Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
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Issue 11-20

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Severance

Parker v. State, A19A2312 (1/24/20)

Appellant was convicted of armed robbery, four counts of aggravated assault, and two counts of possessing a weapon during the commission of a crime. The record showed that prior to trial, the State successfully moved to sever appellant's case from that of Hood, who was his co-indictee. The State argued that because appellant's custodial statement to police implicated Hood in the crimes, admission of this statement at a joint trial might violate Hood's constitutional rights under *Bruton v. United States*, 391 U. S. 123 (88 SCt 1620, 20 LE2d 476) (1968). Appellant contended that the trial court erred in severing his trial from that of Hood. The Court disagreed.

The Court stated that, as an initial matter, a defendant lacks standing to complain of the trial court's decision to sever his trial from that of a co-indictee at the request of the state. Furthermore, a trial court does not abuse its discretion by granting a severance to avoid violation of a co-indictee's constitutional rights under *Bruton*. And here, the Court found, the State planned to present evidence of appellant's custodial statement to police, which directly implicated Hood in the crimes. Absent a severance, a *Bruton* violation would have occurred if the trial court had admitted the statement and appellant had elected not to testify. Therefore, the Court concluded, the trial court did not abuse its discretion in severing the trials to avoid a *Bruton* violation.

Aggravated Sodomy; Evidence of Force

Thurmond v. State, A19A2007 (1/27/20)

Appellant's probation was revoked after he committed the new offense of aggravated sodomy. He contended that the evidence was insufficient to support the revocation. The Court agreed.

The victim testified that after a night out of drinking with a friend, he went to sleep on a couch of a different friend. While he was sleeping, the victim felt appellant (a person he met for the first time that night) touch his penis, and he picked up

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his head but could not see because either his eyes were closed or he was "in between blackout and not blackout," so he put his head back down. Next, he felt appellant undoing his pants and pulling them down, followed by something wet on his penis, which he discovered was appellant's mouth. At that point, the victim got up, asked appellant, "What are you doing?," and took a swing at him. The victim then tackled appellant, got on top of him, and began punching him. The victim did not recall appellant hitting him or using his fists, but testified that they eventually got into a struggle and the victim subsequently ran out of the apartment and called the police. The victim testified that he never gave appellant any indication that he would consent to "that kind of contact," referring to appellant's contact with the victim's penis.

Appellant argued that the evidence was insufficient to show that the act of sodomy was committed with "force" as required by the aggravated sodomy statute. The Court stated that within the meaning of the aggravated sodomy statute, the term "force" means acts of physical force, threats of death or physical bodily harm, or mental coercion, such as intimidation such as would be sufficient to instill in the victim a reasonable apprehension of bodily harm, violence, or other dangerous consequences to oneself or others. To prove aggravated sodomy in cases involving victims who are above the age of consent but unable to consent due to mental incompetency or intoxication by drugs or alcohol, the State must show actual force (not constructive force).

Here, the victim testified that he was asleep or in and out of "being blackout" when appellant began touching him and did not testify to any actual force, physical or otherwise, used by appellant prior to or during the sexual act. Under these particular circumstances, the Court found that the trial court erred in concluding that the act of pulling down the pants of a voluntarily intoxicated adult victim was sufficient to prove the element of "force" as required by OCGA § 16-6-2 (a) (2). Thus, the State failed to prove by a preponderance of the evidence that appellant committed the new offense of aggravated sodomy, and the trial court erred in revoking appellant's probation on that basis.

Nevertheless, the Court found that there was a preponderance of the evidence showing that appellant committed the lesser included offense of sodomy as set forth in OCGA § 16-6-2 (a) (1). The Court also found that the notice given to appellant that he had violated his probation by committing aggravated sodomy was sufficient notice that he had also violated his probation by committing the lesser included offense of sodomy based on the same facts. Accordingly, the Court vacated the trial court's revocation order based on the finding that appellant committed the felony offense of aggravated sodomy, and remanded the case with direction that the trial court enter a new order on the revocation petition based on the finding that appellant committed the offense of sodomy.

Rule of Lenity; Lesser Included Offenses

In re P. T., A19A2151 (1/30/20)

After a hearing, appellant, a 15 year old male, was adjudicated delinquent for felony sexual battery against a 15 year old female victim. Then, in a second case, appellant pled under *Alford* to felony sexual battery and public indecency against a 14 year old female victim.

He first contended that the rule of lenity required that he only be sentenced for misdemeanor child molestation, not felony sexual battery, because the evidence established both offenses. As to the 14 year old victim, the Court found that the entry

of a plea waives claims of trial court error unrelated to the voluntariness of the plea. Therefore, his argument challenging his delinquency adjudication was waived.

As to the felony sexual battery case with the 15 year old victim, the Court stated that the rule of lenity does not apply between the statutes criminalizing sexual battery and child molestation because the offense of child molestation requires additional proof of the defendant seeking to arouse his own sexual desires, which is not required for the offense of sexual battery. Likewise, the offense of sexual battery requires proof of physical contact and the victim's lack of consent, which are not required for the offense of child molestation. As such, the two statutes do not conflict and there is no uncertainty as to which penal clause is applicable in this case. The fact that a single act may, as a factual matter, violate more than one penal statute does not implicate the rule of lenity.

Nevertheless, appellant argued, he should have been entitled to a delinquency adjudication for misdemeanor sexual battery under OCGA § 16-6-22.1 (c). The Court disagreed. The Court noted that subsection (c) of the statute states that "[e]xcept as otherwise provided in this Code section, a person convicted of the offense of sexual battery shall be punished as for a misdemeanor of a high and aggravated nature." OCGA § 16-6-22.1 (c). The exception for misdemeanor punishment is set forth in subsection (d) of the statute which clearly and pertinently provides that "[a] person convicted of the offense of sexual battery against any child under the age of 16 years shall be guilty of a felony[.]" OCGA § 16-6-22.1 (d). Thus, the Court stated, the enhanced sentencing provision for sexual battery focuses upon the age of the victim, not the age of the defendant.

Furthermore, the Court stated, if the Legislature had intended to provide more lenient treatment for teenagers who commit sexual battery against another minor, it could have amended the statute in the same manner as the statutes for statutory rape and child molestation. And, the Court rejected appellant's suggestion that the Court apply a judicial construction that would add an exception to felony sentencing under OCGA § 16-6-22.1 (d) based upon the relative ages of the perpetrator and the victim.

Recidivist Sentencing; Prior Nolo Pleas

Miller v. State, A19A2229 (2/5/20)

Appellant was sentenced as a recidivist under OCGA § 17-10-7 (a) and (c) following entry of his non-negotiated plea to the charge of failure to register as a sex offender. The record showed that one of the convictions used by the State to enhance his sentence was a burglary charge in which appellant entered a nolo contendere plea. Citing *Beasley v. State*, 345 Ga. App. 247 (2018) appellant argued that the plain language of OCGA §§ 17-7-95 and 17-10-7 (c) indicates that a nolo contendere plea could not be used against him in sentencing him as a recidivist. The Court agreed.

The Court found that the plain language of OCGA § 17-10-7 (c) and OCGA § 17-7-95 (c), when read together makes it clear that a nolo contendere plea does not count as a prior conviction for sentencing purposes under the recidivist statute because OCGA § 17-10-7 does not specifically so provide. Therefore, the Court stated, although it suggested it in *Beasley*, the Court now expressly concluded that nolo contendere pleas cannot be used in sentencing under the recidivist statute. In so holding, the Court overruled its holding in *Miller v. State*, 162 Ga. App. 730, 732-734 (4) (b) (1982) and *Phillips v. State*, 329 Ga. App. 279, 282 (2) (a) (2014).

Accordingly, the Court held that the trial court erred in considering appellant's prior conviction for burglary in sentencing him, and consequently vacated the sentence imposed and remanded the case to the trial court for resentencing.

Expert Testimony; Hearsay

Hambrick v. State, A19A2455 (2/5/20)

Appellant was convicted of rape, two counts of aggravated child molestation, incest and cruelty to children. At trial, appellant presented the testimony of Dr. Tillitski to criticize the forensic interview technique. Dr. Tillitski, who is a psychologist, stated that he reviewed certain documents to form his opinion regarding the circumstances of the disclosure, including the police report. He then proceeded to mention information from the police report that he had considered in reaching his opinion, and the State objected on hearsay grounds. After a lengthy discussion with trial counsel, the trial court permitted Dr. Tillitski to testify about the forensic interview process, but not the contents of the police report. Trial counsel then sought to elicit testimony that the manner of the outcry was consistent with a risk of fabrication, much like the State's witness testified that the forensic interview was consistent with abuse.

Appellant contended that the trial court improperly limited the testimony of his expert, Dr. Tillitski, because the testimony was permissible under OCGA §§ 24-6-620 and 24-7-702. He argued that the trial court prevented his expert from testifying about the disclosure because it was based on hearsay and went to the ultimate issue in the case. He further contended that an expert may base his opinions on hearsay evidence, and that the trial court did not limit the State's experts in the same manner.

The Court found that the record reflected confusion over exactly what trial counsel was trying to elicit from the expert. The trial court repeatedly stated that it would not allow the expert to act as "a lie detector," and trial counsel explained that she was trying to establish what an interviewer should look for to determine if an allegation was fabricated or tainted. Trial counsel argued that the State's witnesses had been allowed to testify based on hearsay, but the trial court disagreed and noted that the other witnesses testified from their personal observations, whereas this expert was testifying based on what he read in a police report. Counsel then explained that she was trying to ask the expert whether the outcry had characteristics that raised red flags, not whether the victim was telling the truth. And, although the State objected on the ground that the witness was only an expert in forensic interviews and not case analysis, the trial court allowed the expert to testify about the types of outcry that were less likely to be the result of a scripted or fabricated memory. The trial court ultimately allowed Dr. Tillitski to testify about the circumstances of the disclosure, but not about the facts he had obtained from the police report. Dr. Tillitski then testified about scripted memories and spontaneous outcry and whether, in his opinion, the victim's disclosure could have been scripted.

The Court found that the trial court did not abuse its discretion by limiting Dr. Tillitski's testimony. The trial court allowed the expert to testify at length about the forensic interview and what he opined were problems with the process, as well as why certain outcries were more likely to be the result of a scripted response. Moreover, Dr. Tillitski was permitted to rely on the police report to form his opinions. However, the trial court properly prohibited the expert's testimony about the contents of the police reports. None of our rules of evidence directly allow such testimony. In fact, the Court noted,

trial counsel conceded that the trial court could "limit [the expert] from going into specific things of the police report," which was precisely what the trial court did.

Moreover, the Court found, appellant's contention that the State's witnesses were not limited in the same manner was without merit. As the trial court noted, the State's witnesses testified as to their own personal knowledge and not based on hearsay information from another source. Moreover, Dr. Tillitski was permitted to testify extensively as to his opinion regarding problems with the forensic interview and reasons why, in his opinion, the victim's outcry could have been fabricated. The only limitation the trial court placed on the witness's testimony was to exclude testimony about the contents of the police report on which he relied in forming his opinion. Accordingly, the Court concluded, the trial court did not abuse its discretion in limiting Dr. Tillitski's testimony.

Probation Revocations; Double Jeopardy

Zellner v. State, A19A2369 (2/7/20)

In 2016, appellant pled guilty to aggravated stalking of his ex-wife and was on probation as a first offender when he was indicted in 2017 on several new offenses, including kidnapping his ex-wife at gunpoint. After the new charges were used as a basis to revoke his first offender status and adjudicate him guilty in the stalking case, appellant filed a plea of former jeopardy in the new action on the ground that he could not be prosecuted on the new charges because they had already been used in the stalking action in support of his adjudication of guilt. The trial court rejected his plea in bar and appellant appealed.

Appellant contended that the State's use of the new kidnapping and related charges to adjudicate him guilty and impose a sentence of aggravated stalking in the 2016 matter barred his prosecution in the 2017 case. He argued that he is being placed in jeopardy a second time for the same offense because the State "used" the kidnapping and related charges when seeking to have him adjudicated guilty of aggravated stalking in the 2016 case. The Court disagreed.

First, the constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. In the 2016 case, following his adjudication of guilt, appellant was convicted of aggravated stalking. In the present case, he is charged with crimes relating to an entirely separate event. Thus, the Court found, he was not in jeopardy of being convicted more than once for the same offense.

Second, the use of the 2017 kidnapping and related crimes as a basis for adjudicating him guilty in the 2016 case is expressly allowed by the first offender statute: "The court may enter an adjudication of guilt and proceed to sentence the defendant as otherwise provided by law when the … Defendant violates the terms of his or her first offender probation[.]" OCGA § 42-8-60 (d) (1). Appellant was accused of violating his first offender probation by violating the criminal laws. Whether such a violation occurred is determined by a preponderance of the evidence. Thus, in deciding whether to revoke appellant's first offender status in the 2016 case and adjudicate him guilty of aggravated stalking, the trial court only determined by a preponderance of the evidence that he had committed the 2017 crimes. He was not convicted of those crimes when they were used in that manner, and he was not sentenced for those crimes at the time. Therefore, the 2017 action does not subject appellant to a possible second conviction on the 2017 kidnapping and related charges.

Finally, the Court found, there was no merit to appellant's suggestion that OCGA § 16-1-8 (b) (1) somehow bars his prosecution for the 2017 crimes because the 2017 crimes involve different conduct than the aggravating stalking that occurred a year earlier. Accordingly, the Court concluded, the trial court did not err by denying appellant's plea of former jeopardy.

Breath Test Refusals; Police Reports

Liggett v. State, A19A1843 (2/7/20)

Appellant was convicted of DUI (less safe) and failure to maintain lane. Appellant contended that, in violation of his right against self-incrimination found in the Georgia Constitution, the trial court erred by admitting evidence that he refused a breath test and by charging the jury that it could therefore infer that the test would have shown the presence of alcohol. The Court disagreed.

The Court found that at trial, appellant did not object to the introduction of his refusal to take the breath test. Accordingly, review this contention was for plain error. Similarly, although appellant objected during the charge conference to the charge on the adverse inference, he failed to object after the jury was so charged. Accordingly, review of the jury charge was also only for plain error.

Here, there was a clear and obvious error and no suggestion of affirmative waiver of the error. Compelling a person to breathe into a breath-testing device violates the Georgia Constitution's right against compelled self-incrimination because that right prohibits the compulsion of incriminating acts as well as testimony. And, under *Elliott v. State*, 305 Ga. 179, 210 (IV) (2019), that same right prohibits the State from introducing evidence that a defendant exercised his right to refuse such a test. Furthermore, the Court stated, although *Elliott* was decided over a year after appellant's trial, whether an error is considered "clear or obvious" under the second prong of the plain error test is judged under the law existing at the time of appeal, regardless of whether the asserted error in the trial court was plainly incorrect at the time of trial, plainly correct at the time of trial, or an unsettled issue at the time of trial. Accordingly, the Court determined, *Elliott* applied to appellant's appeal, and appellant met the first and second prong of the plain error test.

The third and fourth prong require showing that the error affected the appellant's substantial rights, i.e., that it affected the outcome of the trial court proceedings, and that it seriously affected the fairness, integrity, or public reputation of the proceedings. Importantly, plain-error analysis, which must be distinguished from harmless-error analysis, requires the appellant to make an affirmative showing that the error probably did affect the outcome of the trial.

The Court noted that with regard to the DUI charge, the State had to prove that appellant was driving or in actual physical control of his SUV, while under the influence of alcohol, to the extent that it was less safe for him to drive. But, the evidence at issue (that appellant refused a breath test) and the jury charge at issue (allowing an inference of the presence of alcohol) pertain only to the question of whether appellant was under the influence of alcohol at the time. And here, the Court found, the facts presented at trial on whether appellant was under the influence of alcohol were that appellant staggered and failed to walk in a straight line upon exiting the SUV; that he smelled of alcohol; that he had dilated pupils, bloodshot and watery eyes, slurred speech, and was unsteady on his feet, each of which was, in the opinion of the officer,

an indication that appellant had consumed alcohol or drugs; that he lost his balance during the walk-and-turn evaluation; that he had open beer bottles in the vehicle; and that he admitted that he had at least one beer that afternoon. Furthermore, appellant did not offer any alternative explanation for why he had physical manifestations of being under the influence of alcohol.

Thus, given this strong independent evidence that appellant was under the influence of alcohol, including his own admission of recently drinking a beer, and his failure to offer an explanation for his physical manifestations of being under the influence of alcohol, the Court concluded that he failed to affirmatively show that evidence that he refused a breath test and a corresponding charge allowing the jury to infer the presence of alcohol probably affected the jury's decision that he was under the influence of alcohol while driving.

Trafficking in Cocaine; Void Sentences

Brown v. State, A19A2048 (2/10/20)

In 2016, appellant pled guilty to trafficking cocaine with a weight of more than 28 grams, in violation of OCGA § 16-13-31 (a) (1) (A), and the State nolle prossed various other drug related offenses charged against him. OCGA § 16-13-31 (a) (1) (A) (2015) provides that "[i]f the quantity of the cocaine or the mixture involved is 28 grams or more, but less than 200 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of ten years and shall pay a fine of $200,000.00." The Court sentence appellant to 25years' imprisonment. Appellant thereafter filed a motion to correct void sentence, which the trial court denied.

The Court stated that a sentence is void if the court imposes punishment that the law does not allow. When the sentence imposed falls within the statutory range of punishment, however, the sentence is not void. OCGA § 16-13-31 (h) (2015) provides as follows: "Any person who violates any provision of this Code section shall be punished … for not more than 30 years of imprisonment and by a fine not to exceed $1 million." Thus, the Court held, because appellant's 25-year sentence was within this statutory limit, he has presented no basis upon which to vacate the sentence of imprisonment.

Nevertheless, appellant contended, his sentence was void because the trial court did not impose the mandatory fine. The Court disagreed. Relying on *Winstead v. State*, 280 Ga. 605 (2006), the Court stated that where a defendant has received a sentence that is too lenient under the law, he will not be heard to complain on appeal that he was accorded an unmerited privilege with beneficent results. Accordingly, that the trial court did not require appellant to pay a fine as part of his sentence was not grounds to vacate his sentence.