Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JANUARY 31, 2020
Issue 5-20

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Mallory; Prosecutorial Misconduct

Clark v. State, S19A1344 (12/23/19)

Appellant was convicted of malice murder. The evidence, very briefly stated, showed that appellant and his date drove up to the woman's house following a night together. The woman's former boyfriend (the victim), who still lived with the woman, came over to the driver's side of the car. He and appellant got into an argument. The victim slapped appellant. Appellant shot the victim and then drove away.

Appellant argued that his trial counsel was ineffective for failing to object or move for a mistrial when the prosecutor commented during opening and closing arguments on his failure to call 911 or turn himself in after the shooting. The Court disagreed.

Appellant argued that trial counsel was deficient based on the bright-line rule the Court established in *Mallory*. But, the Court stated, *Mallory* was an evidentiary holding decided under our old Evidence Code. At the time of appellant's trial, which was conducted under the current Evidence Code, the continued viability of *Mallory* was unsettled. After appellant's trial, and after the trial court considered appellant's motion for new trial in which he raised the ineffectiveness claim, the Court decided *State v. Orr*, 305 Ga. 729 (2019), and concluded that *Mallory* had been abrogated by the new Evidence Code and that pre-arrest silence might be admissible under certain circumstances. And, the Court noted, since deciding *Orr*, it has rejected ineffectiveness claims based on trial counsel's failure to make *Mallory* objections in trials conducted under the current Evidence Code, because *Mallory* did not apply to those trials. Thus, the Court held, appellant's ineffectiveness claim similarly failed.

Nevertheless, appellant argued, the case should be remanded for the trial court to determine the admissibility of the State's comments under the *Orr* standard and then evaluate whether trial counsel was ineffective for failing to object to any impermissible comments. The Court declined to do so because the trial court rejected appellant's claim primarily because it found that trial counsel's attempts to use the State's comments to help the defense's theory was not patently unreasonable. Specifically, the trial court found that trial counsel acted reasonably by attempting to show that appellant left the scene and did not immediately come forward because appellant felt that he had been set up, he feared the victim's family would retaliate against him, and he needed time to collect himself and ensure his safety. Thus, the Court concluded, regardless of whether the State's comments would be permissible under *Orr*, appellant made no argument, much less a sufficient

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showing, that the trial court erred in concluding that trial counsel's decision not to object was objectively unreasonable as trial strategy.

Next, appellant argued that that trial counsel was ineffective for failing to object to the following statements by the prosecutor during closing arguments: "So you heard earlier, or at least during voir dire, possibly during opening, about the presumption of innocence. And the defendant did enter into this case with the presumption of innocence, and he was presumed innocent until proven guilty. But the presumption doesn't stay during the entirety of the case. *You don't get to hide under the cloak of the presumption of innocence*. It's there until it's overcome with evidence. And so at which point — and it could be anywhere in the trial. It could be after witness number one said my name is whatever. *If you believe that he's guilty at that point, then at that point the presumption of innocence is gone and then he's guilty*. Once you believe a person is guilty, they are."

Appellant argued that the italicized language was an improper statement of the law, because it gave the jury the mistaken belief that the State could satisfy its burden of proving his guilt simply by having a witness say his or her name. The Court agreed that the prosecutor's statements on the presumption of innocence plainly misstated the law. A single witness merely stating his or her name is not sufficient evidence to overcome the presumption of innocence.

However, the Court found, although trial counsel should have objected to the prosecutor's statements, appellant could not establish that he was prejudiced by any deficiency. The trial court correctly charged the jury on the presumption of innocence, burden of proof, and reasonable doubt at the beginning of the trial and in its final instruction to the jury. The jury was presumed to follow the trial court's instructions, and appellant presented nothing to overcome this presumption. Therefore, appellant's ineffectiveness claim on this ground failed.

Special Demurrers; Rule 701

Bullard v. State, S19A1017 (12/23/19)

Appellant was convicted of malice murder, violation of the Georgia Street Gang Terrorism and Prevention Act, and possession of a firearm during the commission of a felony in connection with the shooting death of John Johnson. The evidence, briefly stated, showed appellant was a member of the East Macon Family gang. Johnson was a member of the Crips. When Johnson went to a party on the turf of appellant's gang, appellant shot and killed him.

Appellant contended that the trial court erred in denying his special demurrer with respect to Counts 5 and 6 of the indictment, which charged violations of the Street Gang Act. The special demurrer asserted that the State failed to allege sufficient information about those counts, arguing that Counts 5 and 6 of the indictment were "imperfect as to form" and that appellant was "entitled to more information," such as whether the East Macon Family "existed prior to these events," "what was the rival gang" that Johnson was a member of, when appellant became a member of the East Macon Family, and whether appellant was "an actual member of that particular gang or was … just associated with it." Contending that "those technical defects are fatal to those counts," appellant argued that the gang counts contained in the indictment should be "struck" and "re-alleged" or "re-indicted." The trial court ruled, however, that the indictment was "sufficiently technical and correct" and denied the special demurrer.

The Court stated that by filing a special demurrer, a defendant claims not that the charge in an indictment is fatally defective and incapable of supporting a conviction (as would be asserted by general demurrer), but rather that the charge is imperfect as to form or that the accused is entitled to more information. The true test of the sufficiency of an indictment to withstand a special demurrer is not whether it could have been made more definite and certain, but whether the indictment alleges the underlying facts with enough detail to sufficiently apprise the defendant of what he must be prepared to meet.

Here, the Court found, Count 5 of the indictment specifically alleged the date of the offense, the county where the offense occurred, the gang with which appellant was associated, that gang's status as a criminal street gang, the predicate act of criminal street gang activity, the identity of the victim of that act, and the manner in which that act was done. Such allegations provided enough information that the indictment was not susceptible to a special demurrer. Further details were not required to ensure that appellant could prepare his defense. Likewise, the indictment was detailed enough for appellant to prepare his defense without additional information regarding the identity of Johnson's rival gang, the time appellant became a member of the East Macon Family, and the exact nature of his association with that gang. Thus, because an indictment does not have to contain every detail of the crime to withstand a special demurrer, and Count 5 contained sufficient detail, the trial court did not err by denying appellant's special demurrer.

Next, appellant contended that the trial court erred in admitting photographs from appellant's Facebook page. The record showed that during trial, Officer Whitaker—who was qualified as a gang expert without objection—testified that he first came in contact with appellant in 2009 and had been familiar with appellant's various social media pages since that time. Multiple photographs from appellant's Facebook pages were admitted to prove his gang affiliation, and Officer Whitaker described gang-related attire and behavior that he identified in those photographs. Officer Whitaker also identified appellant in one of the photographs.

Appellant argued that allowing a witness to identify him in photographs that, according to the witness, showed gang activity was prejudicial and misleading because the photographs "speak for themselves," and it was for the jury to determine whether appellant was in fact in the photographs that were admitted to show criminal gang activity. The Court disagreed.

The ordinary way to introduce testimony identifying a person in photographs is to meet the requirements of OCGA § 24-7-701 (a) ("Rule 701 (a)"), which allows lay witness testimony in the form of opinions or inferences that are rationally based on the witness's perception, helpful to a clear understanding of the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge. Where there is some basis for concluding that a witness is more likely than the jury to correctly identify a defendant as an individual depicted in relevant photographs, then lay opinion testimony identifying a defendant in those photographs is admissible under Rule 701 (a). Whether to allow such lay opinion testimony under Rule 701 (a) is a matter for the trial court's sound discretion, and here, the Court concluded, the trial court did not abuse its discretion in allowing Officer Whitaker to identify appellant in the photographs presented at trial.

The State acknowledged Rule 701 (a) but argued that it did not apply because Officer Whitaker was qualified as a gang expert and was not testifying about the photographs as a lay witness. But, the Court stated, when considering the meaning of Rule 701 (a), courts must look to decisions of the federal appellate courts, especially the United States Supreme Court and the Eleventh Circuit, which have construed and applied Federal Rule of Evidence 701, the model for our Rule 701

(a). As with the federal rule, nothing in Georgia's Rule 701 (a) prevents a law enforcement officer from being qualified to provide both lay opinion and expert testimony. And lay witnesses may draw on their professional experiences to guide their opinions without necessarily being treated as expert witnesses. The "prototypical" examples of the type of evidence contemplated by Rule 701 (a) include lay testimony relating to the appearance of persons and identity. Contrary to the State's argument, therefore, Officer Whitaker's identification of appellant in one photograph should be considered lay opinion testimony.

Therefore, the Court evaluated whether that aspect of Officer Whitaker's testimony met the requirements of Rule 701 (a). While a number of factors may determine if a witness is better suited to identify the defendant, perhaps the most critical factor to this determination is the witness's level of familiarity with the defendant's appearance. And here, the Court found, Officer Whitaker had first come in contact with appellant years before the crimes charged here—far longer than the jury had to become familiar with appellant's appearance at trial. Also, Officer Whitaker continued to gain familiarity with appellant's appearance from his social media pages during those years. As a result, there was some basis for concluding that Officer Whitaker was in a better position to correctly identify appellant in the photographs than the jurors. That Officer Whitaker became familiar with appellant in Officer Whitaker's capacity as a law enforcement officer, or even in his capacity as a gang expert, did not prevent him from providing identification testimony as a lay witness. Accordingly, the Court concluded, the trial court did not abuse its discretion in permitting Officer Whitaker to identify appellant in photographs from his social media pages.

Municipal Courts; Appeals to Superior Court

State v. Johnson, A19A1967 (11/26/19)

On February 2, 2018, Johnson received traffic citations for having an expired registration and driving with a suspended license. The record showed that, also on February 2, 2018, Johnson had been served with notice that his license had been suspended about a week earlier, on January 26, 2018. After a bench trial, a municipal court acquitted Johnson of the expired registration offense but found him guilty of driving with a suspended license. Johnson appealed to the superior court. After a hearing, the superior court found that the State failed to show that Johnson had received notice of the suspension prior to the date he was stopped. The State then filed this discretionary appeal, which the Court granted.

The State contended that the superior court erred in conducting a de novo review. The State also argued that no transcript of the municipal court trial was before the superior court and that the municipal court record before the superior court was incomplete. Thus, the State contended, the superior court had no way of determining what documents had been tendered into evidence.

The Court stated that when a defendant is convicted of a traffic violation, he has the right to appeal to the superior court, but that appeal "*shall not be a de novo investigation* … but shall be on the record of the hearing as certified by the judge of that court who presided at the hearing below." (Emphasis supplied.) OCGA § 40-13-28. Pursuant to this standard, a defendant is entitled to a review of whether the lower court properly admitted evidence and whether the evidence was sufficient to support his conviction. Thus, the mandate of the superior courts is to review asserted errors of law in the proceedings below under general appellate principles. Further, the burden remains on the defendant to ensure that the record includes the issue upon which he or she seeks review.

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And here, the Court found, as there was no transcript of the municipal court hearing before the superior court, it would have been impossible for the superior court to review that record to determine what evidence was tendered to the municipal court and whether the municipal court received or heard evidence regarding whether Johnson, on February 2, 2018, received notice of his license suspension before or after being cited, that same day, for driving with a suspended license. Thus, the superior court's decision was inconsistent with the general principle of appellate practice that enumerations of error based on the evidence cannot be considered in the absence of a transcript, or a record prepared from recollection or a stipulation of the case pursuant to OCGA § 5-6-41 (g), (i), as well as the principle that the burden is on the appellant to show error affirmatively by the record. Therefore, the Court held that the superior court in this case was required to presume, in the absence of a contrary showing, that the evidence introduced in municipal court supported the appellant's conviction. According, the Court reversed.

State's Right to Appeal; Plea Agreements

State v. Rodriguez, A19A1875 (12/3/19)

Rodriquez was indicted on multiple charges, including aggravated assault, aggravated cruelty to animals, criminal damage to property in the second degree, and aggravated stalking after Rodriguez shot and killed her neighbor's dog. The ADA handling the case and defense counsel agreed that Rodriguez would pay $900 restitution for the dog she killed, and the State offered to let Rodriguez enter a pretrial diversion program. Rodriguez accepted, and the ADA emailed defense counsel the Agreement setting out the terms but instructed Rodriguez not to sign it until the next time they appeared in court. Thereafter, the ADA's superiors balked at the terms of the Agreement, which did not require Rodriguez to serve any jail time. About a week before the scheduled court date, the ADA sent defense counsel an email notifying her that her superiors were instructing her to seek jail time for Rodriguez and that the State was withdrawing its offer. Rodriguez filed a motion to compel the State to comply with the terms of the plea agreement and following a hearing, the trial court granted the motion. The State appealed.

The Court stated that it must first address whether the State has the right to appeal in this instance. The Court noted that the State's notice of appeal cited to both OCGA § 5-7-1 (a) (1) and (a) (6) as authority to appeal the trial court's order. OCGA § 5-7-1 (a) (1) gives the State the right to appeal "[f]rom an order, decision, or judgment setting aside or dismissing any indictment. …" But, the Court found, subsection (a) (1) does not apply here since the trial court's order did not dismiss the indictment; it enforced the pretrial diversion agreement, which conditioned the dismissal of the charges on Rodriguez's compliance with the terms of the Agreement.

Nevertheless, the State argued, "[a]s a party in this criminal case, the State of Georgia has the right … to appeal this order pursuant to OCGA § 5-7-1 (a) (6)." The Court noted that OCGA § 5-7-1 (a) (6) provides that the State may appeal "[f]rom an order, decision, or judgment of a court where the court does not have jurisdiction or the order is otherwise void under the Constitution or laws of this State. …" However, the Court stated, the State did not explain why it believed that the trial court did not have authority to rule on the motion and the Court found no basis to conclude as such. Moreover, it is well established that the trial court has jurisdiction to enforce plea agreements.

Next, as to whether the order was void, the Court stated that a sentence is void if the court imposes punishment that the law does not allow. Also, the Court has consistently construed OCGA § 5-7-1 (a) (6) and its predecessor to confer jurisdiction when the State appealed an order meeting this standard. But here, the Court found, the State did not assert that the order compelling compliance with the agreement imposes a sentence that the law does not allow. Thus, the Court found, the order is not void under OCGA § 5-7-1 (a) (6).

Accordingly, the Court concluded, because the State's appeal was not authorized by OCGA § 5-7-1 (a) (6) or OCGA § 5-7-1 (a) (1), it lack jurisdiction and consequently, dismissed the appeal.

Statements; Miranda

State v. Richardson, A19A2326 (1/2/20)

Appellant was charged with car hijacking, attempted armed robbery, aggravated assault, and second-degree criminal damage to property. The facts, very briefly stated, showed that around 10 p.m., an officer was called to a domestic disturbance at an apartment where Richardson lived with his mother and sister. The mother said that Richardson had been drinking and described her son to police as wearing a black hoodie and dark pants. Around 5 a.m., the officer was called to the same apartment complex regarding a car hijacking and attempted armed robbery. Based on the description of the assailant, the officer suspected Richardson. The vehicle was located in view of Richardson's apartment. The officer and a second officer knocked on Richardson's door and asked his mother if they could speak with him. Thereafter, with the second officer's gun drawn, Richardson walked out of the apartment with his hands in the air, saying, "I ain't got nothing on me." The first officer then placed Richardson in handcuffs, instructing him to "put your hands up until I can figure out what is going on."

Richardson made some incriminating statements at which time, the officer gave Richardson a partial *Miranda* warning. A consensual search of the apartment located a BB gun used by Richardson. The victim then identified Richardson and the officers considered Richardson under arrest at that point, but did not tell him so. The second officer then gave Richardson a partial *Miranda* warning. Richardson then made further incriminating statements.

Richardson moved to suppress his statements and other evidence, including the victim's on-scene identification, on grounds including that he had not been given the *Miranda* warnings before being interrogated. After a hearing, including testimony from the two officers and the introduction of their bodycam videotapes, the trial court filed an order holding that although the on-scene identification was not impermissibly suggestive and police had probable cause to arrest Richardson, all of his statements were involuntary as a result of the officers' failure to read him a complete *Miranda* warning at any time. The trial court also suppressed the BB gun as the tainted fruit of these involuntary statements. The State appealed.

The Court stated that it is well-established that the mere use of handcuffs does not, without more evidence of force, render a person's statements during an investigative stop involuntary. Here, the Court found, the officers placed Richardson in handcuffs for their own safety and for purposes of conducting a second-tier investigatory stop lasting approximately three minutes. Where an accused is neither in custody nor so restrained as to equate to a formal arrest, any statements made to an investigating officer are made under noncustodial circumstances and *Miranda* warnings are not required. Thus, the

Court held, *Miranda* warnings were not necessary during this brief period, which ended when the victim identified Richardson as his assailant and Richardson was taken to the patrol car.

But, the Court added, even assuming that Richardson should have been Mirandized immediately after being placed in handcuffs, a failure to give the prescribed *Miranda* warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained, but such a failure does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. Thus, even when a defendant is in custody for some hours, a trial court errs in concluding that a statement taken without *Miranda* warnings is involuntary in the absence of any evidence of extreme tactics identified as the hallmarks of coercive police activity such as lengthy interrogation, physical deprivation, brutality, or deception.

And here, the Court found, Richardson's first conversation with police, which almost immediately raised the necessity of locating the gun used in the hijacking, was a matter of a few minutes in a noncustodial setting, and the videotape of the incident provided no evidence that he was threatened, coerced, or given a hope of a benefit in exchange for his statement. Even assuming that the officers erred when they failed to Mirandize Richardson immediately, his initial response to questioning had none of the earmarks of coercion, and the officers also did not exploit the unwarned admission to pressure him into waiving his right to remain silent. Under these circumstances, the Court concluded that the trial court erred when it granted Richardson's motion to suppress those statements made before his arrest, and when it also suppressed the gun later recovered from the apartment, which the victim described in the first moments after he was detained, as fruit of the poisonous tree.

Nevertheless, the Court also found that because neither the parties nor the trial court considered in any detail whether, independent of Richardson's first statement, the statements made after the victim's identification and Richardson's arrest were properly excluded, it must vacate the remainder of the trial court's order and remand for further proceedings.