Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING SEPTEMBER 13, 2019
Issue 37-19

THIS WEEK:

- **Intrinsic Evidence; Authentication**
- **Justification; Ineffective Assistance of Counsel**
- **Judicial Comments; Prosecutorial Misconduct**
- **Character Evidence; Rule 404 (a)**
- **Double Jeopardy; Stalking**
- **Search & Seizure**
- **Recorded Jail Telephone Calls; Use of Interpreters**
- **Appellate Jurisdiction, First Offender Sentencing**

Intrinsic Evidence; Authentication

McCammon v. State, S19A0490 (8/19/19)

Appellant was convicted of malice murder, attempted armed robbery, and a gun crime in connection with the shooting death of James. The evidence, briefly stated, showed that appellant and Clemons had been friends for about six months, during which the two men would "[s]moke weed, play basketball together, [and] burglarize houses." Clemons gave appellant a ride to sell a couple of stolen televisions to James. Then the two went to buy marijuana from a drug dealer known as "Dizzy." That evening, James called and wanted a refund on one of the televisions. Appellant agreed, but the next day, he told Clements of his plan to rob and kill James. On the way to meet James, they picked up Reed, who had a gun. Reed gave the gun to appellant. Clemons waited in the car while appellant and Reed met James. The planned robbery went awry and James was shot and killed. When appellant and Reed returned to the car, they told Clemons that they wanted to go rob Dizzy because they believed Dizzy would have cash they could steal. Clemons refused to drive them there and dropped the two off at Reed's house.

Appellant contended that the trial court erred by denying his pretrial motion to exclude evidence of his purchase and use of marijuana, because that evidence was not intrinsic to the charged crimes and was not used for a proper purpose under OCGA § 24-4-404 (b). The Court disagreed. The Court found that appellant and Clemons's activities together that day and appellant and Reed's desire to continue their criminal activities and complete an armed robbery were an integral and natural part of an account of the charged crimes. And explaining who Dizzy was and why appellant believed that Dizzy — like James — would have cash to steal was necessary to complete the story of the crime for the jury. Furthermore, this evidence was interwoven during the whole course of the day of criminality that was occurring. Thus, the court did not abuse its direction in admitting this evidence.

1590 Adamson Parkway, Fourth Floor, Morrow, Georgia 30260 ▪ (770) 282-6300 ▪ www.pacga.org ▪
Facebook: https://www.facebook.com/GAProsecutors
Instagram: https://www.instagram.com/gaprosecutors/
LinkedIn: https://www.linkedin.com/company/prosecuting-attorneys-council-georgia/

Clemons also testified that he and appellant smoked marijuana during their six months of friendship before the murder. The Court found that while this testimony was further afield from the charged crimes, it was a natural part of Clemons's account of his relationship with appellant, it was mentioned only twice in passing (once when appellant's counsel had Clemons confirm the testimony on cross-examination), and it was hardly prejudicial in comparison to Clemons's accompanying testimony — about which appellant did not complain on appeal — that he and appellant also burglarized homes together. Therefore, the Court held, the trial court did not abuse its discretion in this regard either.

Appellant also contended that the trial court erred by admitting an "affidavit" because it was not properly authenticated. At trial, Clemons testified that he and appellant were in jail in adjoining cells and were talking when appellant slid a one-page, handwritten document under the door to Clemons. On the front of the document was an affidavit stating (falsely) that Clemons had stolen the murder weapon from Reed's house without Reed's knowledge. On the back was a note indicating that Reed wanted appellant to sign the affidavit, but that appellant was not going to do that. Clemons believed that Reed wrote the affidavit and that appellant wrote the note on the back.

The court admitted the document over appellant's objection after Clemons testified that the note on the back "look[ed] like [appellant's] handwriting." On cross-examination, however, Clemons admitted that he had never seen appellant write anything by hand and did not actually know that appellant had written the note. Appellant argued that the State therefore failed to carry its burden to authenticate the document under OCGA § 24-9-901. The Court disagreed.

Under OCGA § 24-9-901 (a), authentication of evidence may be achieved through any of a variety of means affording evidence sufficient to support a finding that the matter in question is what its proponent claims. And here, the Court noted, Clemons testified that he believed appellant wrote the note on the back of the document because he was "talk[ing] to [appellant] through the door" as it was passed to him. The unsigned affidavit on the front of the document referred to key facts in the case including the source of the murder weapon, stolen televisions, Reed's full name, Reed's mother's name, and Clemons's nickname, and appellant's note on the back referred to Reed and the upcoming trial. Thus, the Court held, even if Clemons was not familiar with appellant's handwriting, the references in the document and the circumstances in which Clemons received it authorized the court to find that the State had properly authenticated the note.

Justification; Ineffective Assistance of Counsel

Moore v. State, S19A0618 (8/19/19)

Appellant was convicted of felony murder predicated on possession of a firearm during the commission of a felony, possession of a firearm by a convicted felon, three counts of aggravated assault, and three counts of possession of a firearm during the commission of a felony. The evidence, briefly stated, showed that the three victims, Crittenden, Williams, and Byfield were at a house party. During the party, Crittenden and Williams went to purchase marijuana from appellant. They returned to the party after the purchase. When the party ended in the early morning hours, Crittenden, Williams,

and Byfield went to appellant's house to purchase more marijuana. As the three men sat in their vehicle, an argument began between Crittenden and appellant. Crittenden accused appellant of giving him less marijuana than Crittenden paid for. Appellant then shot the three victims.

Appellant argued that the trial court erred when it refused to instruct the jury on his sole defense of justification because there was evidence that Crittenden may have attempted to rob appellant. To support his claim, appellant cited witness statements that Crittenden told Byfield to back into the driveway and that Williams testified that he saw Crittenden pull out a pistol as they arrived at appellant's house. However, the Court held that the crime of possession of a firearm by a convicted felon can preclude a justification defense under OCGA § 16-3-21. Although a felon may be able to possess a firearm in the case of a sudden emergency for the purpose of defending himself, no evidence of a sudden emergency was presented here. There was no evidence presented that Crittenden attempted to rob appellant or that the gun was visible to appellant. Thus, the Court concluded, the trial court did not err.

Appellant also contended that his trial counsel was ineffective because he did not adhere to the Georgia Rules of Professional Conduct for attorneys. Specifically, appellant argued, trial counsel violated the rules because he told the jury it was a self-defense case in his opening argument and then presented no evidence of self-defense due to what appellant contended was an erroneous interpretation of the law. But, the Court stated, even assuming that trial counsel breached his ethical obligations, an ethics violation does not necessarily establish a claim of ineffectiveness of counsel. While compliance with the Rules of Professional Conduct should always be maintained, the Court noted that attorney discipline for a violation of those Rules is not before it; rather the only the issue was whether appellant had established ineffective assistance of trial counsel As such, appellant failed to show trial counsel's performance was constitutionally ineffective for failing to adhere to the Rules of Professional Conduct.

Judicial Comments; Prosecutorial Misconduct

Franklin v. State, A19A0608 (7/1/19)

Appellant was convicted of nineteen counts of cruelty to children in the first degree, eight counts of false imprisonment, and one count of aggravated assault for acts against her teenaged daughter. She argued that the trial court made an improper comment in violation of OCGA § 17-8-57 (a) (1). The Court noted that because appellant did not timely object to the comment, it would review the claim only for plain error affecting the substantive rights of the parties.

The comment that appellant challenged occurred when the state's cross-examination of one of appellant's neighbors became heated. The witness accused the prosecutor of "holler[ing]" at her, followed by an exchange in which the prosecutor told the witness she could "point at [him] all [she'd] like" and the witness replied, "Well, don't holler at me." The prosecutor then asked the judge to admonish the witness and the judge replied, "I'm afraid to." After a brief continuation of the cross-examination, the trial court called for a break, and after that break the trial court made the following statement:

"Let me say, before the break, any comments that I make should not be inferred — it's one of our light moments that — where I make a comment. It should not be inferred as me making an opinion about the credibility of any witness or choosing sides. Really to — I guess a good place to break and keep the momentum going in the case. But I apologize if anybody interpreted what I said to be a slant against the witness. It was not the intent. You should not infer anything negative toward the defendant or the witness in this case for any comment I may make."

The Court stated that as the trial court indicated in his curative instruction, the comment was a "light" or joking comment, not an improper expression of opinion in violation of OCGA § 17-8-57 (a) (1). But, even if the comment could be construed as improper, OCGA § 17-8-57 (a) (2) permitted the trial court to give a curative instruction, and the instruction given by the trial court was sufficient. Thus, the Court found no plain error.

Appellant also contended that her counsel rendered ineffective assistance in failing to object to a comment made by the prosecutor during closing arguments. Specifically, the prosecutor stated: "[Appellant] said that she was withholding Christmas gifts as punishment. Defendant purports to be a Christian and yet we know that God's grace came down as Christ. And one thing that we don't have to earn is Christmas. We don't have to earn it. We don't have to deserve it, but she makes [the victim] deserve it, even though she gets it for free."

The Court stated that closing arguments are judged in the context in which they are made. And here, the Court found the first comment to be concerning. While it could be construed to suggest that appellant did not sincerely hold her professed religious beliefs, it could also be construed to suggest that she sincerely held those beliefs but that the beliefs themselves were wrong. Thus, the Court found, to the extent that the State's closing argument asserted that appellant's religious beliefs were not a correct interpretation of Christianity, it ran afoul of the constitutional principle espoused in *West Virginia State Bd. of Educ. v. Barnette*, 319 U. S. 624, 642 (4) (63 SCt 1178, 87 LE1628) (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). Nevertheless, the Court stated, assuming without deciding that trial counsel performed deficiently by not objecting to the comments, given the overwhelming evidence of guilt, there was no prejudice to appellant.

Character Evidence; Rule 404 (a)

Blackwell v. State, A19A0758 (7/1/19)

Appellant was convicted of armed robbery, of multiple counts of aggravated assault, of making terroristic threats, and of possession of a firearm during the commission of a felony. He argued that the trial court erred in allowing the State to present character evidence in the form of his prior arrest for armed robbery. The Court agreed and reversed his convictions.

The evidence, very briefly stated, showed that appellant, Irving, Ezell, and another man drove from Atlanta to another city about 50 miles away. Ezell and the other man got into one car and drove to the bank. They then robbed the bank. Immediately after, the two drove to a nearby road, abandoned their car, rejoined appellant and Irving, and returned to Atlanta.

The record showed that appellant testified at trial, and during his cross-examination the prosecutor asked him about a prior arrest for armed robbery. Appellant's counsel objected and moved for a mistrial, but the trial court ruled that the state could elicit that evidence under OCGA § 24-4-404 (a) (1) ("Rule 404 (a) (1)"). The State made two different arguments that evidence of appellant's prior arrest for armed robbery was admissible to rebut purported character evidence offered by appellant. First, appellant's prior arrest for armed robbery was admissible under Rule 404 (a) (1) to rebut his testimony that he mentored children. But, the Court found, appellant did not offer this testimony to establish a pertinent trait of character that would allow for rebuttal evidence. And even if appellant's testimony did open the door under Rule 404 (a) (1), the evidence of his prior arrest was not reasonably tailored to rebut that evidence.

Alternatively, the State argued that appellant opened the door to the prior-arrest evidence under Rule 404 (a) (1) through his trial counsel's cross-examination of the accomplice, Ezell. Specifically, counsel had introduced "potentially misleading testimony" by "inserting Chris Snelson's name into Ezell's testimony and questioning his credibility." But, the Court found, trial counsel's cross-examination of Ezell did not amount to an offer of evidence of a pertinent character trait of appellant; it was an attempt to establish that Ezell's statement that he was afraid of "Chris" referred to someone other than appellant. That was a proper topic of cross-examination and the Court found no aspect of the cross-examination that could be construed to permit the prior-arrest evidence under 404 (a) (1).

Next, the Court addressed whether the admission of this character evidence harmed appellant. The Court found that the evidence against appellant was not overwhelming. Thus, the Court held, it could not say that it was highly probable that the admission of the evidence of appellant's prior arrest for armed robbery did not contribute to the jury's verdict that he was guilty for, among other crimes, armed robbery. Instead, the Court concluded that the admission of the evidence was harmful and the judgment was reversed.

Double Jeopardy; Stalking

Ward v. State, A19A0671 (7/2/19)

In August 2009, appellant was acquitted of misdemeanor stalking (Trial 1). The State moved to dead docket the pending aggravated stalking charge based on conduct against the same victim, but appellant objected and the trial court denied the State's request. In January 2010, just five months after his acquittal, a jury convicted appellant of aggravated stalking (Trial 2). Appellant argued that his prosecution on the aggravated stalking charge violated principles of double jeopardy and that the trial court should have granted his motion in limine to exclude admission or reference to the evidence introduced

during Trial 1. Specifically, he argued that because he had been acquitted of stalking in Trial 1, evidence from that trial had been "used up" and could not be introduced to convict him of aggravated stalking in Trial 2. A divided Court agreed and reversed his conviction.

The Court stated that to determine if appellant was twice put in jeopardy for the "same offenses," it must apply the "required evidence" or "same elements" test outlined in *Blockburger v. United States*, 284 U. S. 299 (52 SCt. 180, 76 LEd. 306) (1932), and look to whether each offense requires proof of an additional fact or element which the other does not. Under Georgia's stalking statutes, in order to prove aggravated stalking, the State must also prove the lesser included offense of misdemeanor stalking. And for purposes of double jeopardy, a lesser-included offense and a greater offense are the same offense under the Fifth Amendment and the *Blockburger* test because the lesser crime requires no proof beyond that which is required for the conviction of the greater offense. Furthermore, although the *Blockburger* test focuses on the proof necessary to establish the statutory elements of each offense, rather than on the actual evidence to be presented at trial, the Court stated that it must also determine whether the State relied on the same offense as a matter of fact to prove the underlying stalking course of conduct in Trial 2 as it did in Trial 1. This is because the State is precluded under the Double Jeopardy Clause from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial.

Here, the Court found, a comparison of the transcripts for both trials showed with a few exceptions, the State relied on almost the exact same evidence to prove appellant's alleged harassing and intimidating course of conduct at both the stalking and aggravated stalking trials and the bulk of the evidence presented at Trial 2 concerned events that occurred during the range of dates stated in appellant's first indictment for stalking. Thus, except for the additional evidence concerning violation of a no-contact order and an encounter with the victim's family that occurred after he was arrested the first time, appellant was prosecuted twice for the same stalking conduct — conduct which the jury in Trial 1 had rejected as insufficient to prove the exact same offense as the State was required to prove in Trial 2, except that the State was able to improve its evidence in several respects in Trial 2. And this, the Court stated, is precisely the kind of rehearsal and honing of evidence that the Double Jeopardy Clause is designed to prevent. Accordingly, appellant's conviction was reversed.

Search & Seizure

Chambers v. State, A19A0889 (7/9/19)

Appellant was convicted of possession of cocaine with intent to distribute. He contended that the trial court erred in denying his motion to suppress. The Court disagreed.

The evidence showed that a DTF agent received a tip from a confidential informant that appellant was traveling to his residence in a gold Ford Explorer driven by his girlfriend and he would be carrying a large quantity of crack cocaine. The agent asked an officer with the local police department to be on the lookout for appellant and to detain him. The officer

drove to appellant's residence and observed appellant's girlfriend pull into the driveway in a gold Explorer, with appellant in the passenger seat.

The officer approached the passenger side of the vehicle and told appellant and his girlfriend to put their hands on the dash. Appellant reached into his pants, pulled out a gray cloth bag, threw the bag out the window of the vehicle to his son, and told him to run. The officer asked for the bag, and appellant's son handed it to the officer. The bag contained cocaine.

First, the Court found, the unpaid informant had a history of providing reliable information to the agent, and the informant's tip was corroborated by the officer's observation at the scene that appellant was traveling to his home in the passenger seat of his gold Explorer driven by his girlfriend. When coupled with corroboration by the personal observation of a police officer, a reliable informant's tip is sufficient to establish probable cause for a warrantless search. Accordingly, the officer had probable cause to detain appellant.

Next, the Court found, upon approaching the vehicle, the officer ordered appellant to place his hands on the dash, but instead appellant threw the bag out of the window. Absent physical force, an encounter with a police officer is not considered a seizure under the Fourth Amendment, unless there is submission to the assertion of authority. Thus, because appellant did not comply with the officer's command, his abandonment of the bag was not the fruit of any seizure, and there was no need to suppress the bag.

Finally, the Court held, to the extent that appellant challenged the officer's authority to search the bag, when the accused disavows ownership of or other legitimate possessory interest in the item searched, he has no legitimate expectation of privacy in that item, and thus, a search violates no right. And here, appellant testified that the bag did not belong to him. As such, he had no legitimate expectation of privacy in it and lacked standing to challenge its search. Accordingly, for all these reasons, the trial court did not err in denying the motion to suppress.

Recorded Jail Telephone Calls; Use of Interpreters

Leekomon v. State, A19A0813 (7/16/19)

Appellant was convicted of aggravated child molestation and child molestation. He contended that the trial court erred in denying his motion in limine to prevent the State from admitting recorded telephone conversations between appellant and his wife while appellant was an inmate. The Court disagreed.

The evidence showed that when appellant was booked into the jail, he received and signed a copy of a document which stated that the Sheriff's Office "reserves the authority to monitor and record all telephone conversations within this facility. Your use of the facility telephones constitutes consent to this monitoring and recording." Appellant contended that the he did not consent because he is a native of Thailand, does not speak English, and required a Thai interpreter at trial. Thus,

he argued, the warning, which was written in English, was insufficient for him. However, the Court found, the jail commander testified that during booking, arrestees who speak a foreign language for which the jail does not have a live translator — such as Thai — are given an interpreter over the telephone via a "Language Line." The interpreter translates for the arrestee during the booking process, which includes translation of the document containing the recorded telephone call warning.

The Court also found that while the officer who booked appellant into the jail could not specifically recall whether the warning was translated for appellant because "[s]he's probably booked in two thousand, three thousand people since then," the commander testified that use of the Language Line or a live interpreter is "our policy," and jail records showed that appellant "was booked in at the same time that [the warning] form was signed." Therefore, the Court held, under these circumstances, the trial court was authorized to find that appellant was informed about and consented to the recording of his telephone calls, and that the recordings were therefore admissible.

Appellate Jurisdiction, First Offender Sentencing

Hendrix v. State, A19A1113 (7/29/19)

Briefly stated, in September, 2012, appellant entered a negotiated plea on possession with intent to distribute (Count 1) and possession of marijuana with intent [to distribute] within a thousand feet of a school zone (Count 2). The trial court sentenced him on both counts under the First Offender Act. He received a sentence of three years on Count 1, with 14 days to be served in incarceration and the remainder on probation. On Count 2, appellant received a five year suspended sentence.

In 2018, the State moved to revoke his first offender status because appellant committed new offenses. The trial court revoked appellant's first offender status, revoked his suspended sentence, and re-sentenced him to serve 10 years on Count 1 and 20 years to serve on Count 2, to run consecutive to Count 1.

The State first contended that the Court lacked jurisdiction over the appeal because appellant failed to comply with the discretionary appeal procedure of OCGA § 5-6-35 (a) (5). The Court noted that while appeals from orders revoking probation are subject to the discretionary appeal procedures of OCGA § 5-6-35 (a) (5), this appeal was from an order revoking a suspended sentence, and an order revoking a suspended sentence is directly appealable. Accordingly, the Court found that it had jurisdiction to hear the appeal.

Appellant contended that the trial court erred by revoking his first offender status, adjudicating him guilty, and re-sentencing him on Count 1 because his original probated sentence on that count had run prior to the State moving to revoke his first offender status. The Court agreed. Under the First Offender Act, a person is either exonerated of guilt and stands discharged as a matter of law upon completion of the term of probation or adjudicated guilty in a petition filed

prior to the expiration of the sentence; the statute does not provide for any other alternative. Here, appellant completed his probation on Count 1 prior to the State filing its petition to revoke his first offender status. By allowing appellant to complete his three-year probationary period without initiating any revocation proceedings against him, the State could not urge that he did not fulfill the terms of his probation. Accordingly, the Court held, because the State failed to file a petition to revoke appellant's first offender status prior to the expiration of his term of probation, the trial court erred by adjudicating him guilty and re-sentencing him on Count 1.

Next, the Court addressed Count 2 of appellant's sentence even though it was not addressed by either party. Here, the Court noted, appellant was sentenced on Count 2 to serve a suspended sentence of five years under the First Offender Act. However, the Court stated, the First Offender Act only authorized the trial court to place a defendant on probation or to sentence him to confinement. See OCGA § 42-8-60 (a). And here, the suspended sentence did not have the effect of placing appellant on probation. See OCGA § 42-8-39. Accordingly, the Court held, appellant's sentence on Count 2 is void because the trial court imposed a sentence under the First Offender Act that the law does not allow. Consequently, appellant's adjudication of guilt and re-sentencing on Count 2 was vacated and the case remanded to the trial court for re-sentencing on Count 2.