Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JUNE 19, 2020
Issue 25-20

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Alibi Witnesses; Exclusion of Testimony

Hampton v. State, S20A0482 (5/18/20)

Appellant was tried with Abney, his co-defendant, and convicted of the malice murder of three individuals. He contended that the trial court erred by excluding the testimony of his proposed alibi witness, Gray. Briefly stated, the record showed that after appellant announced his intention to call Gray, the prosecutor stated that she intended to cross examine Gray regarding his statement that he sold appellant the gun that was of the type used in the murders. Since Gray was a convicted felon at the time, his testimony could implicate his right against self-incrimination. After discussing the matter with an attorney, Gray stated that he would invoke his Fifth Amendment rights if asked about the weapon.

Appellant contended that the trial court abused its discretion in excluding Gray's testimony. The Court disagreed. When a witness indicates his intent to invoke his right against compelled self-incrimination, the trial court is required to first decide whether there is a real and appreciable danger that the answer could incriminate the witness. If so, then the decision to answer must be left to the witness. By requiring that Gray be advised of his right against self-incrimination after the prosecutor proffered her planned cross-examination of him, the court implicitly and reasonably decided that there was a real and appreciable danger that Gray's answers regarding his possession of a gun of the type used in the murders and his sale of that pistol to appellant could have incriminated Gray at least as a felon in possession of that firearm. And after making that determination, the trial court properly then left the decision to testify to Gray.

Appellant next argued that the trial court should have concluded that Gray's testimony related only to a collateral matter. The Court again disagreed. According to the proffers, during direct examination, Gray would have testified to appellant's whereabouts during the murder; on cross-examination, the prosecutor would have asked Gray about how appellant obtained the murder weapon. The Court found that both the proffered direct examination and cross-examination were directly related to appellant's involvement in the crimes. To the extent Gray testified that appellant was not involved in the crimes, Gray could also fairly be asked about appellant's possession of the type of gun used in the crimes, which was not a merely collateral matter. And, the prosecutor did not seek to ask Gray about his possession of weapons unrelated to appellant's crimes. Thus, the Court found, the trial court did not abuse its discretion in concluding that it would have to

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strike Gray's proffered testimony regarding appellant's alibi if he invoked his right against self-incrimination when asked about the gun he sold to appellant. Gray's proffered testimony was properly excluded.

Nevertheless, appellant argued, under OCGA § 24-1-104 (a), the State "should" have filed a pretrial motion for a preliminary ruling on the admissibility of Gray's testimony. The Court noted that OCGA § 24-1-104 (a) lays out the general standard for trial court rulings on "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence," but it does not require that the State file a pretrial motion for rulings on preliminary questions; the only requirement that may have been pertinent here was that hearings on preliminary matters of this sort "shall be conducted out of the hearing of the jury when the interests of justice require." The State's challenge to Gray's testimony, Gray's statement to the trial court that he would invoke his right against self-incrimination, and appellant's proffer of Gray's proposed testimony all took place outside the presence of the jury. Moreover, appellant also could have sought a preliminary ruling on the admissibility of Gray's proposed testimony, but he did not. Accordingly, the Court found this argument meritless

Finally, appellant argued that the State "could" have sought "use immunity" for Gray pursuant to OCGA § 24-5-507. But, the Court stated, although the Attorney General or a district attorney may seek immunity for a witness, nothing in the statute requires the prosecutor to do so.

Motions to Withdraw Pleas; USCR 33

Mahaffey v. State, S20A0118 (5/18/20)

Appellant entered a negotiated guilty pleas to felony murder and aggravated assault. Thereafter, he filed a timely motion to withdraw his pleas. After a hearing, the court denied the motion.

Appellant argued that his guilty pleas were not knowingly, intelligently, and voluntarily entered because he was not advised that he had the right to testify at trial. The Court noted that USCR 33.8 (B) (5) says that a trial court should not accept a defendant's guilty plea without informing him on the record that by entering his plea, he waives, among other rights, "the right to testify and to offer other evidence." The provisions of USCR 33 are mandatory in the trial courts, and if a defendant challenges the validity of his guilty plea on direct review, the State has the burden of showing substantial compliance with USCR 33, along with the constitutional requirements that underlie portions of that rule. But even if the record does not adequately demonstrate compliance with one of USCR 33's provisions, the defendant must prove that withdrawal of the guilty plea is necessary to correct a manifest injustice, as provided by USCR 33.12.

Here, the Court found, the specific phrase "right to testify" was not used on the guilty plea form that appellant signed or during his plea hearing. Nevertheless, the State met its burden of showing substantial compliance with USCR 33.8 (B) (5)'s requirement that appellant be informed of his right to testify at trial.
Appellant acknowledged on the guilty plea form and again during his colloquy with the trial court that he understood that by pleading guilty, he was waiving the right to a jury trial and "to compel the production of any evidence, including the attendance of *any witness* in [his] favor." (Emphasis added.) Thus, the Court found, logically included in the right to compel the attendance of witnesses favorable to the defense is the defendant's right to testify himself, should he decide to do so. Moreover, the guilty plea form and the transcript of the plea hearing showed that appellant acknowledged that by

pleading guilty, he was giving up the right not to have to testify against himself, which is a necessary corollary to the right to testify. Appellant's plea counsel also told the trial court that appellant had been informed of his rights and that counsel believed that appellant understood the consequences of his guilty pleas. And although appellant testified at the motion to withdraw hearing that he was "concern[ed]" that he "wouldn't be able to testify on [his] own behalf," the Court stated that the credibility of that self-serving testimony was for the trial court to determine, and the court implicitly rejected it. Accordingly, considering the record as a whole, the Court concluded that appellant was adequately informed of his right to testify at trial.

Appellant also contended that his guilty pleas were invalid because he was never informed that he would not have an absolute right to withdraw his pleas after sentencing. But, the Court stated, a defendant has no constitutional right to be advised by the trial court that he cannot withdraw his guilty plea as a matter of right after his sentence is pronounced. Nor does USCR 33.8 require the trial court to advise a defendant that he cannot withdraw his guilty plea as a matter of right after sentencing. USCR 33.10 says that "[i]f the trial court intends to *reject* the plea agreement" (emphasis added), then before pronouncing sentence on the defendant, the court must inform him on the record that, among other things, he may withdraw his guilty plea as a matter of right. Here, however, the trial court accepted the negotiated plea agreement, so USCR 33.10 did not apply.

Consequently, the Court found, the record as a whole supported the conclusion that appellant was advised of his pertinent constitutional rights, that he understood those rights and the consequences of waiving them, and that he then knowingly, intelligently, and voluntarily entered his guilty pleas. Accordingly, the trial court did not abuse its discretion by denying appellant's motion to withdraw his pleas.

Evidence of Lack of Mental Illness; Rule 803 (2)

Sullivan v. State, S20A0309 (5/18/20)

Appellant was convicted of felony murder, aggravated assault, reckless conduct, cruelty to children in the second degree and three traffic offenses. The evidence, very briefly stated, showed that on the morning of December 10, 2012, appellant was behind the wheel of her Chevrolet Suburban with her husband in the passenger seat and their four-year-old son, J.S., was in a car seat in the back seat. Appellant ran a red light, crossed over into the oncoming traffic, and drove a considerable distance before crashing head-on into a vehicle coming towards her. The collision occurred after appellant had driven at a speed of almost 80 m.p.h. for roughly three miles in the wrong lane and that other cars had to swerve to avoid her vehicle.

Appellant argued that the trial court erred by excluding evidence regarding her lack of history of mental illness. Specifically, she contended that the trial court erred in granting the State's motion in limine to exclude the testimony of two psychiatrists who examined her while she remained hospitalized six days after the incident. Appellant contended that her alleged intent to commit the charged crimes was the central issue in this case and that any evidence which tended to disprove her intent was relevant and should have been admitted in her trial. The Court disagreed.

The Court noted that appellant conceded that she did not raise any type of mental-health related defense for which evidence of psychological evaluations might have been relevant. Moreover, appellant also conceded that she cited to the Court no legal authority under our Evidence Code for the proposition that a defendant should be permitted to introduce

expert testimony that she had no history of mental illness in order to show that she did not intend to commit a crime. Thus, the Court held, because it too found no authority suggesting that evidence of appellant's lack of mental illness had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable," OCGA § 24-4-401, the Court could not say that the trial court abused its discretion by excluding this evidence.

Appellant also argued that the trial court abused its discretion by admitting the following statement that J.S. made to Karen LeBlanc, a pediatric emergency room nurse at the hospital: "Daddy was trying to make Mama stop, but she wouldn't because they were fussing." Appellant contended that the trial court erred by ruling at trial that this statement was admissible under the excited-utterance exception to the hearsay rule set forth in OCGA § 24-8-803 (2). The Court again disagreed.

The Court found that the statement at issue was made by J.S. to LeBlanc two to three hours after J.S., who was four years old at the time, had been involved in a serious multi-vehicle crash in which his mother had driven on the wrong side of the road at a high rate of speed for several miles while apparently arguing with J.S.'s father, narrowly missing four other motorists before colliding with another vehicle. The impact of the crash caused appellant's Suburban, in which J.S. was strapped into a car seat in the back seat, to fly onto the guardrail and flip over. J.S. then freed himself from the vehicle and was seen by witnesses at the scene to be dazed, bleeding, and screaming. After being treated by a nurse at the scene of the crash, J.S. was transported to a hospital and treated for injuries (which later required surgery) without his parents being with him at any point. He then fell asleep in the hospital's trauma bay and made the statement at issue to LeBlanc as she was examining a wound to his arm after he awoke.

Thus, the Court stated, given J.S.'s age, the extent of his injuries, and the traumatic circumstances leading to his hospitalization, it could not say that the trial court abused its discretion by determining that, under the totality of the circumstances, his statement to LeBlanc related to "a startling event or condition" and that he made the statement "under the stress of excitement caused by the event or condition." OCGA § 24-8-803 (2).

Appellate Court Jurisdiction; Pro Se Motions for New Trial

Walker v. State, S20A0170 (5/18/20)

Appellant was convicted in 2016 of felony murder. On November 5, 2019, the State filed a motion to dismiss the appeal, noting that appellant filed his motion for new trial pro se; the record contained no written order permitting his trial counsel to withdraw; by the time appellant's current counsel filed an entry of appearance and an amended new trial motion, the 30-day deadline to file a new trial motion had long since passed; and absent the filing of a timely new trial motion in 2016, appellant's 2019 notice of appeal was untimely by more than three years. The State argued that because appellant filed his motion for new trial pro se while he was still represented by counsel, his filing was a legal nullity, and the Court therefore lacked jurisdiction over the appeal. The Court disagreed.

The Court found that after the trial court pronounced appellant's sentence, a question arose as to whether appellant, who had been represented up to that point by retained counsel, wanted to waive his right to counsel and proceed pro se as to a motion for new trial due to a lack of funds. After a colloquy in which the trial court advised appellant of his right to

appointed counsel and explained the dangers and disadvantages inherent in self-representation, appellant indicated that he wished to proceed pro se, and the court made a finding on the record that appellant had freely, intelligently, and knowingly elected to waive his right to counsel and to represent himself.

The Court noted that it may have been preferable for the trial court to sign and file with the trial court clerk a written order granting appellant's request to proceed pro se. However, Uniform Superior Court Rule 4.3, which addresses attorney requests to withdraw as counsel (either with or without the client's consent) and substitutions of counsel in accordance with the client's wishes, currently does not require a written order granting an appellant's request to proceed pro se. And, the Court noted, the State cited no legal authority requiring the entry of a written order to effectuate the removal of counsel when a criminal defendant invokes his constitutional right to self-representation and that request is granted on the record in open court. And nothing in the record suggested that the trial court's oral order was not understood, by the court or the defendant's existing or replacement counsel, to immediately remove appellant's counsel without the entry of a written order for the purposes of allowing appellant to proceed pro se. Thus, the Court held, the trial court's on-the-record finding that appellant had freely, intelligently, and knowingly elected to waive his right to counsel and to represent himself was sufficient to make effective appellant's pro se motion for new trial filed on the next day, May 11, 2016. Appellant's motion for new trial was therefore timely, and he filed his notice of appeal within 30 days of the trial court's order denying his new trial motion as required by OCGA § 5-6-38 (a). Accordingly, the Court concluded that it had jurisdiction over the appeal.

Severance; Series of Connected Acts

Carson v. State, S20A0288 (5/18/20)

Appellant was convicted of the malice murder of Lee Sokol and the robbery by force of Fred Hickson. The evidence showed that appellant murdered Sokol by an elementary school and on the same evening, robbed Hickson, as he was waiting for a cab to arrive near a hospital.

Appellant contended that the trial court erred in denying his motion to sever the charges alleging the robbery and battery of Hickson from the charges alleging the murder, felony murder, and aggravated assault of Sokol. The Court stated that where offenses are joined in a single indictment, a defendant has a right to severance where the offenses are joined solely on the ground that they are of the same or similar character because of the great risk of prejudice from a joint disposition of unrelated charges. However, where the joinder is based upon the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, severance lies within the sound discretion of the trial judge since the facts in each case are likely to be unique.

And here, the crimes against Sokol and Hickson occurred only a few blocks apart and within a short period of time. During these incidents, appellant hit Sokol on the head with a rock and picked up a brick and threatened Hickson. Severance is generally not warranted where the crimes charged occurred over the same period of time and stem from a course of continuing conduct. Appellant's arrest for the robbery was also integral to appellant's identification as a suspect in the murder and was part of the series of events that led to the DNA testing of appellant's clothes.

Thus, the Court held, as the robbery and murder charges were not joined solely because they were of the same or similar character, severance was not mandatory. Also, there was no evidence that the combined trial of the charges confused or

misled the jury, and the verdict itself, including appellant's acquittal for battery, showed that the jury fully understood the law and evidence. Therefore, the Court concluded, the trial court did not abuse its discretion in denying the motion to sever.

Ineffective Assistance of Appellate Counsel; Habeas Corpus

Johnson v. Williams, S20A0457 (5/18/20)

Williams was convicted of four counts of armed robbery, one count of terroristic threats, and one count of using a hoax device. The evidence, briefly stated, showed that Williams, described as a man wearing a mask, black gloves, safety goggles, overalls, a jacket, and a blue fisherman's hat, walked into a bank, claimed he had a bomb and demanded money. After obtaining the money, he fled. Shortly after the robbery, police received a description of Williams, who was reported to have been last seen driving a dark-green or dark-colored Cadillac. An officer spotted a vehicle matching that description and gave chase. The Cadillac crashed, and the driver, Williams, ran away on foot but was apprehended by an officer.

After his conviction was affirmed on direct appeal, *Williams v. State*, 312 Ga. App. 22 (2011), he filed a habeas petition. He contended that his trial counsel provided ineffective assistance (1) by not informing him about a likely jury charge during the plea bargaining process and (2) by failing to object to bad character evidence. He also claimed that his appellate counsel provided ineffective assistance by not asserting those claims on appeal. The habeas court agreed and the Warden appealed.

The Warden argued that the habeas court erred when it determined that appellate counsel rendered ineffective assistance when he failed to allege that trial counsel provided ineffective assistance during the plea bargaining process. The Court noted that in a claim of ineffective assistance raised in the context of plea bargaining, Williams must show that the outcome of the plea process would have been different with competent advice. More specifically, to meet the prejudice prong of *Strickland v. Washington*, Williams must make three showings: (1) that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), (2) that the trial court would have accepted its terms, and (3) that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

And here, the Court found, Williams failed to carry his burden because he did not show any evidence in the record that there was a plea offer from the prosecutor or that such an offer would have been presented to the trial court. Accordingly, he could not show that the trial court would have accepted the terms of any purported plea offer and that the conviction or sentence, or both, under the purported offer's terms would have been less severe than that which was imposed. Williams therefore did not show that the outcome of the plea process would have been more favorable to him had he received different legal advice from his trial counsel. And, since his underlying claim for ineffective assistance of trial counsel was without merit, so too was his claim that his appellate counsel was ineffective for failing to raise it on appeal. The habeas court therefore erred in granting Williams habeas relief on this claim.

The Warden next argues that the habeas court erred when it determined that appellate counsel rendered ineffective assistance by failing to allege that trial counsel provided ineffective assistance by failing to object to an officer's testimony

on the basis that it included bad character evidence. At trial, an officer, who pursued and apprehended Williams, testified about his years of experience and stated that bank robbers generally like to wear layers that they can discard for disguise. When asked whether the officer knew "for a fact where [the bank robber] drove after he left the bank," the officer responded, "No. He could've done numerous turns to throw us off and gone in different directions, because wherever the last — anybody at the bank is going to call it in as soon as the robbery — if you are a robber, they all do the same thing. When they pull out, unless they are brand new at it, they are going to go one way and then go down the road and change their direction." The habeas court determined that the failure to object was harmful because the testimony insinuated that Williams was a repeat offender and the other evidence in the case was not overwhelming.

However, the Court found, Williams did not show as a threshold matter that his trial counsel performed deficiently by failing to object to the officer's testimony on the basis that it included harmful character evidence or that such objection would have been sustained. Trial counsel objected to the officer's testimony regarding changes in direction on the basis that it was the product of speculation, which was sustained. Williams did not carry his burden of establishing that trial counsel performed deficiently by failing to make the character-evidence objection: none of the officer's testimony was about Williams' bad character; trial counsel's objection based on speculation was sustained; and nothing indicated that a different outcome would have resulted from the character-evidence objection. Therefore, the Court concluded, the habeas court erred in determining that appellate counsel provided ineffective assistance by failing to raise it on appeal. Accordingly, the Court reversed the judgment granting Williams' petition for writ of habeas corpus.

Appellate Court Jurisdiction; Authority of Trial Court to Seal Records

State v. Rowe, S20A0504 (5/18/20)

Rowe and Dubose have been indicted for murder and other crimes relating to the killing of two Department of Corrections (DOC) officers during an escape from a prison van. The record, very briefly stated, showed that as part of Rowe's defense, his lawyers and expert witnesses need to interview various inmates, including Rowe and Dubose. The trial court issued several ex parte orders for the defense team to gain access to specific inmates. When Rowe learned that these ex parte orders were being kept unsealed in the inmates' files, Rowe filed, under seal without serving the DOC, Ex Parte Motion No. 11 to enforce the confidential nature of those visitation orders. The trial court directed that "any ex parte Orders and the accompanying documents required to perfect the Orders" must be kept under seal in the legal department of the DOC, and directed that "[t]he only document to be included in the institutional file of any inmate shall be a form indicating that additional documents exist under seal in the legal department." The DOC filed a direct appeal.

The Court first addressed whether it had jurisdiction over the appeal. The Court was concerned whether OCGA § 5-7-1 et seq., which limits the subject matter that may be appealed by "the State of Georgia" in "criminal cases," included the issue being appealed by the DOC. The Court found that the statute does not apply to appeals by state entities and actors who have no control over prosecutions, like the DOC here. In so holding, the Court noted there are more occasion for some involvement by the DOC in criminal cases arising out of crimes committed in prisons, because the DOC remains responsible for the prison and the defendant after a crime is committed, because prison staff and inmates will often be witnesses, and because the DOC is required to fund the court costs in such cases under OCGA § 42-5-3. However, the prosecutions of such criminal cases are ultimately controlled by the prosecuting attorneys, and therefore, the Court concluded that only the appeals *prosecutors* file are subject to the appeal limitations in OCGA § 5-7-1 et seq.

Nevertheless, Rowe argued, the Court lacked jurisdiction because the order was not a final judgment and thus, the DOC's direct appeal was subject to dismissal. However, the Court agreed with the DOC that the order was immediately appealable under the collateral order doctrine because (1) the sealing order is substantially separate from the criminal prosecution, (2) the DOC faces the loss of important rights because it either must violate its own regulation or face contempt, and (3) the sealing order completely and conclusively decided the issue.

Next, the Court turned to whether the trial court had the authority to address the matter contained in the order. The Court answered the question in the affirmative because orders directing prison or jail authorities to allow visits by defense team members under appropriately specified conditions are proper. This authority arises out of the statutory provision granting the trial courts the authority "[t]o control, in the furtherance of justice, the conduct of [their] officers and all other persons connected with a judicial proceeding before [them], in every matter appertaining thereto." OCGA § 15-1-3 (4). Additionally, such authority arises out of the court's obligation to protect the constitutional rights of the defendant; therefore, that authority exists even if in contradiction to other non-constitutional sources of law and even if the prison or jail officers addressed in such a visitation order are not joined as a party. Thus, the Court concluded, the trial court had the authority to direct the DOC, as a non-party, to take appropriate steps to ensure the rights of Rowe with respect to protecting his defense strategy from disclosure to the prosecution.

However, the Court also concluded that while the trial court had the authority to address the matter at issue, the scope of the trial court's order was nonetheless subject to review for an abuse of discretion. And here, the trial court's order was in contravention of a duly enacted regulation regarding the management of inmate records. Specifically, the regulation requires that inmate records be maintained in each inmate's personal prison file. See Ga. Comp. R. & Regs., r. 125-2-4-.05 (b). If contravening this regulation were actually necessary to secure Rowe's constitutional rights, the Court noted it would fully affirm the trial court's decision. But, the Court found, the portion of the trial court's order directing the removal of the relevant records from inmates' files and sealing them in the legal office of the DOC was an abuse of discretion, at least on the current record. Specifically, ordering the removal of the records from their usual place to the legal office was unnecessary, when the key issue was controlling the persons who were entitled to examine them. Instead, the trial court should have ordered the prison officials not to disclose any of the relevant visitation records to the prosecuting attorney or the prosecution team or to any person whose access to the records is not reasonably justified. In ordering a divergence from the otherwise-binding regulation without sufficient need, the trial court abused its discretion in exercising its authority. Accordingly, the Court affirmed the trial court's order in part and reversed it in part, and directed the trial court to issue a new order that allows the inmate records to be maintained in compliance with the relevant regulation but also directs prison officials to maintain the confidentiality of Rowe's defense strategy with respect to the prosecution team.