

THIS WEEK:

- **Prior Consistent Statements; Defendant's Statements**
- **Ineffective Assistance of Counsel; Jurors**
- **Child Hearsay; Right of Confrontation**
- **Motions to Withdraw Guilty Plea; Timeliness**
- **Illegal Arrests; Interference with Governmental Property**
- **Negotiated Pleas; Stipulated Bench Trials**
- **Refreshing Recollection; Third Party Reports**

Prior Consistent Statements; Defendant's Statements

Williamson v. State, S19A0276 (5/6/19)

Appellant was convicted of malice murder, burglary, and other offenses stemming from a shooting death in 2006. He argued that the trial court erred when it charged the jury that if it found that a witness had made a material prior consistent statement, it could "consider the other statement as substantive evidence." The Court noted that after appellant's trial, it stated that "an instruction on prior consistent statements should no longer be given except where the circumstances of an unusual case suggest that the jury may have the mistaken impression that it cannot consider a prior consistent statement as substantive evidence." *Stephens v. State*, 289 Ga. 758, 759 (1) (a) (2011). But, the Court stated, it also said that giving such an instruction will usually not be a reversible error and here, there was no such error.

Prior consistent statements are substantive evidence that also tends to bolster the witness's trial testimony by disproving charges of recent fabrication or improper influence or motive and the instruction does not explicitly direct the jury to place any additional weight on prior consistent statements beyond that which the law already gives them. And jury instructions must be read and considered as a whole in determining whether the charge contained error. Thus, the Court found, the jury was charged that "evidence" includes all of the testimony of the witnesses and that the jury was to determine what testimony to believe and what weight to give each witness's testimony. The jury also was instructed about how to determine credibility and how to consider conflicts in the evidence. Therefore, taken as a whole, the Court concluded that the jury charge would not mislead a jury of average intelligence and consequently, there was no reversible error in this instruction.

Appellant also argued that the trial court erred by ending its pattern charge concerning statements by the defendant with the words, "You should consider with great care and caution the evidence of any statement made by the Defendant." Specifically, he contended, this instruction had the effect of telling the jury that it should be careful when considering the truth of all of his statements, including his exculpatory statements and his testimony at trial. The Court disagreed.

The Court noted that after appellant's trial, the Court of Appeals cautioned against giving the "great care and caution" charge when the defendant has made exculpatory statements, and recommended that the pattern charge utilizing this

language be modified. But looking at the jury instructions as a whole, a reasonable jury would not have understood the disputed instruction to mean that they should be more skeptical of appellant's statements and testimony than those of other witnesses. Read in context, the admonition to be careful in considering evidence of a statement made by the defendant would be understood to mean that it should consider a custodial statement of the defendant only if the State proves that (1) the defendant was first warned of his constitutional rights and clearly understood and waived those rights; and (2) the defendant's statement was voluntarily given. It was after describing those requirements that the trial court instructed the jury here: "If you fail to find any one of the conditions I've just described, you must disregard the statement entirely and give it no consideration in reaching your verdict except for the purposes of impeachment. You should consider with great care and caution the evidence of any statement made by the Defendant." Moreover, the trial court instructed the jury that if the State had met its burden for admissibility of a defendant's custodial statements, the jury was to "apply the general rules for testing the believability of witnesses and decide what weight, if any, [to] give to all or any part of such evidence." Thus, the Court found, the trial court's giving of the "great care and caution" instruction was not a basis for reversing appellant's conviction, either.

Ineffective Assistance of Counsel; Jurors

Williams v. State, S19A0346 (5/6/19)

Appellant was convicted of murder and attempted armed robbery. The record showed that, during voir dire, defense counsel asked the venire whether anyone had "a close relative or a friend or a son that's a policeman or a GBI agent or an FBI agent or a marshal." One prospective juror responded that her husband and the Sheriff were second cousins and that the families were near neighbors. Asked whether that would affect her ability to listen to the evidence, she responded with uncertainty. Defense counsel did not move to strike the prospective juror for cause.

Appellant contended that his counsel should have moved to strike the juror for cause pursuant to OCGA § 15-12-163 (b) (4), which provides, in pertinent part, that the State or the accused may object to a juror on the basis that "the juror is so near of kin to the prosecutor ... as to disqualify the juror by law from serving on the jury[.]" However, the Court found, the record did not support a finding that the Sheriff had anything to do with obtaining any warrant or indictment in appellant's case or could otherwise be deemed "the prosecutor" in the case. Therefore, a motion to strike the juror on the only basis appellant asserted would have been meritless, and the failure to make a meritless motion to strike does not constitute ineffective assistance of counsel.

Appellant also contended his counsel was ineffective for failing to object to a private communication between the trial judge and a juror. The record showed that, after the jury was selected, the judge informed the prosecutor and defense counsel that he intended to tell a juror who was pregnant that she should just raise her hand if she needed a restroom break and that he would very briefly stop the proceedings until she returned to the courtroom. Neither counsel objected.

Appellant argued that because there was no record of what the judge and the juror spoke about, the Court must assume that the communication was prejudicial to him. The Court stated that a criminal defendant's constitutional right to be present at, and to see and hear all the critical proceedings which are had against him, is a fundamental right and a foundational aspect of due process of law. Thus, where the accused is involuntarily absent from the proceedings, the trial

judge should have no communications with a juror about the case, except as to matters relating to the comfort and convenience of the jury. However, the Court found, nothing in the record showed that the judge made any comment to the juror outside the presence of appellant and his counsel other than telling the juror to raise her hand if she needed a restroom break, a communication relating to the comfort and convenience of the jury. Thus, premitting any deficiency in counsel's performance, the Court concluded that appellant failed to carry his burden of showing that defense counsel's failure to object prejudiced him.

Child Hearsay; Right of Confrontation

Cornell v. State, A19A0665 (4/10/19)

Appellant, the 5-year-old victim's uncle, was convicted of aggravated sexual battery, aggravated sodomy, two counts of child molestation, and two counts of cruelty to children. The State filed notice of its intent to offer child hearsay statements of the victim pursuant to OCGA § 24-8-820. The case proceeded to a jury trial at which the victim testified, as did various witnesses to whom she had made statements about having been sexually abused by appellant.

Appellant argued that the trial court erred in admitting hearsay statements of the victim in violation of the Confrontation Clause of the Sixth Amendment. The Court disagreed.

The record showed that the State provided notice of its intent to use the victim's out-of-court statements, the victim testified at trial, and the persons to whom the victim made the statements were subject to cross-examination at trial. Thus, the out-of-court statements made by the victim to the hearsay witnesses about acts of sexual abuse committed by appellant were admissible under OCGA § 24-8-820.

But, the Court stated, even if OCGA § 24-8-820 authorizes the admission of such evidence as an evidentiary matter, it may still be inadmissible as a violation of the accused's rights under the Confrontation Clause. There is a distinct difference between a challenge to the admission of evidence based upon the Confrontation Clause and that based upon an exception to the hearsay rule. The Sixth Amendment's Confrontation Clause provides that, in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. The Confrontation Clause imposes an absolute bar to admitting out-of-court statements in evidence when they are testimonial in nature, and when the defendant does not have an opportunity to cross-examine the declarant. But when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

And here, the Court found, the victim testified at trial and was cross-examined by appellant. While appellant did not question the victim about her out-of-court statements, he was not precluded from doing so. The victim's out-of-court testimonial statements might have been inadmissible if she had been unavailable and appellant had not been given an opportunity to cross-examine her. But because the victim was present at trial and testified, appellant's confrontation right was not violated. Accordingly, the Court concluded, the trial court did not err in admitting the child hearsay testimony.

Motions to Withdraw Guilty Plea; Timeliness

Mullins v. State, A19A0345 (4/19/19)

On September 6, 2017, appellant pled guilty to two counts of child molestation, two counts of sexual exploitation of children, and a single count each of aggravated child molestation and aggravated sexual battery. After accepting his plea, the trial court orally pronounced the sentence, reduced it to writing, and signed it the same day. The new term of court began on September 11, 2017. However, appellant's sentence was not filed with the clerk of court until October 9, 2017. Less than two weeks later, on October 20, 2017, appellant filed a motion to withdraw his guilty plea. Following a hearing, the trial court dismissed the motion, finding that it was untimely because it was not filed within the term of court in which the sentence was imposed.

The Court reversed. Georgia's appellate courts have long recognized that even where a judge orally pronounces a sentence, no sentence or conviction actually exists until it is reduced to writing and filed with the clerk of court. And until the judgment of conviction and sentence is reduced to writing and filed with the clerk of court, criminal proceedings remain pending against the defendant. Thus, under these circumstances, where sentence is pronounced during one term of court but the written order is not filed until the next term, a defendant's motion to withdraw his guilty plea is timely filed within the term in which the sentence was entered, that is, filed by the clerk. Accordingly, and as the State conceded, the trial court erred in dismissing appellant's motion to withdraw his guilty plea as untimely.

Illegal Arrests; Interference with Governmental Property

Glenn v. State, A19A0334 (4/26/19)

Appellant appealed from the trial court's order finding that he violated the terms of his probationary sentence. The evidence, briefly stated, showed that an officer was dispatched to investigate a suspicious person. He encountered appellant walking near the back of an elementary school around the time students were being released from school. Based on his previous experience with appellant, the officer called for backup. Before backup arrived, the officer ordered appellant to stop and appellant eventually complied with the command. Appellant was handcuffed, detained, and placed under arrest for loitering and prowling.

While appellant was in the vehicle he kicked the door of the police car and knocked it off its hinges. Videotape evidence did not show when appellant damaged the police vehicle door. However, it did show an approximately four-minute interval between the responding officer initially placing appellant in handcuffs and eventually putting him in the patrol car, and an approximately fifteen-minute interval after appellant is placed in the police vehicle and when the responding officer leaves the scene. The video further shows an approximately 28-minute interval between when the responding officer left and when he eventually returned to the scene, and the damage occurred in this time frame.

Appellant argued that the trial court erred in revoking his probation by finding he committed the new felony offense of interference with government property. Specifically, he contended that since the trial court found that the officer lacked probable cause to arrest him, he was justified in using force in resisting an illegal arrest.

The Court stated that the issue was whether the defense of justification under the catchall section of OCGA § 16-3-20 (6) is authorized by the evidence in this case. But, pretermittng whether a justification defense would be authorized, the evidence here did not support it. A premise underlying all the defenses specified in OCGA § 16-3-20 is that the defendant faced circumstances created by external events that demanded prompt, if not immediate, action. But here, the Court found, there was no evidence to show appellant had an imminent need to use force against the police vehicle in order to resist his unlawful arrest. Although the videotape did not show the point when appellant damaged the police vehicle door, it did establish that more than fifteen minutes passed after he was placed in the patrol car.

Given this lapse in time, appellant's damage to the vehicle was not in response to an immediate need to resist an unlawful arrest, but rather was an intentional act occurring sometime after he was detained. As such, appellant failed to show that his reliance on the defense was authorized by the evidence. Based on this evidence, the trial court was authorized to conclude that appellant violated the terms of his probation by committing the new offense of interference with government property when he kicked and damaged the police vehicle door. Accordingly, the Court found no manifest abuse of discretion by the trial court in revoking his probation.

Negotiated Pleas; Stipulated Bench Trials

Smith v. State, A19A0430 (4/29/19)

Appellant was convicted of possession of drug related objects. After the trial court denied her motion to suppress, the trial court conducted a "stipulated bench trial[]" during which it adjudicated appellant guilty on the charge of possession of drug related objects (hereinafter, " the charge"). However, during the proceeding, the State told the court that appellant was "pleading to[]" the charge, and appellant's defense counsel informed the court of the sentence to which the parties had agreed. Defense counsel also reminded the court that the parties and the court had agreed that appellant would be released from jail "during the pendency of the appeal," presumably referring to the instant challenge to the denial of the motion to suppress.

The Court noted, however, that the trial court's judgment of conviction clearly stated that appellant's conviction was based upon a negotiated guilty plea, as opposed to a judgment of guilt following a bench trial. Given the statements made by the State and defense counsel during the "stipulated bench trial[.]" the Court stated that it was uncertain as to how to proceed.

It is axiomatic that a defendant waives any error in the denial of her motion to suppress by pleading guilty. This is true even when the prosecutor and the trial court agree that, if the defendant pleads guilty, she would still be able to appeal the issue. Consequently, if appellant's conviction resulted from a negotiated guilty plea, as shown on the judgment of conviction, she effectively waived her challenge to the denial of her motion to suppress, and the Court would not reach the merits of the appeal.

Thus, the Court vacated the trial court's judgment of conviction and remanded the case to the trial court to either correct the judgment to show that appellant was convicted following the stipulated bench trial, or conduct a guilty plea hearing that complies with Uniform Superior Court Rule 33.8 and, if appellant pleads guilty and the trial court accepts the plea, issue a new judgment of conviction based on the plea.

Refreshing Recollection; Third Party Reports

Earwood v. State, A19A0340 (4/30/19)

Appellant, a police officer, was convicted of aggravated child molestation, aggravated sodomy, child molestation, two counts of cruelty to children in the second degree, sexual battery, sexual assault against a person in custody, giving false statements, and violation of oath by a public officer for his conduct involving the three victims. He argued that the trial court erred in refusing to allow him to refresh a witness's recollection with a report written by a third-party. The Court disagreed.

The transcript showed that during its case-in-chief, the State called as a witness a victim's friend to whom the victim made her initial outcry. The friend testified that the victim told her that appellant had "touched her inappropriately," and that she then reported the victim's allegation to her law enforcement father. On cross-examination, the witness stated that she was present when her father spoke to the victim, but did not see his report on that. Defense counsel then asked if the witness was aware that the father reported that the victim said that appellant never touched her. When the victim said no, the defense attorney wanted to refresh her memory with the report. The State objected and during the ensuing bench conference, the parties discussed the report, which was allegedly written by the police chief after receiving a telephone call from the friend's father, who relayed to him the victim's allegations. The trial court refused to allow appellant to use the report.

The Court noted that when asked about the report, the victim's friend testified that she had not seen the document, nor was she aware of its alleged contents. Further, at no time did she purport to have a faulty memory or express a need to have it refreshed, particularly by a document that she could not identify and that was not prepared by her, for her, or from information provided by her. Under these circumstances, the Court concluded that it was not error for the trial court to preclude appellant's counsel from reading from the document and questioning the witness about its contents. When the document is prepared by a third person not in the presence of a witness, the memory is not refreshed by such memorandum and such testimony is inadmissible.