Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
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Issue 49-19

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Family Violence Protective Orders; Right of Cross-Examination

Jha v. Menkee, A19A1180 (9/25/19)

On August 7, 2018, Menkee filed a petition for a temporary protective order against appellant. The superior court issued a family violence ex parte protective order on August 7, 2018, and held a hearing on Menkee's petition on October 17, 2018. After the hearing, the trial court issued a family violence 12-month protective order, which was dated October 17, 2018. On October 25, 2018, appellant filed a motion to vacate the family violence 12-month protective order, which the trial court denied. Appellant filed an application seeking discretionary appellate review of the trial court order denying his motion to vacate, which was granted.

Appellant contended that the hearing procedure for the family violence 12-month protective order did not afford him due process because he was not allowed to cross-examine Menkee. The Court agreed.

The Court noted that in its order denying appellant's motion to vacate the protective order that appellant, who proceeded pro se, "was not allowed to 'cross examine' or engage in a 'thorough and sifting cross-examination of [Menkee]" or otherwise question [Menkee], who was represented by counsel, in violation of OCGA § 15-19-51 that prohibits an unauthorized practice of law.

The court further noted that it refused to "subject [Menkee] to further intimidation and harassment through 'cross-examination' or 'thorough [and] sifting cross-examination'" because it had a responsibility to safeguard individuals and the judicial process "from further re-victimization, harm, abuse, harassment and menacing attack." However, the Court stated, a victim's sworn statement in support of a temporary protective order is testimonial in nature, providing the party against whom the protective order is sought the Sixth Amendment right to confrontation.

Furthermore, it is well-established that the right of a thorough and sifting cross-examination belongs to every party as to the witnesses called against him. Although cross-examination may be limited by the trial court to relevant matters by proper questioning, the trial court refused appellant any right of cross-examination because, according to the trial court, appellant's cross-examination would have been an "unauthorized practice of law" and re-victimized Menkee. But, the Court found, the trial court's reliance on OCGA § 15-19-51 to support its finding that appellant's cross-examination would constitute an unauthorized practice of law was misplaced. OCGA § 15-19-51 only prohibits an individual from practicing or appearing to practice as an attorney at law "for any person other than himself in any court of this state or before any judicial

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body[.]" It does not prohibit an individual proceeding pro se from representing himself and employing his right to a thorough and sifting cross-examination of a witness called against him.

Therefore, the Court found that the trial court's refusal to allow appellant to cross-examine Menkee was an abuse of discretion. Consequently, it reversed the trial court's order denying appellant's motion and remanded with instructions for the trial court to hold a new hearing on Menkee's petition.

Search & Seizure; Cell Phones

Reyes-Castro v. State, A19A0797 (9/25/19)

Appellant and his codefendant were convicted of the kidnapping and rape of an unconscious 21-year-old woman. Appellant contended that his trial counsel rendered ineffective assistance by failing to litigate properly the motion to suppress the contents of his cell phone. The Court disagreed.

Appellant contended that when the detective seized his cell phone prior to arresting him, the detective had no basis to believe that the phone contained evidence regarding the rape. He contended that instead, the detective seized the phone in the mere hope of finding evidence that would provide probable cause to arrest him, and argued that such hope was comparable to a "hunch" that would be insufficient to permit the seizure and search of the phone. Thus, appellant contended, his counsel's representation was deficient for failing to challenge the allegedly illegal seizure of the cell phone in the trial court.

The Court, relying on *Illinois v. McArthur*, 531 U. S. 326, 331-33 (II) (A) (121 SCt 946, 148 LE2d 838) (2001), considered four principles in balancing an individual's privacy-related concerns with law enforcement-related concerns to determine if a police officer's seizure of a person's property until a search warrant could be obtained was reasonable when that person was not under arrest. And, applying those principles here, the Court held that the record supports the following conclusions. First, given appellant's statements during the first interview regarding his use of the cell phone during the rape, as well as the detective's experience in investigating sexual assaults of this nature, the detective had probable cause to believe that appellant's cell phone contained evidence of a crime. Second, the detective had a reasonable basis to be concerned that, unless he seized the phone during the first interview with appellant, appellant would be able to destroy any incriminating data on his phone — or the phone itself — before the detective could obtain a search warrant. Third, the detective made reasonable efforts to reconcile his law enforcement needs with the demands of appellant's personal privacy, i.e., the detective neither searched the phone nor arrested appellant before obtaining a warrant. And, fourth, the detective seized the phone for a time period that was no longer than reasonably necessary for the detective, acting with diligence, to obtain the warrant and institute the search.

Thus, under the particular circumstances presented and the law enforcement interests at stake, the Court concluded that the detective was authorized to seize appellant's cell phone in order to prevent the destruction of evidence and to retain it until the detective could obtain a search warrant and have the search conducted. Consequently, appellant's trial counsel was not deficient for failing to challenge the detective's seizure of the cell phone prior to appellant's arrest. Moreover, appellant failed to make a strong showing that, if his trial counsel had challenged the detective's seizure of appellant's cell phone, the trial court would have suppressed the evidence obtained from the phone.

Appellant also contended that the search warrant was "impermissibly overbroad[,]" because it authorized a search of all of the phone's digital content, instead of strictly limiting the search to obtaining data from the date and time of the alleged rape. The Court again disagreed.

Here, the Court found, although the search warrant authorized the search of "[a]ny and all [of the phone's] content[,]" the warrant also specifically stated that the issuing judge had concluded that there was probable cause to believe that a crime had been committed based on the detective's affidavit's detailed summary of the crimes at issue and that evidence of such crimes was "presently located on the … property described above[,]" i.e., appellant's cell phone. In addition, the warrant stated that the digital content to be acquired from the phone was related to a "violation of Georgia Law(s): OCGA § 16-6-1 Rape[.]" Thus, given the warrant's reference to the specific crime at issue and to the specific dates on which the crime was allegedly committed, as shown in the affidavit, the Court concluded that the warrant was sufficiently particular to notify the detective, the analyst, and/or any other executing officer of what evidence he or she was authorized to obtain from appellant's phone and to prevent a general exploratory search of the other downloaded content for evidence of unrelated crimes or other unauthorized purposes

Further, although the analyst conducted a complete download of the phone's data, the analyst repeatedly testified at trial that the review of the phone's content was focused on the specific time period during which the rape occurred, i.e., from the evening of November 29, 2014, until the early morning hours of November 30, 2014. Moreover, the only text messages presented at trial were from that specific time period. And, significantly, there was no evidence that the detective, the analyst, or other law enforcement officers conducted a "wholesale fishing expedition" by searching any of the remaining content from appellant's cell phone to develop leads to other evidence in this case or for any other purpose.

Additionally, the Court noted, the analyst testified that the text messages at issue were not found on the cell phone's basic instant messaging platform, but were, instead, found on an entirely separate application, the "What's App chat program," which she described as "a chat program you can chat back and forth online so you don't have to use … part of your cell phone provider['s] data texting limit. … You can circumvent that [by] using What's App." Thus, given appellant's admission that he was texting and talking on his phone during the rape, and given the reasonable possibility that he also video recorded or photographed the rape, the Court agreed with the State's argument that the search warrant "had to be written to encompass a search of all [of] the possible places that [the] text messages that [appellant] admitted to sending [and any videos or photos taken] during the rape of the victim might have been saved."

Finally, the Court found that appellant's argument was entirely dependent on the *possibility* that a partial download of digital data from appellant's cell phone, strictly limited to the date and time of the rape, was an available option that could have been performed in 2014 (when the search warrant was obtained), instead of the complete download of data actually conducted. Yet, appellant failed to present any evidence during the motion for new trial hearing that this option existed, for example, by calling as a witness the analyst who performed the download pursuant to the search warrant. Absent such evidence, appellant's argument that the search warrant should have limited the digital download to only extracting data from November 29 and 30, 2014, was based upon his mere speculation that such a procedure existed and was available to the detective in 2014, and such speculation was insufficient to support a claim of ineffective assistance.

Accordingly, the Court concluded that appellant failed to meet his burden of showing that his trial counsel was deficient for failing to challenge the validity of the search warrant, nor did he meet his burden of making a strong showing that, if counsel had raised such a challenge, the trial court would have suppressed the evidence.

Sentencing; Rule of Lenity

Gonzalez v. State, A19A1452 (9/25/19)

Appellant was convicted of criminal attempt to commit a felony (murder), two counts of aggravated assault (family violence), possession of a firearm during the commission of a felony, cruelty to children in the first degree, and cruelty to children in the third degree. The evidence, briefly stated, showed that appellant put a gun to his estranged wife's head and pulled the trigger. When the gun did not fire, he threw the victim to the floor and began slamming her head against the tile floor. The victim's screams woke their two sons, who were then 15 and 18 years old. The 15-year-old entered the bathroom first, and upon seeing appellant on top of the victim, intervened by pulling appellant off of the victim.

Appellant contended that the trial court erred by failing to apply the rule of lenity in sentencing him on Count 1, criminal attempt to commit a felony, rather than on Count 2, aggravated assault. The Court stated that the rule of lenity ensures that if and when an ambiguity exists in one or more statutes, such that the law exacts varying degrees of punishment for the same offense, the ambiguity will be resolved in favor of a defendant, who will then receive the lesser punishment. But if after applying the traditional canons of statutory construction, the relevant text remains unambiguous, the rule of lenity will not apply. The fundamental inquiry when making this assessment, then, is whether the identical conduct would support a conviction under either of two crimes with differing penalties, i.e., whether the statutes define the same offense such that an ambiguity is created by different punishments being set forth for the same crime.

Here, appellant was charged with criminal attempt to commit a felony in Count 1 and aggravated assault in Count 2. The criminal attempt statute provides: "A person commits the offense of criminal attempt when, with intent to commit a specific crime, he performs any act which constitutes a substantial step toward the commission of that crime." OCGA § 16-4-1. The attempted crime in this case was murder, and the statute for murder provides: "A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." OCGA § 16-5-1 (a). The aggravated assault statute provides, in relevant part: "A person commits the offense of aggravated assault when he or she assaults … with a deadly weapon[.]" OCGA § 16-5-21 (a). "A person commits the offense of simple assault when he or she … [c]ommits an act which places another in reasonable apprehension of immediately receiving a violent injury." OCGA § 16-5-20 (a).

The indictment accused appellant of committing criminal attempt to commit a felony by "perform[ing] acts which constitute a substantial step toward the commission of [murder], to wit: accused pointed a handgun at the head of victim … and did pull the trigger[.]" The indictment accused appellant of committing aggravated assault by "knowingly mak[ing] an assault upon the person of [the victim] with a deadly weapon, to wit: a handgun by pointing said handgun at said victim's head, placing her in reasonable apprehension of receiving a violent injury[.]"

The Court stated that a review of these statutes and the language in the indictment showed that the two counts do not address the same criminal conduct. Under the indictment and the statutory definitions, appellant could commit attempted

murder only if he performed an act which constituted a substantial step toward the commission of murder; that substantial step was pulling the trigger of the handgun aimed at the victim's head. Such an additional step is not required for the commission of aggravated assault. Thus, Counts 1 and 2 were not proved by the same evidence, and the rule of lenity did not apply.

Nevertheless, appellant contended, the trial court erred by failing to apply the rule of lenity in sentencing him on Count 5, cruelty to children in the first degree, rather than on Count 6, cruelty to children in the third degree. The Court again disagreed.

OCGA § 16-5-70 (b) provides as follows: "Any person commits the offense of cruelty to children in the first degree when such person maliciously causes a child under the age of 18 cruel or excessive physical or mental pain." OCGA § 16-5-70 (d) provides, in relevant part: "Any person commits the offense of cruelty to children in the third degree when … [s]uch person, who is the primary aggressor, having knowledge that a child under the age of 18 is present and sees or hears the act, commits a forcible felony, battery, or family violence battery."

Here, the Court found, the indictment accused appellant of committing cruelty to children in the first degree by "maliciously caus[ing] [his 15-year-old son], a child under the age of eighteen (18) years, excessive mental pain by forcing said child to intervene and prevent the accused from beating said child's mother[.]" Appellant was accused of committing cruelty to children in the third degree by "being the primary aggressor [and] unlawfully commit[ting] the offense of attempted murder, a felony, upon [the victim], while having the knowledge that [his 15-year-old son], a child under the age of eighteen (18) years, was present to see or hear the act[.]"

Thus, a review of the statute and the indictment revealed that Counts 5 and 6 did not address the same criminal conduct. As alleged here, cruelty to children in the first degree required proof of malice and that the child suffered excessive mental pain, "while third degree cruelty to children requires only that the perpetrator do an act with knowledge that a minor child is present and can see or hear the act. Therefore, the two crimes could not be proven by the same evidence, and the rule of lenity did not apply.

Mistrials; Deadlocked Juries

Parker v. State, A19A1009 (9/27/19)

Appellant was on trial for armed robbery and illegal firearm possession. The record, very briefly stated, showed that the jury began deliberating around 3:30pm on Friday. After re-watching some of the evidence, the jury sent out a note at 6:30 stating it was deadlocked 11-1 not guilty. The jury was told to continue deliberating. At 7:15pm, a note was sent stating that at least one person on each side will not change their minds and that coming back on Monday will not change that status. Nevertheless, the jury was brought back on Monday at 9:00am. But, at 10:15am, they sent out another note, this time stating that there were jurors on each side who were unwilling to change their vote. The jury was told continue to deliberate. An hour after the lunch break, the jury again sent out a note and this time, the court gave them an *Allen* charge. One hour later, after another note stating that the lines of communication have broken down in the jury room, the court ordered a mistrial. Thereafter, appellant filed a plea of former jeopardy, which the trial court denied.

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Appellant contended that the trial court abused its discretion in granting the mistrial because the court failed to ask the jury if anyone was refusing to deliberate, as appellant requested, in an attempt to avoid granting a mistrial. The question of whether a jury is "hopelessly deadlocked," and thus the existence of manifest necessity for a mistrial, is within the discretion of the trial court. That discretion is not unbridled, and it must be exercised carefully, which requires the trial court to take certain steps before concluding that the jury is hopelessly deadlocked and that a mistrial is necessary. For example, in deciding whether to declare a mistrial or require further deliberation the trial court should: inquire of the jury whether additional time for deliberation would be helpful; consider whether the jury is so exhausted that the minority might be induced to vote for a verdict which they otherwise would not support; and consider the length and complexity of the trial and the length of the deliberations. In addition, it is highly important that the trial court undertake a consideration of alternative remedies before declaring a mistrial based on a jury's alleged inability to reach a verdict.

Nevertheless, a court is not required to accept less drastic remedies if reasonable judges could differ about their use: Although trial courts should give careful, deliberate, and studious consideration to whether the circumstances demand a mistrial, with a keen eye toward other, less drastic, alternatives, a court's rejection of other alternatives is a proper exercise of the court's discretion — and not an abuse — if reasonable judges could differ about the proper disposition.

Also, the Court stated, although the trial judge is not required to make explicit findings of manifest necessity nor to articulate on the record all the factors which informed the deliberate exercise of his discretion, the record must at least show that the trial court actually exercised its discretion. Finally, although the amount of scrutiny used to evaluate mistrial decisions varies according to the reason for the mistrial, great deference is accorded to decisions to grant a mistrial based on the judge's belief that the jury cannot reach a verdict.

And here, the Court found, under the circumstances, reasonable judges could differ about whether that action was necessary. The transcript showed that the court carefully considered the jury's progress as reflected in the five notes that it sent before appellant asked the court to question the jury, which indicated that positions had changed slightly from Friday to Monday and that, therefore, the jurors were continuing to deliberate. The court even noted that the Monday afternoon message from the jury expressly stated that the jury had been deliberating. The court therefore had a reasonable basis to conclude that the notes did not indicate that any person was refusing to deliberate. In addition, the court clearly exercised discretion, in part by carefully considering when to give the *Allen* charge, finding it premature to do so Monday morning, and by repeatedly considering the length of the case and how long the jury had been deliberating when making its decision in what the record showed was not a complex case. After receiving the final note, the court considered the apparent futility of going forward.

Nevertheless, the Court stated, a trial court may not allow itself to be bound by a jury's pronouncement that it is hopelessly deadlocked, and that possible investigatory steps include polling the jurors individually or questioning them as a group to determine how close they are to an agreement and/or whether one or more jurors is refusing to deliberate. But here, applying the great-deference standard, the Court concluded that the trial court did not abuse its discretion in granting the mistrial.