), OCGA § 40-6-395 (b) (5) (A), and OCGA § 40-6-395 (b) (5) (B), the State asked the trial court to sentence Yohman to a minimum term of imprisonment of five years. The State also admitted evidence of Yohman's prior felony convictions for which she received a sentence of "7 [years] with fifteen weekends to be served in confinement and the remainder to be served on probation. …" Yohman countered that the recidivist statute did not apply because Yohman "did not serve any time in custody - in confinement in a penal institution" for her prior conviction. The trial court agreed that there must have been "some confinement" on the prior felony in order for the recidivist punishment statute to apply, and concluded that "the recidivist statute is not applicable here[.]" The trial court sentenced Yohman to "3 years to serve in the state correctional system[,]" and the State appealed.

The Court stated that it must first determine if it has jurisdiction over the appeal. OCGA § 5-7-1 (a) (6) authorizes the State to appeal from an order that "is … void under the Constitution or laws of this state." A sentence is void if the court imposes punishment that the law does not allow. And, when the sentence imposed falls within the statutory range of punishment the sentence is not void. Accordingly, the Court stated that it must determine if Yohman's sentence constituted a "void" judgment.

Reading OCGA § 40-6-395 (b)(5)(A and B) and OCGA § 17-10-7 (a) together, the Court stated that these code sections first mandate that a defendant convicted of felony fleeing and attempting to elude under OCGA § 40-6-395 (b) (5) (A) *must* receive a sentence of "a fine of $5,000.00 or imprisonment for not less than one year nor more than five years or both." If the defendant has been previously convicted of a felony for which she was "sentenced to confinement in a penal institution," and the State has otherwise complied with the appropriate notice requirements to seek recidivist punishment, the defendant "*shall* be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense of which he or she stands convicted" — in this case, imprisonment for five years. (Emphasis supplied.) OCGA § 17-10-7 (a). And OCGA § 40-6-395 (b) (5) (B), which expressly governs Yohman's conviction pursuant to OCGA § 40-6-395 (b) (5) (A), contains a limiting provision, requiring that Yohman's "sentence shall not be suspended, probated, deferred, or withheld, and the charge shall not be reduced to a lesser offense, merged with any other offense, or served concurrently with any other offense."

Here, the Court found, at Yohman's guilty plea hearing in this case, the State introduced evidence of Yohman's two felony convictions in February 2014 for possession of methamphetamine and possession of Alprazolam for which she received a sentence of "7 [years] with *fifteen weekends to be served in confinement* and the remainder to be served on probation.…" (Emphasis supplied.) Thus, although Yohman's prior sentence included probation, she was also "sentenced to confinement in a penal institution" for purposes of the recidivist punishment statute. The recidivist punishment statute does not mandate that the defendant's entire sentence be served in confinement. As a result, under the foregoing sentencing scheme, the trial court was required, by operation of law, to sentence Yohman to a five-year term of confinement on Count 1 (fleeing and attempting to elude), none of which may be suspended, probated, or served concurrently with any other sentence. Accordingly, the Court concluded, the trial court's sentence of three years to serve on Count 1 was not allowed as a matter of law, and Yohman's sentence on that conviction is void. Therefore, the State was authorized to appeal Yohman's sentence pursuant to OCGA § 5-7-1 (a) (6), and the Court had jurisdiction to consider the State's appeal. And, because the Court found the sentence to be void, the Court further concluded that the trial court erred in sentencing Yohman on felony fleeing and attempting to elude and remanded for resentencing.

Resentencing on Remand; Right to Withdraw Plea Prior to Sentencing

Troutman v. State, A18A1613 (1/11/19)

Following his guilty plea and convictions for armed robbery, aggravated assault, kidnapping, and possession of a knife during the commission of a felony, appellant on appeal challenged the trial court's denial of his motion to withdraw his guilty plea and to reduce his sentence on the grounds that trial counsel was ineffective and that he did not knowingly, intelligently, or voluntarily enter his guilty plea. The Court affirmed the majority of the trial court's order, but agreed that the trial court should have merged the aggravated assault conviction into the armed robbery conviction for purposes of sentencing. Accordingly, the Court vacated appellant's sentence and remanded the case for resentencing, but also indicated that "[t]he sentence was otherwise legal." One day before that hearing, appellant filed an objection to resentencing and renewal of his motion to withdraw his guilty plea, which the trial court denied at the hearing and in a subsequent written order.

Appellant appealed from the entry of his new sentence and the denial of his renewed motion and objection to resentencing, arguing that pursuant to *Kaiser v. State*, 285 Ga. App. 63 (2007), he was permitted to withdraw his guilty plea prior to

resentencing because his original sentence was void. The Court disagreed. The Court noted that it considered the same argument under similar facts in *Murray v. State*, 314 Ga. App. 240 (2012) ("Murray II"), distinguished *Kaiser*, and rejected it. There was no basis for finding that the sentences entered on the armed robbery, kidnapping, and possession of a knife during the commission of a felony were void because the Court found appellant's sentence on the aggravated assault conviction to be void. In other words, where only a "discrete provision" of defendant's sentence was invalidated — expressly leaving all other provisions of sentence intact — appellant was ineligible to withdraw his guilty plea.