

THIS WEEK:

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Ineffective Assistance of Counsel; Possession of Firearm by First Offender Probationer

Chavez v. State, S19A1573 (1/13/20)

Appellant was convicted of malice murder, participation in criminal street gang activity, possession of a firearm during the commission of a felony, and possession of a firearm by a first-offender probationer. He first contended and the State conceded, that there was insufficient evidence to support his conviction for possession of a firearm by a first-offender probationer. Appellant's first-offender probation expired on July 11, 2015, prior to the July 23, 2015, the date on which he was alleged to have possessed a firearm.

Appellant argued that his trial counsel rendered ineffective assistance. First, he contended that trial counsel performed deficiently by failing to stipulate to his status as a first-offender probationer at the time of the offense. Given that the evidence of his prior disposition was relevant only to prove his status as a first offender, neither the State nor the trial court could have rejected an offer to stipulate. And due to this failure to stipulate, appellant argued, the jury heard prejudicial character evidence.

But, the Court stated, even assuming the fail to object was deficient performance, appellant failed to show a reasonable probability of a different outcome but for that failure to stipulate. Prior convictions involving firearms and minor drug offenses are not likely to inflame the jury's passions in a murder case. And, although appellant cited *Old Chief v. United States*, 519 U.S. 172, 185 (117 SCt 644, 136 LE2d 574) (1997), for the proposition that the risk of unfair prejudice from a prior conviction for a gun crime is "obvious", the Court noted that *Old Chief* made clear in that same case that the risk of unfair prejudice "will vary from case to case" and that "a prior offense may be so far removed in time or nature from the current gun charge and any others brought with it that its potential to prejudice the defendant unfairly will be minimal."

Here, the Court found, the evidence against appellant was strong. The State did not bring out details of the prior offenses through testimony, and instead only entered a copy of the prior disposition into evidence without comment at the close of its case. Although the State referenced the prior disposition in its closing argument, it was not clear that the prosecutor made the sort of improper propensity argument as suggested by appellant on appeal. Accordingly, the Court concluded,

appellant did not show a reasonable probability of a different result had counsel offered to stipulate to his (expired) first-offender status.

Appellant also argued that trial counsel was ineffective for failing to object to the prosecutor's use of his prior criminal disposition in closing argument. Specifically, the State referenced the details of appellant's "certified conviction." The prosecutor then continued: "So not only did he possess it on the day of the incident, but we know that he continuously had firearms because he had a numerous of ballistics [sic] located in his bedroom." Appellant argued that trial counsel should have objected to the prosecutor's erroneous characterization of appellant's first-offender disposition as a "conviction," as well as the prosecutor's elicitation of an improper propensity inference by using the disposition to argue that appellant "continuously had firearms." The Court disagreed.

The Court noted that trial counsel testified that the use of the disposition was at least "potentially" objectionable under OCGA § 24-4-404 (b) and that they had no strategy in failing to object. But, the Court stated, trial counsel's own assessment of their performance does not control. Instead, to establish that trial counsel was deficient, appellant] has to show that no reasonable attorney would have failed to object to the prosecutor's argument.

And here, the Court found, it was not clear that the prosecutor was relying on the first-offender disposition in arguing that appellant "continuously had firearms"; it appeared at least as likely that he was relying on the physical evidence found in appellant's room. Thus, because the prosecutor's statements, in context, did not constitute a clear propensity argument, appellant failed to demonstrate that no reasonable attorney would have failed to object to those statements.

Nevertheless, appellant argued, trial counsel should have objected to the prosecutor characterizing his first-offender disposition as a "conviction," given that he was not resentenced or adjudicated guilty. The Court stated that it is true that first offender pleas are not a "conviction" as understood in the criminal code because the defendant is discharged without an adjudication of guilt. But, it would not be unreasonable to refer to appellant's first-offender disposition colloquially as a "conviction" given that he had entered a plea of guilty, and the disposition carried negative consequences for him and temporarily resolved the charges against him. A reasonable attorney might have assumed that an objection would have resulted in the jury being given some explanation of the nature of a first-offender disposition, including that appellant had pleaded guilty to the charges in question. A reasonable attorney thus might well have surmised that an objection would have been of little help and possibly could have hurt the defense by unduly focusing on appellant's criminal history. Accordingly, the Court concluded, appellant did not show deficient performance in trial counsel's failure to object to the remarks in question.

Body Cam Evidence; Advice from the Court

Morgan v. State, S19A1261 (1/27/20)

Appellant was found by a jury to be guilty but mentally ill of murdering her two infant daughters by drowning them. The evidence showed that appellant drowned her daughters in her home and then she immediately called 911 to report what she had done. The responding officers found the children's bodies where appellant had told the dispatcher they would be.

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 14, 2020

Issue 7-20

Appellant contended that the trial court abused its discretion in admitting into evidence video-recordings of the crime scene taken from the body cameras of two police officers who responded to her 911 call. The video-recordings were made roughly at the same time, and both showed what transpired within the first minutes of the police officers' arrival in response to appellant's 911 call. The trial court allowed the recording, but required they be muted except for statements made by appellant.

The Court noted that the State's first recording was less than four minutes long; the second, about six and a half minutes long. In the first recording, appellant can be seen standing in the doorway, talking on her cell phone, when the officer wearing the body camera arrives. Appellant appears responsive, though somewhat subdued. This recording showed the interior of her home, brief glimpses of the children's bodies and a police officer attempting to perform CPR on one of the children, and a female officer escorting appellant from the residence. In this recording, views of the children's bodies are often blocked by other officers. As the officer wearing the body camera moved through appellant's home, his body camera captured scenes of a home that appeared dark, dirty, and in disrepair. Although the recording showed the faces of some officers and responding medical personnel, the Court noted that it was difficult to see them in much detail because of the dim lighting. To the extent their faces can be seen, they appeared focused and professional, displaying little emotion.

The second video-recording was from the perspective of the police officer who performed CPR on one of the children while inside the home. At about 11 seconds into the recording, the children's bodies are visible, though the dim lighting obscured some detail. As the officer wearing the body camera moves closer to the children's bodies, the recording revealed that the children are unclothed and unresponsive. They showed no sign of external physical injury, such as cuts or bruises. One child can be seen lying on the hallway floor. The other is briefly seen floating face-up in a plastic tub full of water. After the child is removed from the tub, the officer wearing the body camera attempted to revive the child with CPR, which caused some water and foam to emerge from the child's mouth and nose. During this four-minute period, the officer's body camera was mostly focused on the child's body, but the recording also showed images of the floor and walls as the officer changed his position over the body. When the ambulance arrived, the officers quickly take the children to it, where emergency medical personnel begin their efforts to revive them. Again, the Court noted, the officers and medical personnel appeared calm, focused, and professional. There were no overt displays of emotional distress. The video-recording thereafter showed the officer walking from the ambulance to his patrol car. Although the recordings are in color, the low light made them appear to be in black and white most of the time.

First, the Court addressed whether the recordings were relevant under Rule 401. The Court found that although those portions of the video-recordings showing the officers performing CPR on the children's lifeless bodies were certainly disturbing to see — as are many images from crime scenes — those portions and both video-recordings as a whole were relevant to show the children's manner of death, the state of the home and where the children were found, appellant's condition and demeanor as she spoke to the responding officers, as well as to corroborate testimony concerning these matters from the State's lay and expert witnesses.

Next, the Court addressed the recordings' probative values. The Court stated that although appellant confessed that she had drowned her children, the video-recordings were not needlessly cumulative of the manner of death because the State was not required to stipulate to the cause of death and the circumstances surrounding the murders. Additionally, the video-recordings were probative of matters other than the children's manner of death. Here, the State needed to rebut appellant's insanity defense and to prove beyond a reasonable doubt all of the elements of the crimes charged in the indictment. To

those ends, the video-recordings from the officer's body cameras helped illustrate the State's prosecution theory that appellant had killed her children in a manner that showed deliberation and an awareness of the wrongness of her actions: Appellant chose to drown her children one after another in a tub of water without inflicting cuts or bruises, calmly report her crimes to the police, and then wait for them to take her into custody.

However, the Court found, by contrast, the last four minutes of the second video-recording showed little of the home, nothing of appellant, and focused primarily on the officer's efforts to revive one of the children. Particularly, with the first recording in evidence, the State had scant, if any, need for this last portion of the second video-recording, a factor which significantly diminished its probative value.

As to prejudicial impact, the Court agreed with appellant that the last portion of the second video-recording showing the officer's effort to revive one of the children was unfairly prejudicial. The four-minute-long portion of the second video-recording depicted, from the officer's close-up perspective, a dead baby girl sprawled on a dark hallway floor with water and foam oozing from her nose as the officer futilely tries to pump life back into her tiny, naked body. The Court found that such a video-recording, especially when shown on a large screen, is likely to incite feelings of revulsion, disbelief, shock, sadness, and anger. Under these circumstances, the Court concluded that this portion of the second video-recording had an undue tendency to suggest that the jury render its decision on an improper basis. Given this undue tendency, the prejudicial impact of this portion of the recording was unfair.

Applying the Rule 403 balancing test, the Court found no abuse of discretion in the trial court's admission of the first video-recording or the first part of the second video-recording. The prejudice inherent in those recordings was not unfair, nor did it substantially outweigh the recordings' probative value in showing the crime scene, the cause of the children's deaths, appellant's demeanor, and other factors pertinent to the State's theory of the case. However, the trial court should have excluded the four-minute portion of the second recording showing the officer performing CPR on the dead child. Nevertheless, the Court found, considering the trial record as a whole, it was highly probable that any erroneous evidentiary ruling by the trial court with regard to the admission of the second video-recording did not contribute to the jury's verdict and was harmless error.

Nevertheless, seven of the nine Justices felt that it was important to note the Court's concern about the use of this sort of evidence at trial. Body cameras are increasingly being used by law enforcement officers in Georgia and throughout the country because when used as evidence in a criminal trial, body-camera recordings may provide clear proof of pertinent facts — but they also may pose significant risks to the defendant's right to a fair trial.

Thus, the Court stated, a major concern is that a body camera records everything within its range. Some of the recorded images and sounds will likely be relevant to the matter the officer was there to investigate, but some may be entirely irrelevant, even recognizing the need to provide context for the relevant portions. The audio-recorded statements of the officer, those with whom he or she interacts, and those of people simply talking in the background may be inadmissible hearsay. In addition, video and audio of an event is often much more emotionally powerful than testimony or even still photographs, so the prejudicial impact of relevant body-camera evidence may substantially outweigh its probative value, particularly in cases involving violent crimes. Finally, a video recording is the equivalent of a series of still images, so the playing of a length of body-camera video may be needlessly cumulative.

For these reasons, the Court advised that simply playing a full body-camera recording for a jury will often create unnecessary risks of reversible evidentiary errors. Although it requires more work for the parties and the court before trial, efforts should be made to identify the specific segments of a body-camera recording (which may be only the video or audio component of certain portions) that are properly admissible under the Evidence Code, so that only those segments are admitted into evidence and presented to the jury. This pretrial work can eliminate the need to resolve objections during trial and can preclude post-trial challenges to aspects of a body-camera recording that — had more attention been paid to the recording — would not have been deemed necessary to present as evidence.

Ineffective Assistance of Counsel; Conflicts of Interest

Williams v. State, S19A1250 (1/27/20)

Appellant was convicted of murder. Prior to trial, appellant's trial counsel argued that a conflict existed with respect to one of the State's witnesses, Robert Brown. Brown had been represented in a prior, unrelated case by Hoffman, who also worked in the office of appellant's public defender. Hoffman had briefly represented appellant in the beginning of appellant's murder case, and had reviewed discovery, interviewed the medical examiner, and spoken with appellant and his family. However, the case was reassigned to another attorney in the public defender's office, who continued representing appellant through his trial.

Brown was called to testify in the case against appellant regarding an incident in the jail in which appellant gave Brown a note to pass to Reynolds (a co-indictee), which instructed Reynolds how to testify in appellant's murder case. The record showed that appellant's trial counsel was addressing the issue with the court immediately prior to trial, and with appellant present, when Hoffman suggested a confidential meeting between himself and the trial judge to explain his position and to address any confidential information that would be protected by attorney-client privilege. The court agreed and met with Hoffman and a court reporter in chambers. The trial court ultimately decided there was no conflict because Brown's prior case was closed and Brown's testimony in appellant's case was limited to his passing of the note. The trial court instructed Hoffman to make himself "scarce" during appellant's trial. Appellant's trial counsel objected that there was a conflict, but did not object to the in-chambers discussion held with Hoffman by the court.

Appellant argued that the trial court erred in declining to find a conflict of interest with respect to Hoffman, that the trial court erred when it instructed Hoffman to make himself scarce, and that this violated his right to counsel and denied him an effective cross-examination of Brown. The Court stated that in order to prevail, appellant must show an actual conflict of interest that adversely affected his attorney's performance. There are three factors to consider: (1) concern that the lawyer's pecuniary interest in possible future business may cause him or her to avoid vigorous cross-examination which might be embarrassing or offensive to the witness; (2) the possibility that privileged information obtained from the witness in the earlier representation might be relevant to cross-examination; and (3) whether the subject matter of the first representation is substantially related to that of the second.

Here, the Court found, there was no evidence that the first factor applied because appellant's lawyers were public defenders, and there was no suggestion of any pecuniary interest being at stake. As to the second and third factors, Hoffman previously represented Brown on charges unrelated to this murder and the later jailhouse note, and those charges against Brown had

already been resolved, so there was no simultaneous representation of appellant and Brown. Nor did the record indicate that trial counsel's performance was affected in any way. Thus, the Court found no error

Nevertheless, appellant argued, the trial court erred when it excluded him from "extensive, critical discussions outside the jury's presence." More specifically, appellant contended that he had a right to be present in chambers when Hoffman was discussing potentially privileged information pertaining to his prior representation of Brown.

However, the Court stated, even assuming, dubiously, that appellant had a right to be present at these discussions of a witness's attorney-client privileged information, in failing to voice any objection during the trial proceedings to his absence at the conference in chambers, appellant clearly acquiesced in his trial counsel's waiver of his right to be present at that conference.

Notices of Appeal; Out-of-time Appeals

Vieyra v. State, A19A2050 (1/8/20)

Appellant pled guilty to home invasion and family violence aggravated assault. Two years later, he filed a motion for an out-of-time appeal, which the court summarily dismissed. The Court of Appeals dismissed appellant's notice of appeal because it was untimely.

A month or so later, appellant filed a second motion for out-of-time appeal. The trial court denied the second motion and then dismissed appellant's notice of appeal. Appellant filed an application for discretionary appeal, which the Court granted.

The Court noted that the trial court dismissed appellant's notice of appeal on the ground that appellant had "nothing cognizable to appeal." The Court found this to be error because Georgia law generally reserves to the appellate courts the authority to dismiss appeals. Consequently, the Court vacated the order dismissing appellant's notice of appeal, and determined it had jurisdiction to review the denial of appellant's second motion for out-of-time appeal.

The Court stated that out-of-time appeals are designed to address the constitutional concerns that arise when a criminal defendant is denied his first appeal of right because the counsel to which he was constitutionally entitled to assist him in that appeal was professionally deficient in not advising him to file a timely appeal and that deficiency caused prejudice. In appellant's second motion for out-of-time appeal, he challenged his indictment, the guilty plea proceedings, and the sex offender registration requirement of his sentence. Therefore, because appellant did not allege that ineffective assistance of counsel was the cause of his failure to file a timely direct appeal from the judgment entered on his guilty plea, the Court held that the motion for out-of-time appeal was properly denied.

Search & Seizure; DUI

Mason v. State, A19A2167 (1/8/20)

Appellant was convicted of DUI. He contended that the trial court erred in denying his motion to suppress because the search warrant affidavit submitted to obtain the warrant to take his blood failed to establish probable cause of a crime. The Court disagreed.

At the hearing on the motion, an officer with specialized DUI training testified that he received a report of a serious incident and responded to the call. Upon arrival at the scene, the officer interviewed a witness who had information about the single car accident. The officer had the name of the witness but did not include it in the report. Based on that conversation and a conversation with the first officer on the scene, the DUI officer prepared an affidavit and application for a search warrant. The relevant portion of the affidavit states as follows: “ The facts tending to establish probable cause that a crime has been, or is being committed ... are as follows: On 1/1/14[,] I responded to a serious injury wreck on Montgomery Crossroads near Abercorn St. An SUV driven by Mr. Mason was traveling westbound on Montgomery Crossroads when it left the roadway. The SUV went up onto a grass median and struck a large tree. The SUV rotated and came to rest back on the westbound side of Montgomery Crossroads. The driver of the SUV sustained two broken legs and extensive facial injuries. A witness that arrived on scene shortly after the collision advised that he could smell the odor of an alcoholic beverage when he approached the SUV.”

The Court noted that a trial court is permitted to consider hearsay evidence at a hearing on a motion to suppress. Also, information received from a concerned citizen is inherently more credible and reliable than that received from an anonymous tipster and is deemed reliable. Here, the Court found, although the officer did not include the name of the witness in the search warrant affidavit, the officer identified the witness at the hearing on the motion to suppress. Thus, the trial court was authorized to rely on the presence of an odor of alcohol coming from appellant's SUV, as well as an inference that it came from him.

Nevertheless, appellant contended, in determining probable cause to arrest, the odor of alcohol on a driver's breath shows only the presence of alcohol and does not support an inference that the driver is intoxicated and it is less safe for her to drive. But, the Court stated, here, evidence of the odor of alcohol was combined with evidence that the driver lost control of his vehicle and crashed into a tree early on the morning after New Year's Eve. The trial court was therefore authorized to conclude that there was probable cause to search, and that there was a fair probability that a test of appellant's blood would reveal evidence that appellant was driving under the influence of alcohol at the time that he ran off the road.

Finally, the Court stated, although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. Accordingly, the Court concluded that the trial court properly denied the motion to suppress.

Verdict Forms; Golden Rule Arguments

Robinson v. State, A19A1645 (1/15/20)

Appellant was convicted of kidnapping with bodily injury and other offenses. He first contended that the trial court erred when it sentenced him to life imprisonment for kidnapping with bodily injury when the jury's verdict form indicated that they only found him guilty of kidnapping. The Court disagreed.

The Court stated that even though the verdict form indicated that the jury found appellant guilty of "kidnapping," the trial court nevertheless properly sentenced appellant for kidnapping with bodily injury. The pre-printed verdict form used at appellant's trial read, "We, the Jury, find the Defendant, ROYCE ROBINSON, JR., _____ of the charge of KIDNAPPING." The verdict form did not give the jury the option to choose between kidnapping or kidnapping with bodily injury or specially ask the jury whether bodily injury occurred. Instead, the indictment alleged that appellant committed kidnapping when he "unlawfully abduct[ed the victim] without lawful authority or warrant and held such person against her will, *said act resulting in bodily injury* to [the victim]." (Emphasis supplied.) When the trial court instructed the jury, it read the indictment for the jury and also instructed them on the elements of kidnapping with bodily injury. Given these circumstances, the verdict was clear that the jury found appellant guilty of kidnapping with bodily injury, and so the trial court did not abuse its discretion by sentencing appellant to life imprisonment for kidnapping with bodily injury.

Appellant also argued that the State made an improper "golden rule" argument when it asked the jury during its closing argument to remember "a traumatic experience in your own life." The Court again disagreed.

The Court stated that a "golden rule" argument is one that, regardless of the nomenclature used, asks the jurors to place themselves in a victim's position. Such an argument is impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. And here, the Court found, viewed in context, the statement did not constitute an impermissible golden rule argument. The statement, taken as a whole, did not ask the jury to put themselves in the victim's shoes for the purpose of asking the jury to sympathize with the victim or ask the jury how they would have felt if they were the victim to a crime. Instead, the prosecutor made this statement in an attempt to explain away inconsistencies in the testimonies of many of the witnesses. The Court also noted that the statement asked the jury to remember a "traumatic experience," which would not necessarily cause the jury to remember a crime. Furthermore, the statement was in reference to the memories of many of the other witnesses to the incident, all but one of which were not victims to the crime. Given all of these circumstances, the Court concluded that the State's argument was not an improper golden rule argument.