Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING SEPTEMBER 20, 2019
Issue 38-19

THIS WEEK:

- **Out-of-Time Appeals; Waiver**
- **Insanity Defense; Jury Charges**
- **Juveniles; OCGA § 17-7-50.1**
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Out-of-Time Appeals; Waiver

Blackwell v. State, S19A0801 (8/19/19)

Four years after a trial court denied his timely motion to withdraw his guilty plea to murder and other crimes, appellant filed a pro se motion for out-of-time appeal. The trial court denied that motion summarily and without holding a hearing.

Appellant contended that he was entitled to an out-of-time appeal because neither the trial court nor his motion-to-withdraw counsel informed him of his right to appeal. As for the allegation of trial court error, the Court found that appellant waived that claim because he did not raise it in his motion for out-of-time appeal. However, with respect to his claim that his right to appeal was frustrated by the ineffectiveness of his motion-to-withdraw counsel, the Court stated that it could not determine whether appellant's counsel performed deficiently in failing to file a notice of appeal because the trial court failed to hold an evidentiary hearing on the issue. Thus, the trial court's order denying appellant's motion for out-of-time appeal had to be vacated and the case remanded for the trial court to determine whether appellant's motion-to-withdraw counsel was ineffective in failing to file a timely notice of appeal.

In so holding, the Court noted that this inquiry must be conducted consistently with the principles of *Roe v. Flores-Ortega*, 528 U.S. 470 (120 SCt 1029, 145 LE2d 985) (2000), which the Court noted, is laid out in detail in *Ringold v. State*, 304 Ga. 875, 878 (2019). In particular, with regard to the prejudice component of appellant's ineffective assistance claim, appellant need not demonstrate that he would have prevailed in a timely appeal, but only that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed.

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Insanity Defense; Jury Charges

Foster v. State, S19A0854 (8/19/19)

Appellant was convicted of malice murder and a firearms offense. He contended that the trial court erred by giving the jury inconsistent instructions regarding its consideration of his punishment. Specifically, appellant contended that a jury will inevitably be confused when the trial court gives both the instructions mandated by OCGA § 17-7-131 (b) (3) and the standard instruction that the jury is not to consider punishment. Appellant argued that the instructions contradict each other, requiring the jury to be informed of the consequences of some of its choices but disallowed from considering those consequences. Thus, appellant contended, this contradiction makes the charges misleading and, therefore, the trial court erred in instructing the jury in this way. The Court disagreed.

The Court noted that in 1985, the General Assembly enacted what is now OCGA § 17-7-131 (b) (3), expressly mandating that the trial court charge the jury on a defendant's placement as a result of certain verdicts related to the insanity defense. The legislature made the statutory charge mandatory to prevent courts from incorrectly summarizing the law and confusing the jury. Failing to give the statutory charge informing the jury of the consequences of these verdicts is presumptively harmful error.

Thus, the Court explained, the jury instructions required by OCGA § 17-7-131 (b) (3) create a limited exception to the general rule proscribing consideration of the consequences of a guilty verdict. This exception protects the defendant's right to an impartial verdict by correcting any misconceptions jurors may have that a verdict of not guilty by reason of insanity, guilty but mentally ill, or guilty but with intellectual disability, would result in the defendant's immediate release (as does a verdict of not guilty). Once the jury understands the nature of these particular verdicts, it can focus solely on the mental condition of the defendant and decide that issue free from concerns about whether and how the defendant might be punished. Therefore, the § 17-7-131 (b) (3) instructions serve to ensure that the jury does not improperly concern itself with the lesser-known punishments associated with an insanity defense, thereby supplementing, rather than conflicting with, the general instruction to the jury not to concern itself with punishment. According, the Court held, the trial court did not err in giving the disputed instructions.

Juveniles; OCGA § 17-7-50.1

State v. Coleman, S19A0603 (8/19/19)

On February 16, 2016, Coleman, who was 16 at the time of his arrest for murder, was held at a youth detention center until his release on bond on March 24. On April 8, 2016, he was indicted for felony murder and other charges. In March of 2018, re was re-indicted and the April 8 indictment was nolle prossed. Coleman then filed a motion to transfer his case to juvenile court, arguing that, because the March 2018 indictment was returned outside the 180-day time limit set by OCGA § 17-7-50.1, the Superior Court no longer had jurisdiction. Relying on the Court of Appeals' decision in *Edwards v. State*, 323 Ga. App. 864 (2013), the trial court granted Coleman's motion to transfer. The State appealed and the Court reversed.

The Court noted that in granting Coleman's motion to transfer, the trial court found that the phrase "who is detained" within OCGA § 17-7-50.1 (a) has been interpreted by the Court of Appeals to mean that "the date of detention is a

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specific point in time, rather than an ongoing condition necessary for the running of the 180-day time limitation." *Edwards*, 323 Ga. App. at 866. Indeed, in *Edwards*, the Court of Appeals determined that "nothing in the statute mandates that the defendant continue to be detained for the entire 180-day period." *Id.* The Court, however, disagreed.

The General Assembly enacted the relevant phrase "who is detained" in the present tense. And while the "date of detention" refers to one specific point in time, the phrases "detained child" and "who is detained" describe a required condition or state of confinement the child must be in for the 180-day time limitation to apply. Accordingly, the Court held, pursuant to the plain language of the statute, and contrary to the Court of Appeals' decision in *Edwards*, a child must be detained in order for the 180-day time limitation to run. Consequently, the Court concluded that the 180-day time limitation in OCGA § 17-7-50.1 does not apply to a juvenile who is released and remains on bond prior to the running of 180 days. And, in so holding, the Court overruled *Edwards*, and further concluded that the trial court erred in transferring Coleman's case to the juvenile court.

Ineffective Assistance of Counsel; Waiver

Robinson v. State, S19A0954 (8/19/19)

Appellant was convicted of malice murder and other offenses. His trial counsel filed a timely motion for new trial. Over a year later, a different attorney ("motion-for-new-trial counsel") appeared as counsel for appellant and amended the motion for new trial twice. The trial court ultimately denied the motion for new trial as amended, and motion-for-new-trial counsel did not file a notice of appeal. More than two years later, through a third attorney, appellant filed a motion for an out-of-time appeal, alleging that motion-for-new-trial counsel was ineffective due to, "but . . . not limited to[,] the . . . failure to file a notice of appeal from the denial of the motion for new trial" and "failure to inform [appellant] that a notice of appeal could and should be filed." The court granted the motion and appellant's third attorney was still appellant's counsel before the Court.

Appellant argued that his trial counsel rendered ineffective assistance of counsel. However, the Court stated, it is well established that in order to avoid a waiver of a claim of ineffective assistance against trial counsel, the claim must be raised at the earliest practicable moment, and that moment is before appeal if the opportunity to do so is available. Therefore, because appellant was represented at the motion for new trial by different counsel than at trial, he had the opportunity to raise the ineffective assistance of trial counsel claims at that point, and by failing to do so he waived those claims.

Nevertheless, appellant contended, his motion-for-new-trial counsel was constitutionally ineffective by failing to raise trial counsel's ineffectiveness, by failing to file a notice of appeal, and by failing to inform him of his right to appeal.

With respect to appellant's claims that motion-for-new-trial counsel was ineffective for failing to raise trial counsel's ineffectiveness, the Court found those claims are procedurally barred because appellant has simply recast his trial-counsel ineffectiveness claims as motion-for-new-trial counsel ineffectiveness claims. But, the Court stated, it has consistently held that a defendant cannot resuscitate a specific claim of ineffective assistance of trial counsel that was not raised at the motion for new trial stage by recasting the claim on appeal as one of ineffective assistance of motion-for-new-trial counsel for failing to raise the specific claim of trial counsel's ineffectiveness. Indulging such bootstrapping would eviscerate the

fundamental rule that ineffectiveness claims must be raised at the earliest practicable moment and would promote serial appellate proceedings.

And, the Court found, with respect to appellant's assertion that motion-for-new-trial counsel was ineffective by failing to file a notice of appeal and by failing to inform appellant of his right to appeal, that claim was remedied by the grant of an out-of-time appeal. Accordingly, the Court concluded, because appellant's motion-for-new-trial counsel ineffectiveness claims were procedurally barred or otherwise remedied, his claims of ineffective assistance of motion-for-new-trial-counsel failed.

DNA Testing; OCGA § 5-5-41 (c)

Lewis v. State, A19A1023 (8/5/19)

Appellant was convicted of child molestation, rape, and two counts of aggravated sodomy in connection with the repeated sexual abuse of his then fourteen-year-old step-daughter. He argued that the trial court erred in denying his request to test a washcloth recovered from the victim's underwear drawer for DNA pursuant to OCGA § 5-5-41 (c). The Court disagreed.

The victim testified that appellant usually ejaculated onto a washcloth and that he used a washcloth "to wash off before [he] started, and a dry [washcloth] for when he finished." After the victim disclosed the abuse to her mother and the police, the mother informed police that she had found a purple washcloth in the back of the victim's underwear drawer. A detective retrieved the washcloth from the victim's dresser drawer, noting that it was "folded up or kind of wadded up in the very back corner of the drawer." The detective testified that the mother informed him that the washcloth had been washed and that the Georgia Bureau of Investigation's crime lab informed him that "it would hold no evidentiary value because of the fact that, any evidence would have long been gone at that point." The washcloth was collected roughly six months after the last incident of abuse.

The Court found that appellant could not demonstrate that any of the statutory requirements of OCGA § 5-5-41 (c) were met. First, it was undisputed that appellant and his trial counsel knew about the washcloth prior to trial. And while appellant submitted an article which purportedly shows that DNA profiles can be obtained from laundered semen stains, appellant did not show that the actual technology for the testing of the washcloth was not available at the time of trial.

Next, the identity of the perpetrator of the abuse was not a significant issue at trial. Instead, the pivotal issue in the case was whether the sexual abuse alleged by the victim occurred at all. Appellant asserted that if another person's DNA were to be recovered from the washcloth, it would constitute potentially exculpatory evidence. But, the Court stated, nothing in the record supported the possibility that another male perpetrated the acts; and no other male lived in the home. Thus, the Court found, under these particular facts and circumstances, appellant did not show the relevance of this hypothetical result.

Finally, the Court found that appellants' motion for testing of the washcloth failed to meet OCGA § 5-5-41 (c) (3) (D). At trial, the jury was informed that the washcloth had been washed. Further, the victim testified that the recovered washcloth was "unused." Thus, even if the washcloth had been tested — assuming it had any evidentiary value — and appellant's DNA was not recovered from the washcloth, it would only show an absence of appellant's DNA from a

laundered and/or unused washcloth. In light of this as well as all of the evidence presented at trial, the Court concluded that appellant failed to show a reasonable probability that he would have been acquitted had the DNA results been available at the time of trial. Accordingly, the trial court did not err in denying appellant's post-conviction motion for DNA testing of the washcloth.

Drivers' License Offenses; Sentencing

Lechuga v. State, A19A1536 (8/6/19)

Appellant pled guilty to the charge of failure to display his driver's license in violation of OCGA § 40-5-29 (b). The court sentenced him to serve 12 months on probation, pay a fine and other costs, and meet various conditions of probation. Appellant contended that the trial court erred in imposing a probated misdemeanor sentence and in refusing to impose only a fine pursuant to OCGA § 40-5-29 (c). Specifically, he argued that the court should not have sentenced him to 12 months of probation and instead, under subsection (c) of 40-5-29, should have only imposed a fine of no more than $10.00 because he had a valid license at the time of his arrest.

The Court noted that OCGA § 40-5-29 sets forth requirements that a driver carry a license and exhibit it on demand. Subsection (a) of OCGA § 40-5-29 provides, in pertinent part, that "[e]very licensee shall have his or her driver's license in his or her immediate possession at all times when operating a motor vehicle." Subsection (b) pertinently provides: "Every licensee shall display his or her license upon the demand of a law enforcement officer. A refusal to comply with such demand not only shall constitute a violation of this subsection but shall also give rise to a presumption of a violation of subsection (a) of this Code section . …" And subsection (c) provides: "A person convicted of a violation of subsection (a) of this Code section shall be fined no more than $10.00 if he or she produces in court a license theretofore issued to him or her and valid at the time of his or her arrest."

The Court held that the plain language of subsection (c) provides that it applies only to a violation of subsection (a). There is nothing in subsection (c) indicating that it also applies to a violation of subsection (b). Thus, since appellant pled guilty only to a violation of subsection (b) for failure to display his license, the $10.00 fine provision of subsection (c) did not apply. Rather, the trial court properly imposed a probated misdemeanor sentence since a violation of OCGA § 40-5-29 (b) is punished as a misdemeanor and under OCGA § 40-5-120 (4), it is a misdemeanor for a person to fail to perform any act required by Chapter 5 of Title 40 for which a criminal sanction is not provided elsewhere in the chapter.

DUI; Implied Consent

Fafanah v. State, A19A0787 (8/15/19)

Appellant was convicted of two counts of DUI and failure to maintain lane. He contended that the trial court erred in denying his motion to suppress. First, he contended that the trial court should have excluded the results of the breath test because the officers did not give him a *Miranda* advisement prior to seeking his consent for the test. However, citing *State v. Turnquest*, 305 Ga. 758,760-761 (3) (2019) and *MacMaster v. State*, 344 Ga. App. 222, 228 (1) (b) (2018), the Court stated that neither Georgia law nor the Georgia Constitution requires that a suspect in custody receive a *Miranda* warning before being asked if he or she will submit to a breath test.

Next, appellant contended that the implied consent notice was per se materially and substantially misleading because it stated that if he refused to submit to the breath test, then his refusal could be used against him at trial. However, citing *Olevik v. State*, 302 Ga. 228, 239-241 (3) (a) (iii) (2017), the Court stated that the implied consent notice, standing alone, is not per se coercive.

Finally, appellant also raised an "as-applied" challenge to the implied consent notice, asserting that his consent was not voluntary because he merely yielded to the authority of the three police officers present after he was placed in custody, and his "language issues limited his comprehension" of the implied consent notice. The Court noted that the trial court conducted a "totality of the circumstances analysis," assessing the impact of various factors on appellant's consent. The failure of the police to advise the accused of his rights is a factor to be evaluated in assessing the voluntariness of an accused's consent. But here, the trial court did not consider the deficiency in the implied consent notice as a factor in its totality of the circumstances analysis. Thus, citing *Elliott v. State*, 305 Ga. 179, 209 (IV), 223 (IV) (E) (2019), the Court vacated the trial court's ruling on the motion to suppress and remanded the case because appellant's arguments implicated *Elliott*, which had not yet been decided when the trial court ruled on the motion.

Right to Counsel; Waiver

Cade v. State, A19A0888 (8/16/19)

Following a bench trial, appellant was convicted of aggravated battery, aggravated assault, possession of a firearm by a convicted felon, and two counts of possession of a firearm during the commission of a felony. He argued that he did not knowingly and intelligently waive his right to counsel. The Court disagreed.

The Court found that prior to trial, appellant filed a motion to represent himself. On the day of trial and prior to its commencement, appellant abandoned his motion and indicated that he wanted to enter a plea. During the plea proffer, appellant's educational background and criminal history were placed on the record. The trial court explained that appellant did not have to plead guilty and instead could go to trial. Appellant then changed his mind and decided to proceed to trial with the assistance of legal representation. Yet, immediately prior to his trial counsel's cross-examination of the State's first witness, appellant told the trial court, through counsel, that he wanted to represent himself. The trial court appointed trial counsel as standby counsel.

The Court held that even if the trial court erred in permitting appellant to represent himself, under these circumstances, the error was harmless. Here, the record showed that standby counsel actively participated in the trial, providing assistance during the questioning of witnesses, conferring with appellant throughout the trial, and making the closing argument. Thus, under the facts of this case and the totality of the circumstances, the Court concluded that any deficiency in the trial court's warning as to the dangers of self-representation was harmless. It was clear that the appellant did not conduct the proceedings alone with no assistance or protection of his rights.

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Rule 404 (b) Evidence

Cordova v. State, A19A1152 (8/16/19)

Appellant was convicted of burglary in the first degree, cruelty to children in the first degree, cruelty to children in the third degree, terroristic threats, and two counts of aggravated assault. The evidence, very briefly stated, showed that a husband, wife, and their 11 and 12-year-old daughters lived on Gee Mill Road. At 3:30 a.m., the wife woke up to find appellant walking in her bedroom. She got up and found appellant hiding behind the door of her daughter's bedroom. Her husband then threw appellant out of the house. The family then went back to bed. However, the wife couldn't sleep and realized that someone was again in the house. She heard one of her daughters scream. Appellant was found holding a knife to the other daughter's neck. The husband fought with appellant, who tried to cut the husband with the knife. Appellant ran out of the house.

Appellant contended that the trial court erred in admitting evidence of other crimes, that, shortly before he entered the Gees Mill Road residence, he had been found in a child's bedroom in a home on Millstone Manor, about a mile away. Specifically, appellant argued that the testimony of the home owner of the Millstone Manor residence was "highly suggestive of sexual misconduct [on the part of appellant, and] there was nothing similar or related to" the events that occurred at Gees Mill Road.

The record showed that the trial court ruled that the State could present evidence that appellant was at a party in a residence on Millstone Manor when he was found in a child's bedroom with the lights off and was forced to leave the residence. The trial court ruled, however, that "[t]here will be no discussion of [appellant's] pants being down or of any sexual activity that may or may not have occurred while he was in that bedroom."

In addressing the first prong of the Rule 404 (b) test, the Court found that appellant pled not guilty to the charges and maintained his innocence throughout the trial, therefore making intent a material issue, and he did not affirmatively attempt to remove the issue from the case. Because the appellant's actions at the Millstone Manor residence (specifically, entering a five-year-old girl's bedroom without authority) involved the same mental state as appellant allegedly had when he entered an eleven-year-old and twelve-year-old girls' bedroom without permission at the Gees Mill Road residence, the evidence from the Millstone Manor residence was relevant to establish intent.

As to the second prong of the test, the Court found that within an hour after being escorted out of a five-year-old girl's bedroom at the Millstone Manor home, appellant was found in the bedroom of eleven-year-old and twelve-year-old girls at the Gees Mill Road residence. Further, the two residences are a short distance from each other. Thus, the Court found no clear abuse of the trial court's discretion in determining that the probative value of the evidence that appellant unlawfully entered the five-year-old's darkened bedroom shortly before he committed a similar offense at the nearby home on Gees Mill Road was not substantially outweighed by the danger of unfair prejudice.

Finally, under the third prong of the test, the Millstone Manor homeowner testified that he had found appellant in his young daughter's unlit bedroom and promptly escorted him off his property. Thus, there was sufficient proof for the jury to find by a preponderance of the evidence that appellant committed the prior act. Accordingly, the Court concluded, the trial court did not abuse its discretion in admitting the Rule 404 (b) evidence.

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