Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
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Search & Seizure; *Gary*

Mobley v. State, S18G1546 (10/21/19)

Appellant was convicted of two counts of vehicular homicide. He contended that the trial court erred in denying his motion to suppress. The Court of Appeals, in a split panel decision, affirmed. *Mobley v. State*, 346 Ga. App. 641 (2018). The Court granted appellant's petition for writ of certiorari.

The evidence, very briefly stated, showed that appellant was driving a 2014 Dodge Charger and collided with a Corvette that pulled onto the road from a private driveway, killing the two passengers. But before the vehicles were removed from the scene of the collision, Sergeant Gagnon—a supervisor in the Traffic Division of the Police Department—directed officers to retrieve any available data from the airbag control modules (ACM) on the Charger and Corvette. The data retrieved from the Charger indicated that, moments before the collision, appellant was driving nearly 100 miles per hour. The officers subsequently cleared the scene and had the Charger and Corvette both towed to an impound lot for further investigation.

The next day, Investigator Thornton joined the team investigating the collision. He applied for a search warrant to physically remove and seize the ACMs from both vehicles. His application, however, did not rely on the data to establish probable cause for the seizure of the ACMs. A magistrate issued the warrant, officers executed the warrant at the impound lot, and the ACMs were removed from both vehicles. No additional data was retrieved from the ACMs subsequent to the execution of the warrant.

The Court first considered whether the retrieval of data from the ACM of the Charger at the scene of the collision was a search and seizure that implicates the Fourth Amendment. To retrieve the data, Investigator Hatcher entered the passenger compartment of the Charger and connected a CDR device with the ACM by way of an onboard data port. A personal motor vehicle is plainly among the "effects" with which the Fourth Amendment—as it historically was understood—is concerned, and a physical intrusion into a personal motor vehicle for the purpose of obtaining information for a law enforcement investigation generally is a search for purposes of the Fourth Amendment under the traditional common law

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trespass standard. Thus, the Court found, the retrieval of data without a warrant at the scene of the collision was a search and seizure that implicates the Fourth Amendment, regardless of any reasonable expectations of privacy.

Next, the Court considered whether the retrieval of the data was an unreasonable search and seizure under the Fourth Amendment. The Court found that Investigator Hatcher retrieved the data from the ACM on the Charger at the scene of the collision without a warrant, and the State failed to identify any recognized exception to the warrant requirement applicable to the facts established in the record. Accordingly, the Court held that the retrieval of data from the ACM in the Charger at the scene of the crash without a warrant was an unreasonable search and seizure that violated the Fourth Amendment.

The Court then turned to whether the evidence should be excluded. The State argued that the evidence need not be suppressed because of the doctrine of inevitable discovery and here, the State obtained a warrant for the information regardless of whether the initial search was illegal. Appellant contended that OCGA § 17-5-30 is a statutory exclusionary rule that—unlike its federal counterpart, which developed and has been refined judicially—admits of no exceptions. According to appellant, OCGA § 17-5-30 categorically precludes the recognition in Georgia of *any* exception to the exclusionary rule, and in support of this argument, he relied principally on *Gary v. State*, 262 Ga. 573 (1992). Thus, appellant argued, the inevitable discovery exception is not cognizable in Georgia. The Court disagreed with both parties.

First, the Court addressed appellant's argument. The Court looked at the history of the exclusionary rule in Georgia, the enactment of OCGA § 17-5-30, the text of which was borrowed substantially from Federal Rule of Criminal Procedure 41 (e), and that the *Gary* Court gave no consideration to the legal context of OCGA § 17-5-30, including the background law of Georgia at the time of its enactment and the understanding of Rule 41 (e), from which its provisions were substantially borrowed. The Court found that because *Gary* failed to consider this important context, it concluded that its broader reasoning is unsound, and its understanding of OCGA § 17-5-30 is simply incorrect.

The Court noted that *Gary* involved the admission of evidence obtained by way of a search conducted by officers relying in good faith on the validity of a search warrant issued without probable cause, and the three cases in which the Court relied on *Gary* all involved officers relying in good faith on the validity of search warrants. But, the Court stated, whether the holdings of *Gary* and its progeny should be squarely overruled is a question that would require a consideration of the doctrine of stare decisis, and is not a question that the Court must answer to resolve this case. This case did not involve good faith reliance on the validity of a search warrant, and the Court never relied on the broader reasoning of *Gary* to foreclose consideration of an exception to the exclusionary rule in any other context, including with respect to the inevitable discovery exception. Thus, the Court declared, "Today, we disavow the unsound reasoning of *Gary*, hold that it does not extend to any context other than the reliance of an officer in good faith upon the validity of a search warrant, and conclude that, in all other contexts, OCGA § 17-5-30 means what it most naturally and reasonably is understood in context to mean—it establishes a procedure for applying the exclusionary rule but does not itself require the suppression of any evidence. It does not, therefore, categorically foreclose the application of any other exception to the exclusionary rule."

Finally, the Court addressed whether the inevitable discovery exception applies. The Court noted that for the inevitable discovery exception to apply, there must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the illegal conduct. But here, the

Court found, the record did not show that the officers were "actively pursuing" a search warrant at the time Investigator Hatcher retrieved the data without a warrant. Absent proof that the officers were actively pursuing a warrant at that point in time, the mere fact that Investigator Thornton actually obtained a warrant on the following day was not enough to bring this case within the inevitable discovery exception. In fact, the Court stated, because a valid search warrant nearly always can be obtained after a search has occurred, allowing law enforcement to use a warrant from after-the-fact to justify an earlier search would threaten to vitiate the warrant requirement.

And here, there was no evidence that any of the investigating officers applied for a warrant, were preparing an application for a warrant, or even were contemplating a warrant before Investigator Hatcher retrieved the data. Nor was there evidence that the police department had a policy, standard operating procedure, or consistent practice that leads officers to always or even routinely obtain search warrants for ACM data in the investigation of fatality crashes. To the contrary, the officers testified that the most common practice in such investigations is to retrieve ACM data at the scene of a crash without a warrant. Not one of the officers suggested that they usually obtain warrants in cases like this one.

Thus, the Court concluded, the State failed to lay an evidentiary foundation for the application of the inevitable discovery exception. And the State failed to identify any other established exception to the exclusionary rule that would have been applicable to the facts as shown by the record. Accordingly, the Court held, the usual rule of exclusion holds, and the trial court should have granted the motion to suppress. Consequently, the judgment of the Court of Appeals, affirming the decision of the trial court, was reversed.

Grand Juries; Selection Process

State v. Towns, S19A0557 (10/21/19)

Towns was indicted for murder and armed robbery. He moved to dismiss the indictment alleging that the grand jury was unlawfully constituted because some of the grand jurors were not selected randomly. Following an evidentiary hearing, the trial court agreed that two of the grand jurors were not selected randomly, and dismissed the indictment. The State appealed and a divided Court affirmed.

The facts, briefly stated, showed that 50 prospective grand jurors were summoned, but fewer than 16 showed up for service. The presiding judge directed the sheriff to attempt to locate jurors who failed to appear, but also directed the clerk to supplement the number of prospective grand jurors with persons who had been summoned to appear for service as petit jurors, a procedure that is authorized by OCGA § 15-12-66.1. The Clerk selected two prospective petit jurors—T.S. and B.W. — who along with the jurors the sheriff located comprised the grand jury that indicted Towns.

The Court stated that OCGA § 15-12-66.1 authorizes a court to select persons who have been summoned for service as petit jurors to supplement the number of persons summoned to appear for service on the grand jury when necessary to secure the attendance of enough jurors to empanel a grand jury. However, OCGA § 15-12-66.1 requires that the petit jurors selected to serve on the grand jury be chosen *randomly*. And here, the Court found, the persons summoned for service as petit jurors were selected at random from the master jury list. But in selecting T.S. and B.W. from that random list to serve on the grand jury, the clerk relied on her personal knowledge of the prospective petit jurors, her own assessment of the extent to which she had the information necessary to contact them, and her estimate of the likelihood that they

would be available to report immediately. Thus, the Court found, those selections were not "random" in any sense of the word. Consequently, the Court concluded, the trial court was right to conclude that T.S. and B.W. were not "cho[sen] at random" for service on the grand jury and were not, therefore, selected as required by OCGA § 15-12-66.1.

Next, the Court noted, only a disregard of an "essential and substantial" provision of the jury selection statute will have the effect of vitiating the array. A grand jury is randomly selected only to the extent that all of its members were randomly selected. Even an occasional, limited, and well-intentioned violation of the randomness requirement in the statute governing the summoning of additional grand jurors undercuts a key feature of the modern scheme for selecting juries. And here, a majority of the Justices could not say that such a violation is anything less than the violation of an "essential and substantial" provision of the jury selection statutes. Accordingly, under these facts, the Court concluded that the trial court did not err when it dismissed the indictment as a remedy for the violation of the randomness requirement that occurred in this case.

Murder; Sufficiency of the Evidence

Smith v. State, S19A0749 (10/21/19)

Smith, Hawkins and Seay were convicted of murder and other crimes arising from a fight in a nightclub and the aggravated assault and shooting death of Stanford. The evidence, briefly stated, showed that Stanford and a group of friends went to a nightclub one night. At some point, a group of between 15 and 30 people began to fight Stanford, chanting "EMF" as they punched and kicked him. "EMF" apparently refers to "East Mafia Family," a street gang that operates in the area, and evidence showed that Smith, Hawkins, Seay, and a number of other individuals at the club were affiliated with that gang. Ferguson, a security guard, along with other security guards eventually pulled Stanford away from his attackers and escorted him from the club. The fight spilled out into the parking lot. Ferguson tried to escort Stanford to his car, but failed because lots of people continued to jump on Stanford. Ferguson left to break up a fight between a guard and Seay. Ferguson told three men to leave the premises. At that point, according to Ferguson, Smith said "f**k this sh*t" and ran to a car in the parking lot across the street from the club. Smith then returned and shot Stanford and Ferguson.

Hawkins and Seay contended that the evidence was insufficient to support their convictions for murder. The Court agreed. The indictment alleged in pertinent part that Hawkins and Seay committed felony murder by virtue of their participation in an aggravated assault upon Stanford with "fists and feet … and with handguns."

Here, the Court found, there was enough evidence to prove beyond a reasonable doubt that Hawkins and Seay were parties to an aggravated assault upon Stanford with "fists and feet" inside the club. That assault, however, was not the immediate cause of Stanford's death. Indeed, the testimony of the medical examiner that the cause of death was "multiple gunshot wounds" was undisputed. Although the medical examiner said that Stanford also sustained several "blunt force injuries" to his head, neck, back, and extremities—apparently as a result of the beating and kicking by the sizeable crowd of which Hawkins and Seay were a part—the medical examiner confirmed that those injuries were not life-threatening.

Nor did the Court find there was there evidence sufficient to prove beyond a reasonable doubt that the beating and kicking of Stanford with "fists and feet" inside the club and the shooting of Stanford in the parking lot were one and the same assault. The shooting was attenuated in time, in place, and most significantly, in circumstance from the earlier fighting

with "fists and feet." The beating and kicking began and mostly occurred inside the club, and although some individuals may have continued to try to fight Stanford after he was escorted from the club, it was undisputed that the fighting apparently ceased at some point—at least two minutes, and perhaps as many as ten—before the shooting. More importantly, there was no evidence that Smith—who fired the fatal shots—was a part of the crowd beating and kicking Stanford inside the club or that any member of that crowd fired shots at Stanford or otherwise was involved in the shooting. Around the time Stanford was escorted from the club, Smith was with another man (who was involved in a separate fight with a security guard), was confronted by Ferguson and told to leave the premises, became angry and proceeded to a parking lot across the street, returned with a gun, shot Ferguson, and then shot Stanford. Thus, the Court found, the beating, kicking, and shooting could not on these facts properly be characterized as parts of a single, continuous assault.

Next, the Court addressed whether the State might conceivably have proved Hawkins and Seay guilty of felony murder as alleged in the indictment. First, the State perhaps might have proved that Hawkins and Seay were parties to the separate assault upon Stanford with a handgun. But, the Court found, there was no evidence that Hawkins or Seay was communicating or coordinating with Smith—or even in his company—during the beating or at any time prior to the shooting. There was no evidence that either of them knew Smith had a gun, that they encouraged, counseled, or solicited Smith to use his gun, or that they aided and abetted Smith in shooting Stanford. The State did present evidence that Smith, Hawkins, and Seay—and numerous other individuals at the club—were affiliated with EMF. Although a common gang affiliation sometimes may tend to show concerted action, gang affiliation, without more, is not enough to render one gang member chargeable for the crimes of another. Here, there was not enough additional evidence of concerted action to prove beyond a reasonable doubt that Hawkins and Seay were parties to the shooting in the parking lot.

The Court then addressed whether the State might conceivably have proved Hawkins and Seay guilty of felony murder in that the aggravated assault with "fists and feet" inside the club set in motion a chain of events, unbroken by any intervening cause, that led foreseeably to the fatal shooting in the parking lot. But again, the Court found, there was insufficient evidence to sustain such a theory. Absent concerted action between Smith, Hawkins, and Seay and in furtherance of which Smith fired the fatal shots, absent evidence that Smith shooting Stanford was reasonably foreseeable to Hawkins and Seay when they were a part of the crowd beating and kicking Stanford inside the club, and absent evidence that the assault with "fists and feet" left Stanford helpless to defend against the subsequent and separate shooting by Smith, the shooting would break the causal chain between the death of Stanford and the earlier beating in which Hawkins and Seay were complicit. Accordingly, the Court reversed their convictions for murder.

Affirmative Defenses; Accident

Pinkston v. State, A19A1390 (9/20/19)

Appellant was convicted of two counts of child molestation against E. M. and S. C., preschool girls. He argued that the trial court erred in failing to charge the jury on accident, which he argued was his sole defense against the charge that he molested E. M. The Court disagreed.

The Court noted that OCGA § 16-2-2 provides that "[a] person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking, intention, or criminal negligence." Here, appellant contended that he was entitled to a charge on this principle because he lacked the necessary

criminal intent to commit child molestation, arguing that he reflexively touched E. M.'s vaginal area while pushing the girl away as she tried to climb on him and painfully aggravated the site of a recent hip surgery.

The Court noted that because appellant did not request a charge on accident or object to the court's failure to give the charge, its review was limited to whether the error amounted to plain error. Thus, the proper inquiry is whether the failure to give the instruction was erroneous, whether it was obviously so, and whether it likely affected the outcome of the proceedings. And here, the Court found, appellant failed to show an obvious error in the trial court's failure, sua sponte, to charge the jury on accident, which is an affirmative defense premised on the claim that appellant acted without any criminal intent. A trial court must give an accident charge sua sponte only where accident is the sole defense. But contrary to appellant's argument, the Court found that accident was not his sole defense to the charge that he molested E. M., because it was not a complete defense to that count. The State did not charge appellant separately for each of the acts of molestation to which E. M. testified; it charged appellant in a single count with one instance of "commit[ting] an immoral and indecent act upon [E. M.] . . . by touching [her] vaginal area with [his] hand[.]" At trial, the State presented evidence that appellant molested E. M. in this manner on several occasions. But appellant's accident defense addressed only one of those instances; he denied that the other instances had occurred. So, the Court found, appellant in fact offered two defenses to the single charge of molestation against E. M. — that one of the alleged instances was an accident and the rest of the alleged instances did not happen. If the jury accepted the accident defense but rejected the defense that the other instances did not occur, it could still find appellant guilty of the charge that he molested E. M. Consequently, the trial court was not required to sua sponte charge on accident.

Furthermore, the Court noted, this case involved a claim that the correct instruction was absent, not that an incorrect instruction was present. And, the affirmative defense of accident did not provide appellant with a complete defense against the charge that he molested E. M. because there was evidence that appellant touched E. M.'s vaginal area on several occasions and appellant's claim of accident pertained to only one of those instances. Thus, the Court found, given the quantum of evidence, combined with the fact that the instruction was incomplete rather than overtly incorrect, appellant failed to also show that the instruction likely affected the outcome of the proceedings. Accordingly, the Court concluded that there was no plain error.

Character Evidence; Other Acts Evidence

Easley v. State, A19A0903 (9/23/19)

Appellant was convicted of armed robbery, false imprisonment, theft by taking property valued at $5,000 or more, fleeing or attempting to elude a police officer, and possession of cocaine. The evidence, very briefly stated, showed that the victim arranged to meet Watts, appellant's female codefendant, at a hotel and shortly after the victim entered the room, appellant and a Sterling, appellant's male codefendant, emerged from the bathroom and robbed the victim. They then forced the victim into a closet and the three fled in the victim's car.

Appellant argued that the trial court abused its discretion in admitting improper character evidence of him by allowing the State to present evidence of: (a) his previous incarceration; and (b) outstanding warrants for his arrest without notice or a hearing as required by OCGA § 24-4-404 (b).The Court disagreed.

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As to the previous incarceration evidence, during trial, outside the presence of the jury, the trial court held a hearing on the admissibility of portions of appellant's custodial interview. During the interview, appellant stated that his friend, Royal (also known as Jeremy), was in the hotel room on December 10, and that he and Royal had previously been incarcerated together. The trial court admitted that portion of appellant's statement because the "prejudice does not substantially outweigh the probative value of the two [appellant and Sterling] being friends together and being in jail for that brief mention." The detective subsequently testified at trial that appellant and Sterling were never in jail together.

The Court stated that as a general rule, a trial court's decision under OCGA §§ 24-4-403 and 24-4-404 (b) to exclude or admit other acts evidence will be overturned only where there is a clear abuse of discretion. Moreover, although evidence may incidentally put appellant's character in issue or be prejudicial, it may be admitted if otherwise relevant. Thus, because appellant's brief statement about being in jail with Royal, and that Royal was Sterling's street name, was relevant and admissible to show that the men knew each other prior to the crimes at issue, the trial court did not abuse its discretion in admitting the evidence. And, the Court added, even if appellant's passing reference to Sterling and he being incarcerated together was improperly admitted, appellant failed to demonstrate reversible error.

Appellant also argued that the trial court erred by admitting evidence of his outstanding arrest warrants for shoplifting, contending that the trial court failed to provide notice and a hearing, as required by OCGA § 24-4-404 (b). Specifically, appellant argued that the court erred in admitting evidence that, during his custodial interview, he stated that he decided to flee from the police in the stolen vehicle after dropping off Sterling and Watts because he had outstanding warrants.

The Court stated that evidence is intrinsic to the charged offense, and thus does not fall within OCGA § 24-4-404 (b)'s ambit, if it (1) arose out of the same transaction or series of transactions as the charged offense; (2) is necessary to complete the story of the crime; or (3) is inextricably intertwined with the evidence regarding the charged offense. And here, appellant's statement was intrinsic evidence because his motive for fleeing from the police was "inextricably intertwined" with the evidence of the charged crime of fleeing or attempting to elude a police officer. Thus, a hearing pursuant to OCGA § 24-4-404 (b) was not required. Accordingly, the Court concluded, the trial court did not abuse its discretion in admitting the evidence.

Void Sentencing; Split Sentences

Reed v. State, A19A0865 (9/24/19)

Appellant was convicted in 2016 of 15 counts of possessing material depicting a minor engaged in sexually explicit conduct in violation of OCGA § 16-12-100 (b) (8) (2014). In 2018, he filed a motion to vacate his sentences as void, which the trial court denied.

Appellant argued that his sentence was illegal because it was a hybrid sentence that was partially consecutive and partially concurrent. The Court disagreed. At the time appellant committed the acts, § 16-12-100 provided that a person who commits that offense "shall be punished by imprisonment for not less than five nor more than 20 years." OCGA § 16-12-100 (g) (1) (2014). Moreover, a violation of OCGA § 16-12-100 (b) (8) is a sexual offense subject to the sentencing requirements of OCGA § 17-10-6.2. The Court found that the version of OCGA § 17-10-6.2 applicable to appellant's sentence required the imposition of a split sentence for each of the sexual offense counts for which appellant was convicted

— in other words, the sentence on each count was required to include a mandatory minimum term of imprisonment followed by an additional probated sentence of at least one year. The trial court, however, was authorized to run a split sentence partially consecutive and partially concurrent to another sentence, such that the probationary component of a split sentence was to be served concurrently with a period of confinement imposed by the sentence on another count. And here, the trial court imposed a hybrid sentence that was partially consecutive and partially concurrent. Thus, the Court found, this aspect of the sentence was within the trial court's authority.

However, appellant contended, and the State conceded, that the trial court did not impose a split sentence on each count in violation of OCGA § 17-10-6.2 (b) (2014). Therefore, the Court vacated appellant's sentence and remanded the case for resentencing.

First Offender Sentencing; Ambiguous Sentencing

Coleman v. State, A19A1387 (9/24/19)

Appellant was convicted of making a false statement. He contended that the trial court erred in denying his motion for an order of exoneration and restriction of access to his criminal records under Georgia's First Offender Act because his sentence was ambiguous.

The Court stated that sentences for criminal offenses should be certain, definite, and free from ambiguity; and if they are not, the benefit of the doubt should be given to the accused. Appellant contended that the following language on the sentencing form created an ambiguity as to whether he was sentenced as a first offender: "The Defendant is adjudged guilty or sentenced under First Offender/Conditional Discharge for the above-stated offense(s) . . . ." But, the Court found, this sentence merely established that appellant was either being adjudged guilty or sentenced as a first offender, not both. Moreover, this statement is entirely consistent with Georgia law because when a defendant is sentenced as a first offender, there is no adjudication of guilt and there is no conviction. Additionally, the sentencing form indicates, in bold print, that the "[d]isposition]" of the charged offense is "Guilty." And while the box on the form indicating the defendant was being sentenced as a repeat offender is not checked, neither was the box indicating the defendant was a first offender. In sum, the Court found, because a first-offender sentence is not an adjudication of guilt and appellant's sentencing form indicated that he was being convicted of the charged offense, the form was not ambiguous as to whether appellant received first-offender status, as it made clear that he did not.

Furthermore, the Court found, his trial counsel informed the court, without prompting, that appellant was ineligible for first-offender status because he had been given first-offender status in a prior proceeding. Thus, the trial court was not authorized to sentence him under the First Offender Act.