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Statements; *Miranda*

Driver v. State, S19A1298 (1/13/20)

Appellant was convicted of felony murder and possession of a firearm during the commission of a felony. The facts, very briefly stated, showed that appellant went to a party at appellant's house. Appellant got into an argument over money with the victim. The victim punched appellant and then told him to leave. Appellant left but came back 15 minutes later. He was told to leave again. A few minutes after that, appellant returned and approached the victim's house. This time, appellant had a gun. When the victim came to the door, appellant shot him.

Appellant turned himself in three days later. An investigator took down some basic information about appellant, read appellant his *Miranda* rights, and then asked appellant if he wanted to tell his side of the story. Appellant declined, stating that he would wait for his lawyer. But, as the investigator was getting ready to leave, appellant re-initiated the conversation and made incriminating statements.

Appellant contended that the trial court erred in admitting the incriminating statement after invoking his right to counsel. First, he argued that the investigator's initial questions, prior to giving appellant the *Miranda* warnings, amounted to a "psychological ploy" to "build a rapport with [him] and make him feel more at ease . . . likely lead[ing] to an incriminating response," and that those initial questions therefore amounted to a custodial interrogation before administration of the required *Miranda* warnings. The Court disagreed because the controlling case law excludes from the "functional equivalent" of interrogation those police statements and actions normally attendant to arrest and custody. Basic biographical questions asked in relation to an arrest are an exception to *Miranda* because such "booking" questions are unrelated to the investigation and serve a legitimate administrative need and therefore do not qualify as "interrogation." Moreover, there was no evidence to suggest that, for example, the investigator telling appellant he could call him by his first name amounted to an impermissible "psychological ploy" that the investigator should have realized would result in an incriminating response.

Next, appellant argued that after advising him of his rights under *Miranda* (but before he invoked his right to counsel), the investigator further interrogated appellant in a "cajoling" manner by expressing a desire to hear appellant's "side of the story." But, the Court found, the record showed that the investigator's comment was merely part of his explanation that appellant did not "have to talk," that it was "not going to get any worse" if he did not, and that it was "[his] choice" whether to talk or not. These comments did not amount to an attempt to pressure or coerce appellant. Nor did the investigator suggest that appellant's defense would be somehow harmed if appellant decided to invoke his right to counsel. When appellant in fact invoked his right to counsel, the investigator again confirmed that right, expressed his willingness to honor appellant's decision, and made no further attempt to talk about the case in the absence of appellant's attorney.

Third, appellant argued that the investigator continued his interrogation even after appellant invoked his right to counsel (but before appellant inquired about the investigation) by stating that he would be glad to listen to appellant and his attorney tell what happened from appellant's "point of view." However, the Court found, viewed in context, this statement did not rise to the level of interrogation because there was no evidence to suggest that the statement was designed to elicit an incriminating response or that the investigator should have known it was reasonably likely to do so.

Finally, appellant contended that after he invoked his right to counsel, but just before his admission that he shot the victim, the investigator's disclosure of incriminating evidence to appellant, followed by the investigator's silence in apparently waiting for appellant's response, amounted to continued interrogation. However, the Court found, The investigator's responses did not violate appellant's previously invoked right to counsel because appellant's questions initiated a renewed conversation and evinced a willingness and a desire for a generalized discussion about the investigation. Under these circumstances, the investigator was not obliged to stop listening to what appellant chose to say or to immediately leave the room so that the investigator could not hear him. Moreover, a police officer's response to a direct inquiry by a defendant does not constitute "interrogation." Thus, an accused's response to an officer's answer to a question posed by the accused is not the product of custodial interrogation.

Accordingly, the investigator's response to questions appellant initiated and posed to him when he was preparing to walk out of the room did not render appellant's unsolicited and incriminating admission the product of interrogation that must be suppressed at trial. Considering the totality of the circumstances, the Court concluded that appellant voluntarily waived his right to counsel when he reinitiated the conversation with the investigators and made an incriminating admission. Consequently, the trial court did not err in deciding not to suppress appellant's statements to the investigator.

Search & Seizure; Constitutional Right to Speedy Appeal

Davis v. State, S19A1187 (1/13/20)

Appellant was convicted of felony murder. He argued that the trial court improperly admitted as evidence at trial a letter that jail personnel opened, violating his reasonable expectation of privacy under the Fourth Amendment. The evidence showed that Sgt. Wilson, the office manager at the county jail who handles all of the incoming mail, received an envelope addressed to "PFC Robert R. Thompson" at a Fort Stewart address from "Jerome Smith" with a return address from the county jail. When Sgt. Wilson saw the letter, it was marked "return to sender" because it could not be delivered to the designated Fort Stewart recipient. Sgt. Wilson realized that the letter had originally been sent from the jail, as evidenced by the county jail return address and the county jail stamp on the back of the envelope—a stamp that marks every piece

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of outgoing mail pursuant to the jail's policy. Sgt. Wilson then checked the jail's computer database and discovered that the jail had never housed a "Jerome Smith" as an inmate. Because she was unsure to whom she should return the letter, she opened the letter to determine its author. She then brought it to Franks, the jail administrator in charge of daily jail operations. Based on the content of the letter, Franks instructed that the letter be turned over to the lead detective in appellant's case.

The Court stated that a pre-trial detainee's Fourth Amendment expectation of privacy in his cell and personal effects is necessarily diminished. Consequently, items found during searches conducted for security and maintenance purposes are not within the scope of protection of the Fourth Amendment. However, where a search is not initiated for legitimate prison objectives, but instead is instigated by the State for the purposes of bolstering the prosecution's case against a pretrial detainee, then the pre-trial detainee retains a limited but legitimate expectation of privacy and is protected from an unreasonable search.

Here, the Court found, the record supported the trial court's ruling that the letter was recovered during a search conducted for security and maintenance purposes. At the hearing on the admissibility of the letter, the State presented evidence that Sgt. Wilson opened the letter for the administrative purpose of processing the mail because she did not know to whom the letter should be routed. Moreover, Franks testified that "all mail" is opened and monitored "for contraband." There was no record evidence showing that the opening of the letter was instigated for prosecutorial purposes or for the purposes of bolstering the prosecution's case against appellant. And because the letter was properly authenticated at trial as written by appellant, the Court held that the trial court did not err when it ruled that appellant's Fourth Amendment rights were not violated and by admitting the letter into evidence at trial.

Appellant also contended that the 14-year delay between his jury verdict and the trial court's denial of his motion for new trial violated his due process rights. The Court noted that substantial delays in the appellate process implicate due process rights, and review of appellate due process claims fall under the four-factor analysis used for speedy trial claims set forth in *Barker v. Wingo*. The four *Barker* factors include the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. However, in determining whether an appellate delay violates due process, prejudice, unlike in the speedy trial context, is not presumed but must be shown. Appellate delay is prejudicial when there is a reasonable probability that, but for the delay, the result of the appeal would have been different.

Appellant argued that the first three *Barker* factors weigh in his favor and that he has also proven prejudice through his presentation of meritorious claims on appeal. However, the Court stated, even assuming that the first three *Barker* factors weighed in appellant's favor, his due process claim nevertheless failed because appellant failed to show that he was prejudiced by the delay. Here, appellant only pointed to his enumerations of error on appeal as evidence that he has suffered prejudice. But, the Court stated, since it had determined that all of the enumerations of error were meritless, its decision would have been the same regardless of when appellant brought his appeal and thus, appellant failed to demonstrate prejudice. Accordingly, appellant failed to establish a due process violation, and the trial court therefore did not abuse its discretion in denying relief on this ground.

Jury Instructions; Accomplice Testimony

Doyle v. State, S19A1005 (1/13/20)

Appellant was convicted of murder and possession of a firearm during the commission of a felony. The facts, very briefly stated, showed that Richardson was a drug addict who often drove appellant's co-defendant, Parks, to various places in exchange for money or drugs. On the night in question, Richardson drove his vehicle to Parks' house and picked up Parks, appellant, and another man. They drove to a club located near Midtown Towing where the victim worked as a security guard. When they arrived at the club, the men sat in the car and discussed "hurting somebody or jumping on somebody" and "getting payback" for something. After about 20 minutes, Parks directed Richardson to drive to Midtown Towing. After appellant exited the vehicle, Richardson heard gunshots. He started to drive away, but Parks told him to "hold up" so appellant could get back in the car. Richardson then drove the men back to Parks' house, where he dropped them off. The victim, who had been sitting in Midtown Towing's guard shack, died from eight gunshot wounds.

Appellant contended that the trial court committed plain error by failing to instruct the jury as to the corroboration requirement for accomplice testimony. The Court agreed.

The State argued that Richardson was not an accomplice, and therefore, the trial court did not err by failing to give the accomplice-corroboration charge. However, the Court stated, where the evidence presented at trial could support a finding that a witness acted as an accomplice, it is for the jury to determine whether the witness acted in such a capacity. And here, the Court found, the evidence presented at appellant's trial could have supported a finding that Richardson intentionally aided in the commission of a crime. According to Richardson's own testimony, he drove appellant and Parks to Midtown Towing after hearing them discuss hurting somebody and getting payback. He told the detective that he saw Parks rack a gun and appellant holding a gun while in the car. He drove them away from the scene after hearing gunshots and stopping to wait for appellant to get back in the car. He also did not report the shooting to authorities and initially told the detective that he knew nothing of the crime. Such evidence was enough to support a finding of accomplice liability. Thus, the question of whether Richardson was an accomplice should have been for the jury to decide.

The Court also held that giving the single-witness instruction here, while failing to give the accomplice-corroboration instruction, where the defendant was directly linked to the crime through the testimony of an accomplice, deviates from the plain language of OCGA § 24-14-8 and constitutes a clear and obvious error. Moreover, the Court found, while other evidence may have served as legally sufficient corroboration of Richardson's testimony, the jury was never instructed how to properly evaluate this evidence, and it was likely that the jury convicted appellant on Richardson's testimony alone, which the jury was affirmatively told that it could do. Because the jury did not receive proper instructions on how to evaluate the evidence, the Court concluded that the outcome of the proceedings was likely affected by the trial court's failure to give the accomplice-corroboration charge.

Finally, the Court stated that affirming appellant's "conviction on this record with a jury that was authorized to find him guilty solely on Richardson's testimony would render the accomplice-corroboration requirement meaningless." Accordingly, the Court held that the trial court plainly erred and appellant was entitled to a new trial.

Right of Confrontation; Hearsay

State v. Stephens, S19A1079 (1/13/20)

Stephens and others were indicted for murder. The State filed a pretrial motion in limine, seeking an order to admit the recorded statement of Harry Dimeco, who was now dead. The trial court ruled that the statement was inadmissible under *Crawford v. Washington* based on the court's determinations that the witness's statement was testimonial in nature and that the defendants were not afforded the opportunity to cross-examine the witness prior to his death. The State appealed.

The State conceded that the statement at issue was testimonial because, when given, the statement was going to be used for prosecution purposes. The State also conceded that the defendants had no meaningful opportunity to cross-examine the witness. Nevertheless, the State argued, Dimeco's pretrial statement is objectively trustworthy, because he came forward as a concerned citizen with no connection to the parties, and that, although his statement was taken as part of an investigatory effort by law enforcement, "the content of the statement is non-accusatory against any party." The State argued that admission of the statement would therefore not violate the rights of the defendants under the Confrontation Clause, and the statement is admissible by necessity pursuant to the hearsay exception provided in OCGA § 24-8-807, the "residual exception" to the general rule that hearsay is not admissible. Furthermore, the State contended Dimeco's statement satisfies all six requirements for the admissibility of evidence under OCGA § 24-8-807.

However, the Court was unpersuaded. Even when an unavailable witness's out-of-court statement has indicia of reliability, if the statement is testimonial and the defendant had no prior opportunity for cross-examination, admitting such a statement on the basis of necessity violates the Confrontation Clause. This is because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. Because the Confrontation Clause imposes "an absolute bar" to admitting a testimonial statement when the defendant does not have an opportunity to cross-examine the declarant, normal rules regarding the admission of hearsay, like the residual exception, apply only *after* a determination is made that a statement is nontestimonial in nature. Consequently, the Court concluded, the trial court did not err in denying the State's motion in limine.

Deaf Defendants; OCGA § 24-6-653

Harris v. State, S19A1572 (1/13/20)

Appellant, who is deaf, was convicted of murder and concealing the death of another. The evidence, very briefly stated, showed that on January 1, appellant engaged the services of the victim for sex. Appellant met the victim at a hotel and at some point, strangled and drowned her in a bathtub. The victim's boyfriend/pimp, who was waiting outside, grew concerned when the victim did not return his texts. He went up to the room and found the victim. Appellant, who had left the room, returned and saw the boyfriend. Appellant mumbled an apology for the death and quickly left again, drove across the street to a gas station, and had the attendant call 911.

Officer Figueroa arrived and tried to interview appellant. He requested appellant write out his answers upon learning appellant was deaf. Appellant went to the police station where he was interviewed by Detective Erion with the assistance of Barbara Bell, a sign language interpreter who also worked as a dispatcher for a local college police department. After this second statement, Erion reviewed the hotel surveillance video-recording and because of the discrepancies between what he

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saw and appellant's statements, Erion arrested appellant. On January 14, in the presence of his retained attorney, appellant informed Erion through interpreter Bell that he wanted to make a revised statement. Appellant gave Erion a hand-written statement concerning the victim's death. The following day, appellant, in the presence of his attorney and with the assistance of his chosen interpreter, continued the interview.

Appellant contended that the trial court erred in admitting (1) the written statement given at the scene of the crime on January 1, 2013; (2) the statement made at the police station with the assistance of interpreter Bell, also on January 1; and (3) the hand-written custodial statement made on January 14, with the assistance of interpreter Bell and appellant's retained counsel. The Court found that despite an agreement between the State and appellant regarding his objection to the admission to these statements, appellant had not objected and therefore, its review was limited to whether there was plain error.

As to the first statement, appellant contended that the written statement given to Officer Figueroa at the crime scene should have been suppressed on the ground that it was not freely and voluntarily made because he was in custody at the time and he was not given the benefit of *Miranda* warnings. He also argued that because the officer was required by OCGA § 24-6-653 to question him through a qualified interpreter, which he failed to do, the trial court was required to suppress the statement. But, the Court found, because the record did not contain any evidence that would support a finding that appellant had been arrested or that a reasonable person in appellant's position would have perceived that he was in custody during his interaction with Figueroa, the trial court did not err in determining that *Miranda* warnings were not required. Further, OCGA § 24-6-653 did not require the trial court to suppress appellant's statement under these circumstances. The record showed that appellant had not been formally arrested when he communicated with Figueroa; consequently, at that moment, there was no "arresting law enforcement agency" that was required to provide appellant with a "qualified interpreter" under OCGA § 24-6-653 (a) (emphasis supplied). And assuming that OCGA § 24-6-653 (b) applied to appellant, though he had neither been formally arrested nor found by the trial court to be in custody, the record also showed that Figueroa complied with subsection (b) (1) by reasonably accommodating appellant's disability by communicating with him in writing, as it was undisputed that appellant could read and write the English language.

As to the January 1 statement, appellant argued that he could not have knowingly and intelligently waived his rights because Bell was not a qualified sign-language interpreter and that she essentially "spoke a different language." He argued that using Bell as an interpreter violated OCGA § 24-6-653 (b) (1) and § 24-6-656. However, the Court found, when appellant made his January 1 statement at police headquarters, he had not yet been formally arrested. Prior to giving his statement, appellant read and signed a waiver-of-rights form. Detective Erion, through interpreter Bell, also read appellant his *Miranda* warnings. Thus, because appellant not been formally arrested when he gave this statement, the law enforcement agency was not required to provide him with a qualified interpreter pursuant to OCGA § 24-6-653 (a). The record showed that Erion nevertheless complied with OCGA § 24-6-653 (b) by reasonably accommodating appellant's disability by providing him with Bell's sign-language assistance and by having him read his waiver-of-rights form and write down his statement. Moreover, the Court found, the video-recording supported the trial court's finding that appellant's statement to Erion was made freely and voluntarily. Consequently, appellant failed to show error, much less plain error, in the admission of this statement.

When appellant and his defense counsel met with Erion on January 14, appellant had been arrested and was in custody. Appellant contended that Bell was not qualified to participate in this meeting and that her efforts to facilitate

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communications between him, his attorney, and Detective Erion violated OCGA § 24-6-653 (b) (1) and § 24-6-656, rendering his written statement involuntary and inadmissible. The Court again disagreed.

The video-recording showed that appellant initiated the interview through, and in the presence of, his defense counsel. Defense counsel informed Detective Erion that appellant wanted to explain why he had not been completely truthful with law enforcement previously. Appellant was again advised of his *Miranda* rights through interpreter Bell, and appellant read and signed a waiver-of-rights form as his attorney watched. The Court found that under the circumstances, Bell's involvement in the January 14 interview was harmless. First, it appeared that appellant waived the requirements imposed by OCGA § 24-6-653 and § 24-6-656 when he and his counsel requested this follow-up meeting and elected to “take a stab” at the interview with Bell interpreting. Further, the written statement that appellant ultimately gave was not translated by Bell. It was clear from the video-recording that appellant, in consultation with his attorney, had already made the decision to give the police a revised statement before the interview began. Appellant read and signed a waiver-of-rights form in the presence of his attorney. Both appellant and his attorney clearly stated that appellant wanted to give the statement that he gave, and it was plain from the video-recording that the statement was freely and voluntarily made. Consequently, appellant did not show error, much less plain error, in the admission of this statement.

Statements; Sentencing

Appellant v. State, S19A1004 (1/13/20)

Appellant was convicted of malice murder and other crimes. After a two-day sentencing hearing, the trial court sentenced him to life without parole on the murder count, plus 10 years' imprisonment each for concealing the death of another and tampering with evidence. The facts, briefly stated, showed that the victim's father called police to report that his 18-year-old son was missing. Three days later, after receiving reports pointing to appellant as a suspect, and without first obtaining an arrest warrant, police arrested appellant in the doorway of his home. After 17-year-old appellant arrived at the police station, he waived his *Miranda* rights and submitted to an interview. During the interview, appellant confessed that he and one of his friends had killed the victim. Appellant then led detectives to the body.

Appellant argued that his statements to law enforcement should have been suppressed because he was illegally arrested without a warrant and interrogated immediately thereafter. The Court disagreed.

The Fourth Amendment generally prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. The Court stated that although it doubted whether the arrest here satisfied the Fourth Amendment, even if it did not, the trial court properly refused to suppress appellant's statements. The Court noted that appellant did not meaningfully challenge the trial court's conclusion that based on statements from appellant's family, the officers had probable cause to arrest him when they did. Instead, appellant focused on their failure to obtain a warrant. But, the Court found, given the trial court's factual findings about the information that appellant's family members provided to law enforcement, which were supported by the record, the trial court did not err in finding probable cause to arrest. And appellant raised no argument that he was interrogated inside of his residence. He therefore failed to show error in the trial court's denial of his motion to suppress his statements.

Appellant argued that the trial court erred by applying a preponderance of the evidence standard in finding that he was eligible for a sentence of life without parole. Relying on the Eighth Amendment and Due Process Clause of the Fourteenth Amendment, he argued that the trial court was required to apply a standard of beyond a reasonable doubt. The Court again disagreed.

Under *Miller v. Alabama*, 567 U. S. 460, 465 (132 SCt 2455, 183 LE2d 407) (2012), life-without-parole sentences for juveniles will be “exceptionally rare, and that determining whether a juvenile falls into that exclusive realm turns not on the sentencing court’s consideration of his age and the qualities that accompany youth along with all of the other circumstances of the given case, but rather on a specific determination that he is irreparably corrupt.” Here, the trial court found that appellant “is in fact irreparably corrupt,” and sentenced him to life without parole. However, appellant contended, citing *Mathews v. Eldridge*, 424 U. S. 319 (96 SCt 893, 47 LE2d 18) (1976), as a matter of due process, the State must prove permanent incorrigibility beyond a reasonable doubt in order for the trial court to sentence him to life without parole. But, the Court found, *Mathews* does not apply in the context of a state criminal case. Rather, a state criminal procedure is not prohibited by the federal Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. The United States Supreme Court has held that application of the preponderance standard at sentencing generally satisfies due process. And no Supreme Court decision of which the Court is aware — much less that appellant cited — holds that juvenile sentencing of the sort at issue here is an exception to that rule. Thus, appellant failed to show that the burden of proof applied by the trial court violated his rights under the federal Due Process Clause.

Nevertheless, appellant argued, U. S. Supreme Court precedent requires that the trial court find beyond a reasonable doubt that he is irreparably corrupt before sentencing him to life without parole. But, the Court stated, language in *Miller* is contrary to appellant’s argument that those cases demand the State prove permanent incorrigibility beyond a reasonable doubt. Furthermore, the Court stated it saw no reason to go further than the Supreme Court has already gone, and nothing in its Eighth Amendment case law demands a deviation from the ordinary rule that proof by a preponderance of the evidence is sufficient. And it was undisputed that the General Assembly has not established any special standard of proof for finding a juvenile offender eligible for the sentence of life without parole.

Severance; Ineffective Assistance of Counsel

Floyd v. State, S19A1493, S19A1494 (1/13/20)

Appellants Floyd and Harrell were tried jointly for malice murder, felony murder and other related offenses. Floyd was convicted of all counts; Harrell was acquitted of the malice murder charge, but convicted of felony murder and the other counts. The conflicting evidence, very briefly stated, showed that Floyd and Harrell were in a tumultuous romantic relationship. Harrell had a child with the victim and Floyd was jealous of her relationship with the victim. The victim was staying at a Dollar Inn. Appellants went to the Dollar Inn to buy drugs and alcohol from a third party. When that person could not be located, appellants got into an argument. Floyd punched Harrell. Harrell then went into the victim’s room and may have asked for child support. Floyd then went into the victim’s room. There was a fight inside the room and the victim was stabbed twice. Floyd came out with a knife and one witness testified to seeing Floyd stab the victim. Harrell made statements that she stabbed the victim when the victim punched her during an argument over child support. Floyd and Harrell then left the Dollar Inn together.

Floyd contended that the trial court erred in not granting his motion to sever. He argued that severance was required because of the likelihood of *Bruton* issues and because he and Harrell had antagonistic defenses. The Court disagreed.

The Court stated that in a murder case where the death penalty is not sought, the trial court has broad discretion to grant or deny a motion for severance. In ruling on a severance motion, the court should consider: (1) the likelihood of confusion of the evidence and law; (2) the possibility that evidence against one defendant may be considered against the other defendant; and (3) the presence or absence of antagonistic defenses.

First, the Court found, there were only two co-defendants, who were tried for the same crimes based on largely the same evidence, and the State's theory was that they acted together to commit the crimes. Thus, there was little likelihood that the issues to be tried would be confused or that evidence against one defendant would improperly be considered against the other. Second, the fact that Harrell presented evidence that implicated Floyd, standing alone, was insufficient to require severance, because unless there is a showing of resulting prejudice, antagonistic defenses do not automatically require a severance. And here, the Court found, although Harrell presented evidence that Floyd stabbed the victim and that Floyd harbored ill-will against the victim because of the victim's relationship with Harrell, Floyd failed to show that there was any evidence introduced at trial by Harrell that would have been inadmissible had it been introduced by the State. Moreover, the State offered the testimony of three witnesses who placed Floyd (or a man matching his general description) in the victim's room at the time the victim was stabbed and one of those witnesses testified to witnessing Floyd stab the victim. Consequently, although Harrell presented evidence that likely damaged Floyd's case, Floyd failed to show any specific prejudice resulting from antagonistic defenses that would have required the trial court to grant his motion to sever.

As to the *Bruton* issues, the Court found that even assuming that some of Harrell's statements to other witnesses about Floyd were testimonial in nature, during the State's case, the trial court instructed witnesses who testified regarding conversations they had with Harrell that they should not testify about any statements Harrell made to them regarding Floyd's involvement in the victim's death. Floyd failed to show anything in the record suggesting that these instructions were not followed. And, the Court stated, more importantly, after colloquy with the trial court and consultation with her counsel, Harrell elected to testify and was cross-examined by both the prosecutor and Floyd's counsel. Thus, Floyd failed to show that severance was required in order to avoid a *Bruton* violation.

Appellant also argued that his counsel rendered ineffective assistance. Specifically, he argued that, although at the close of the State's case, his trial counsel advised him of his right to testify and advised him against doing so, counsel performed deficiently by failing to consult with him and again discuss the advisability of testifying in light of the evidence later presented by Harrell. The Court disagreed.

Trial counsel testified that at the motion for new trial hearing that, although she initially advised Floyd that he should not testify, she and Floyd did not discuss this issue again following Harrell's trial testimony. However, trial counsel also testified that her recommendation against testifying would not have changed and that she probably would have attempted to talk Floyd out of testifying had they discussed the issue again. Trial counsel testified that she believed it was unnecessary for Floyd to testify because it would expose him to cross-examination and because trial counsel doubted that the jury would credit Harrell's testimony and that of the witnesses Harrell called.

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Thus, the Court found, although Floyd claimed that he would have testified had he consulted with his trial counsel again after Harrell testified, he did not establish that trial counsel was deficient by failing to further consult with him about doing so. Furthermore, citing *Thomas v. State*, 282 Ga. 894, 896 (2) (b) (2008), the Court stated that there is a lack of authority supporting the proposition that this constitutional obligation extends so as to require counsel to inform a defendant of a “continuing” right to testify or to re-advise a defendant of the right to testify after further evidence is presented against him. Therefore, the Court held, so long as the additional evidence presented against the defendant would not prompt a reasonable defense attorney to provide different advice to the defendant with regard to testifying from that previously given, trial counsel has no duty to re-advise a defendant throughout trial that he has the right to testify. Since Floyd failed to show that his counsel's performance in regard to advising him of his right to testify was deficient, his claim of ineffectiveness failed.