

THIS WEEK:

- Hearsay; Sentencing
- Jury Charges; Lesser Included Offenses
- Habeas Corpus; Sentencing
- *Garza*; Merger
- Ineffective Assistance of Appellate Counsel
- Closing Arguments; Split Sentences

Hearsay; Sentencing

Tyner v. State, S18A1071 (3/4/19)

Appellant was indicted for malice murder (count 1), felony murder (counts 2-4), kidnapping with bodily injury (count 5), aggravated assault with intent to rape (count 6), aggravated assault (count 7), and robbery by force (count 8). The jury convicted him on all counts.

Appellant contended that the trial court erred in admitting into evidence statements the victim made to Haberkorn regarding a missing key. At trial, the trial court allowed the victim's close friend Crystal Haberkorn to testify about statements the victim made to her in the weeks before her death. Haberkorn and the victim attended the same church, saw each other every week, spoke during the week, and confided their personal feelings to one another. Haberkorn testified that, while appellant was in the process of painting the victim's home, the victim expressed concern that appellant had taken a spare key from a desk drawer in her home. Sometime later, the victim told Haberkorn that the key had been replaced or returned.

The Court noted that the State offered the statements at issue as an explanation for the lack of evidence of forced entry to the victim's home. Appellant did not argue that the statements were not offered as evidence of a material fact or that the State, through reasonable efforts, could have procured more probative evidence on this point. Instead, appellant limited his argument to attacking the statements' factual value and their "guarantees of trustworthiness." Specifically, appellant cited the Court's recent decision in *Jacobs v. State*, 303 Ga. 245 (2) (2018), and argued that the trial court erroneously relied on Haberkorn and the victim's "close relationship" as evidence of Haberkorn's credibility.

But, the Court found, contrary to appellant's assertion, the trial court did not predicate admission of Haberkorn's testimony on her credibility as a witness. Instead, as in *Jacobs*, the trial court considered the circumstances under which the victim's statements to Haberkorn were made: within the confines of their close friendship. The Court found the trial court's reasoning persuasive: The victim and Haberkorn knew each other for some time and they had a trusting relationship. There would be no reason—and the defense proffered no alternate reason—why the victim would have told Haberkorn about the missing key except that she was concerned about it. In short, the victim had no reason to concoct and relate to Haberkorn, her close friend, a story about a missing key and implicate appellant in the key's disappearance.

Therefore, the Court held, the trial court did not abuse its discretion in permitting Haberkorn to testify to the victim's statements regarding the missing key.

Appellant also contended that the trial court erroneously merged his felony murder counts with the malice murder count. The Court agreed because any felony murder conviction would be vacated by operation of law. But that error was harmless because, either way, appellant was not convicted of, or sentenced for, felony murder. Nevertheless, the Court noted, it appeared that the trial court should have separately sentenced appellant for kidnapping with bodily injury and aggravated assault with intent to rape. However, under *Dixon v. State*, 302 Ga. 691, 698 (2017), the Court stated that when a merger error benefits a defendant and the State fails to raise it by cross-appeal, it generally will not correct the error. Accordingly, the Court declined to do so here.

Jury Charges; Lesser Included Offenses

Overton v. State, S18A1273 (3/4/19)

Appellant was convicted of felony murder (aggravated assault with a deadly weapon), aggravated assault with a deadly weapon, and possession of a firearm during the commission of a crime. The evidence, briefly stated, showed that appellant and the victim quarreled over a gun the victim borrowed from appellant and had not returned. Witnesses said they heard the victim say something to the effect of, "Oh, so you're going to shoot me?" and then heard gunfire. Appellant shot the victim in the leg, and the victim bled to death because the bullet injured his femoral artery. Appellant testified and admittedly approached the victim with the intent to fight.

The trial court charged the jury on accident, justification, mutual combat and voluntary manslaughter. Appellant argued that the trial court erred in giving his requested charges on involuntary manslaughter and the underlying misdemeanors of pointing a gun and reckless conduct. He contended that such charges were warranted because of certain witness testimony suggesting the bullet appellant fired ricocheted from the ground into the victim's leg. Specifically, one of the witnesses, who was at the house when the shooting occurred, testified he "believed" appellant shot into the ground. Appellant also pointed to testimony from the medical examiner who testified that the bullet's trajectory through the victim's right thigh was at an upward angle. The Court disagreed.

According to appellant's testimony at trial, he intentionally pointed his gun at the victim's leg prior to the gun "going off" during a subsequent struggle with the victim. Witnesses stated that just before hearing gunfire, they heard the victim say something to the effect of, "Oh, you're going to shoot me now?" The record showed that the victim was in reasonable apprehension of immediately receiving a violent injury. And if the pointing of a firearm places the victim in reasonable apprehension of immediate violent injury, the felony of aggravated assault, rather than the misdemeanor of pointing a gun, has occurred. Therefore, the record supported the crime of aggravated assault inasmuch as appellant intentionally pointed his gun at the victim, eliminating any entitlement to charges of involuntary manslaughter and pointing a gun. Furthermore, the Court found, appellant was also not entitled to charges on involuntary manslaughter and reckless conduct since he approached the victim with an intent to fight and intentionally pointed his gun at him. Accordingly, the Court concluded, the trial court did not err when it refused to give these charges.

Habeas Corpus; Sentencing

Conley v. Pate, S18A1121 (3/4/19)

In 2010, Pate was convicted of statutory rape, aggravated assault, and possession of a knife during the commission of a felony. The evidence showed that at the time of the offenses, Pate was 15 years old and the victim, M.R., was 13 years old. A habeas court granted his petition finding that the statutory rape of which he was found guilty is only a misdemeanor, and it cannot, therefore, sustain a felony sentence of 20 years for statutory rape or a conviction for possession of a knife in the commission of a felony; that his sentence of imprisonment for 20 years is in any event so disproportionate to the crime of statutory rape that it amounts to cruel and unusual punishment; and that the sentencing court erred when it sentenced him for aggravated assault without considering the Youthful Offender Act, OCGA § 42-7-1 et seq. The Warden appealed.

The Warden contended that the habeas court erred in its determination that the statutory rape of which Pate was found guilty is only a misdemeanor. The habeas court reasoned that Pate was “not more than two years older” than M.R. at the time of the statutory rape, and for that reason, his conduct was punishable only as a misdemeanor under OCGA § 16-6-3 (c). But, the Court stated, by its plain terms, subsection (c) applies only when the victim is “at least 14 [years of age].” Here, M.R. was only 13 years of age at the time of the statutory rape. Accordingly, subsection (c) does not apply, the statutory rape of which Pate was found guilty is punishable as a felony, and the statutory rape is an adequate predicate for the conviction for possession of a knife in the commission of a felony.

Next, the Warden contended that the trial court erred in finding that the sentence of imprisonment for 20 years for statutory rape amounts to cruel and unusual punishment. The Court agreed. Here, the habeas court finding of gross disproportionality rested principally on its view that the conduct underlying Pate's conviction for statutory rape was merely “consensual sex with an individual younger than him” and was only a “passive felony.” But, the Court found, the record showed that this characterization was wrong. The trial evidence, showed that M.R. did not readily consent to sex with Pate at all—she refused him repeatedly and expressly. She finally gave in and agreed to have sex with Pate only after he brandished a knife and threatened to kill her father, who was asleep in an adjoining bedroom. Thus, the Court stated, “[t]o call such conduct ‘consensual sex’ and only a ‘passive felony’ is to grossly mischaracterize what Pate did to M.R.”

Moreover, the Court found, Pate's reliance on *Humphrey v. Wilson*, 282 Ga. 520 (2007) was misplaced. Unlike Pate, the defendant in *Wilson* did not brandish a knife and threaten to kill anyone, and the underlying circumstances of an offense are important in assessing the proportionality of the punishment. Moreover, unlike in *Wilson*, there was no indication in this case that the General Assembly ever has concluded that conduct like that for which Pate was convicted ought to be punished only as a misdemeanor. Therefore, the Court found, Pate's sentence of 20 years' imprisonment for statutory rape does not meet even the threshold inference of gross disproportionality, and so, despite his young age, his sentence for statutory rape must stand.

Finally, the State contended that the habeas court erred in finding that the sentencing court improperly failed to consider the Youthful Offender Act, OCGA § 42-7-1 et seq., when it sentenced Pate for aggravated assault. The Court again agreed. Whether to sentence a defendant under the Youthful Offender Act is purely a matter of discretion for the sentencing court;

a failure to exercise discretion under the statute to impose an ostensibly more lenient sentence does not amount to a deprivation of due process or some other constitutional right remediable by a writ of habeas corpus. Accordingly, the Court reversed the grant of Pate's habeas petition.

Garza; Merger

Chambers v. Hall, S18A1322 (3/4/19)

The Court granted appellant's application for a certificate of probable cause to appeal the denial of his petition for habeas corpus, identifying two questions: (1) whether the habeas court erred in concluding that there was sufficient evidence of asportation (movement of the victim) under *Garza v. State*, 284 Ga. 696 (2008), to support appellant's conviction for kidnapping Ryan Mantz; and (2) whether the count charging appellant with aggravated assault of Mantz with a deadly weapon merged into his conviction for armed robbery of Mantz.

The evidence, briefly stated, showed that three armed, masked men entered a restaurant after it had closed. Mantz, was sitting at a table in the front room near the cash register. One of the masked men pointed a gun at Mantz's head, grabbed him, pushed him against the cash register, and told him to open it. Mantz complied, and he was then pushed back against a nearby table while the assailants took cash and checks from the register. The three masked men then fled with cash and checks from the cash register.

The Court stated that *Garza* requires courts to consider four factors to determine whether the movement of an alleged kidnapping victim is sufficient to establish the essential element of asportation: the duration of the movement; whether the movement occurred during the commission of a separate offense; whether such movement was an inherent part of that separate offense; and whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. And here, the Court found, Mantz's movement was minimal in duration and distance — it happened quickly and was limited to a few feet. It occurred during and was an integral part of the armed robbery — Mantz was pushed against the cash register so he could open it and then pushed out of the way so the robbers could access it. And the movement did not pose any danger to Mantz independent of the danger already posed by the armed robbery. Accordingly, there was insufficient evidence to support appellant's conviction for kidnapping Mantz.

As to whether the trial court should have merged the aggravated assault and armed robbery counts, the Court noted that Count One of appellant's indictment charged him with armed robbery by taking money "from the immediate presence of Ryan Mantz, by use of an offensive weapon, to-wit: a handgun." Count Six charged appellant with aggravated assault by making "an assault upon the person of Ryan Mantz with a deadly weapon, to-wit: a handgun, by threatening him with, and pointing said handgun at him." Both of those charges arose from the same conduct — threatening Mantz at gunpoint to make him open the cash register so the assailants could take the cash and checks inside. Accordingly, the Court held, the aggravated assault count as to Mantz merged into appellant's conviction for armed robbery of Mantz. The trial court failed to recognize that merger and erroneously entered a conviction and sentence for the aggravated assault, which must be set aside. Nevertheless, the Court noted, appellant's remaining convictions were unaffected by the Court's rulings.

Ineffective Assistance of Appellate Counsel

Cartwright v. Caldwell, S18A1396 (3/4/19)

During his 2007 trial, appellant unsuccessfully asserted an alibi defense to charges of murder and other crimes in connection with the shooting death of Stafford. Appellant was convicted and sentenced to serve life in prison plus five years. On direct appeal, he claimed that his trial counsel provided ineffective assistance by failing to challenge Detective Andrew Tyner's testimony that appellant had not mentioned his alibi during his post-arrest police interview. Appellant contended that during a preliminary hearing, Detective Spicer, the lead investigator in the case, testified that Detective Tyner told him that appellant had mentioned his alibi during the interview. The Supreme Court affirmed appellant's convictions, rejecting his claim that his trial counsel provided ineffective assistance by failing to introduce Detective Spicer's testimony. Specifically, the Court held that appellant had not shown prejudice because at the motion for new trial hearing, he failed to call Detective Spicer as a witness or introduce a transcript of the detective's preliminary hearing testimony.

Appellant then filed a petition for habeas corpus, alleging that his appellate counsel provided ineffective assistance by failing to introduce evidence to prove trial counsel's ineffectiveness in failing to impeach Detective Tyner. At an evidentiary hearing, appellant introduced into evidence, without objection, the transcript of his preliminary hearing. The transcript shows that appellant's pre-trial attorney asked Detective Spicer: "Do you know if ... within [appellant's post-arrest interview, appellant] told Detective Tyner that ... at the time of this alleged murder ... he was at home with his mama and his sister?" Detective Spicer answered, "Yes, sir. Detective Tyner did relate that to me." Also, appellant introduced into evidence, without objection, an affidavit from Detective Spicer stating that "Detective Tyner did relate to me that appellant stated [in the interview] that at the time of the murder, he was at home with his mother and sister." Detective Spicer also said that appellant's trial and appellate attorneys never interviewed him about the case or called him as a witness.

The habeas court denied the petition. Specifically, premitting the question of deficient performance, the court concluded that appellant had not established prejudice on this ineffective assistance claim because he had presented his alibi defense at trial through the testimony of several other witnesses, but the jury had chosen to reject that defense and to credit the testimony of the State's witnesses instead. The Court then granted appellant's application to appeal.

First, the Court addressed whether trial counsel performed deficiently by failing to present evidence at trial tracking Detective Spicer's preliminary hearing testimony and habeas hearing affidavit — a question that the habeas court pretermitted. At trial, a major focus of Detective Tyner's testimony was appellant's purported failure to mention his alibi during his post-arrest interview. Evidence that Detective Tyner told Detective Spicer that appellant did assert his alibi in the interview would have directly contradicted Detective Tyner's testimony — with that evidence coming from a fellow police officer and the lead investigator for appellant's case.

The Court found that trial counsel did not even cross-examine Detective Tyner about appellant's alleged failure to mention his alibi, much less present evidence of Detective Tyner's prior inconsistent statement to Detective Spicer and thus, "trial counsel simply whiffed on this issue. Although the scope of cross-examination will rarely support a claim of deficient performance, no reasonably competent defense attorney would have decided to forgo presenting this evidence to cast doubt on the credibility of the State and one of its key witnesses and to bolster [appellant]'s alibi defense."

Next, the Court looked at whether trial counsel's deficient performance prejudiced appellant. The Court stated that the State's claim that appellant failed to provide his alibi to Detective Tyner during the post-arrest interview was not a passing comment that the jury might have overlooked; it was instead a targeted attack on the truthfulness of appellant's alibi defense — his primary defense at trial. Therefore, given the less than overwhelming evidence of appellant's guilt, his affirmative defense of alibi supported by multiple witnesses, and the importance of Detective Tyner's testimony to the State's efforts to disprove that defense, the Court concluded that trial counsel's failure to introduce Detective Spicer's contrary testimony had a reasonable probability of affecting the outcome of the trial.

Consequently, the only question remaining was whether appellate counsel performed deficiently by failing to introduce evidence of Detective Spicer's testimony at the motion for new trial hearing to support the ineffectiveness-of-trial-counsel claim. And the Court stated, there was no good reason why a competent appellate lawyer would have failed to raise and support that claim under these circumstances. In fact, the Court noted, appellate counsel did *raise* the claim but failed to introduce evidence to *support* the claim at the motion for new trial hearing. No reasonable attorney would have failed to present the readily available evidence from Detective Spicer, which was essential to proving trial counsel's ineffectiveness.

Accordingly, the Court concluded that appellate counsel provided ineffective assistance, and the habeas court's ruling to the contrary was erroneous. The Court therefore reversed the habeas court's denial of appellant's petition for a writ of habeas corpus.

Closing Arguments; Split Sentences

Whitelock v. State, A18A1872 (3/1/19)

Appellant was convicted of aggravated child molestation, child molestation, and cruelty to children in the first degree. Appellant contended that his counsel provided ineffective assistance by failing to object and failing to move for a mistrial when the prosecutor allegedly made an improper statement during closing arguments. Specifically, he argued that, while addressing the testimony of the State's expert witness, the prosecutor told the jury that the expert witness had already decided that appellant was guilty of molesting the victim and that, if the expert had not believed that the appellant had done so, the State would not have put appellant on trial. He contended that the prosecutor's statement was improper and prejudicial because it "intimate[d] that the government [had] already decided [his] guilt" and, thus, had invaded the province of the jury as to the ultimate issue to be decided. The Court disagreed.

The Court noted that the actual statement made by the prosecutor was as follows: "You heard [the expert witness] testify on the stand [that] she's done thousand[s] of interviews. She's counseled hundreds of kids. She's experienced in this. She knows what she is talking about. She's testified that if [she] didn't find anything in the interview of the child, [she] would suggest that the case not go forward. She evaluates the children and she talked to you about the concepts that fit."

Thus, the Court found, the prosecutor was referring to the witness's testimony about her evaluations of crimes involving child victims generally, not this case specifically. In fact, the expert witness never offered an opinion in this case as to whether the victim's behavior prior to her disclosure, or her responses during the forensic interview, were consistent with

child sexual abuse accommodation syndrome, nor did she offer an opinion as to whether appellant was, in fact, guilty of the crimes charged. And neither did the prosecutor.

Moreover, the Court noted, shortly after the prosecutor made the statement at issue, the trial court instructed the jury that the statements of the attorneys during closing arguments were not evidence and that it was the jury's role to determine whether the defendant was guilty beyond a reasonable doubt or not guilty of the crimes as charged in the indictment. And, the since the trial court found that the decision not to object was a strategic one, the Court concluded that trial counsel did not render deficient performance in failing to object.

Appellant also contended that the trial court erred in issuing a void sentence, arguing that the court failed to impose a probated sentence of at least one year in addition to the mandatory sentence (also known as a "split sentence"), as required by former OCGA § 17-10-6.2 (b) which was in effect when the crimes were committed. The Court agreed in part.

The Court noted that former OCGA § 17-10-6.2 (a) provided that the term "sexual offense," as used in that statute, included the crime of child molestation, but did not include the crimes of aggravated child molestation or cruelty to children. Thus, the trial court did not err in failing to apply the split sentence provision in former OCGA § 17-10-6.2 (b) to the sentences on appellant's convictions for aggravated child molestation and cruelty to children.

However, the 20-year sentence imposed by the court for appellant's child molestation conviction did not include at least one year of probation and, thus, was void under former OCGA § 17-10-6.2 (b). As a result, the Court vacated the sentence remanded to the trial court for resentencing on that conviction.

Nevertheless, the State argued, the current version of the statute applied retroactively and therefore authorized appellant's sentence because it included a 20-year probated sentence for the cruelty to children conviction. The Court disagreed. First, in *Hardin v. State*, 344 Ga. App. 378, 387-389 (2) (2018), the Court specifically rejected the argument that OCGA § 17-10-6.2 (b) applied retroactively. And, second, even if the current statute could be applied retroactively, the consecutive 20-year probated sentence for appellant's cruelty to children conviction is not a consecutive sentence for a sexual offense under the current version of OCGA § 17-10-6.2 (b), because the term "sexual offense" in OCGA § 17-10-6.2 (a) does not include the crime of cruelty to children. Therefore, even if the current version of the statute could be applied in this case, the sentence on the child molestation conviction would still be invalid.