Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING FEBRUARY 19, 2021
Issue 8-21

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Bench Conferences; Right to Be Present

Nesby v. State, S21A0207 (1/11/21)

Appellant was convicted of malice murder and other offenses. He contended that his constitutional right to be present at all critical stages of the proceedings was violated by the court conducting bench conferences outside of his presence. The Court disagreed.

The Court noted that a "critical stage" of a criminal proceeding is defined as one in which the defendant's rights may be lost, defenses waived, privileges claimed or waived, or one in which the outcome of the case is substantially affected in some other way. However, a defendant's presence at bench conferences that deal with questions of law and consist of essentially legal argument about which the defendant presumably has no knowledge, or those that deal with logistical and procedural matters, ordinarily do not implicate the right to be present.

And here, the Court noted, none of the bench conferences about which appellant complained were transcribed. Consequently, appellant failed to present evidence that any of the bench conferences about which he complained were the sort that implicated his right to be present because mere speculation as to what may have been discussed at the conferences cannot serve as the basis for the grant of a new trial.

Nevertheless, appellant contended that his right to be present was implicated based on trial counsel's testimony at the motion for new trial hearing that he "probably . . . made motions for cause" at the one bench conference that occurred during the questioning of three potential jurors, who were all excused at the end of voir dire for the day. The Court again disagreed.

Appellant was in the courtroom at the defense table during voir dire, and, thus, was in a position to hear the trial court go through the statutory exemptions for jury service, and to hear the affirmative responses the three jurors gave to the caretaker question, as well as to observe counsel approach the bench. Moreover, appellant's trial counsel testified at the hearing on the motion for new trial that during the proceedings in this case, he discussed all the issues with appellant that were raised with the court during the bench conferences, and the trial court expressly credited counsel's testimony at the motion for new trial hearing. Finally, appellant was present when the trial court confirmed with the prosecutor and defense counsel

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that the three jurors were to be removed. Appellant neither voiced disagreement with the trial court's decision or his counsel's conduct, nor did he ask for any explanation. Thus, even assuming appellant's right to be present was implicated, he acquiesced in the limited trial proceedings that occurred in his absence.

Statements; Arrest Warrants

Harper v. State, S20A1288 (1/11/21)

Appellant was convicted of malice murder of his girlfriend, concealing her death, and tampering with evidence. He contended that the trial court erred in failing to suppress his September 28, 2012 interview because his arrest warrant was invalid. Specifically, he argued that the warrant for his arrest was issued eleven minutes before the police applied for it, that the warrant did not include the victim's name as required by OCGA § 17-4-41 (a) (1), and that the warrant was issued without any showing to the magistrate judge of probable cause for his arrest. The Court disagreed.

The Fourth Amendment does not require the suppression of statements made outside the home after a warrantless arrest as long as the police had probable cause to make the arrest. Thus, the critical question is whether there was probable cause to arrest appellant on September 28, 2012.

Here, the Court found, at the time of appellant's arrest, the police knew that the victim had been killed; that her naked body had been found in the woods wrapped in black trash bags and duct tape; that she had been living with appellant in the months leading up to her death and wanted to leave him but was scared for her life because he had threatened her; that appellant had lied to the police about being in a relationship with her and the last time he saw her; and that saliva containing appellant's DNA had been found on the victim's chest. These facts and circumstances were sufficient to warrant a prudent person to believe that appellant had murdered the victim and therefore to support a finding of probable cause. Thus, regardless of any deficiency in the July 30, 2012 arrest warrant, the Fourth Amendment did not require the suppression of appellant's post-arrest interview on September 28, 2012.

Search & Seizure; Search Warrants

Palmer v. State, S20A1118 (1/11/21)

Appellant was convicted of felony murder and other offenses. He contended that the trial court erred in denying his motion to suppress the evidence found in his apartment because the search warrant contained an intentionally or recklessly false statement in violation of *Franks v. Delaware*, 438 U.S. 154 (98 SCt 2674, 57 LE2d 667) (1978).

The Court noted that in *Franks*, the U. S. Supreme Court held that where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

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Here, the Court stated, assuming, without deciding, that the existence of an intentional or reckless falsehood could be established under F*ranks*, the trial court correctly concluded that "the affidavit's remaining content" was sufficient to establish probable cause independently of any alleged false statement. The trial court therefore did not err in denying appellant's motion to suppress on this ground.

Appellant also contended that the search warrant contained "a general description with no particularity," in violation of the Fourth Amendment and OCGA § 17-5-21. The Court noted that the warrant authorized the search and seizure of: "any fingerprints, any and all firearms, any and all ammunition, shell casings, identification cards, receipts, photos, hand written statements, cell phones (to include all data contained therein), currency, and any and all blood evidence, and DNA, which are being possessed in Violation of Georgia Law(s): O.C.G.A. [§] 16-5-1 Murder."

The Court stated that the particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized, and a description of property will be acceptable if it is as specific as the circumstances and nature of activity under investigation permit. And here, the Court concluded, the search warrant listed classes of items that, as a practical matter, were likely to be found relevant to the shooting death of the victim and the removal of his body to the location where it was found. Finally, the warrant limited the classes of items to those relevant to the crime of murder. The trial court therefore did not err in denying appellant's motion to suppress on this ground either.

Right of Confrontation; Search & Seizure

Johnson v. State, S20A1289 (1/11/21)

Appellant was convicted of malice murder and other crimes in connection with a string of robberies that included the shooting death of one victim. Very briefly stated, the evidence showed that appellant, and two codefendants, Adside and Slayton, robbed a Waffle House in August 2010. Later in August, the three, with two more codefendants, Holmes and Jackson, robbed a Chevron. Then on September 5, 2010, the five, with sixth codefendant McMillan, decided to rob the Ingles where appellant worked as a cashier and acted as the "inside man" for the robbery. This armed robbery resulted in the shooting death of Castro, the Ingle's security guard.

The record showed that Slayton pled guilty to two charges of armed robbery for his involvement in the Waffle House and Chevron robberies, and he was called by the State as a witness at appellant's trial. After answering some preliminary background questions, Slayton said, "I'm sorry, I can't do this. I'm sorry, I can't do this. I can't—I plead the Fifth. I can't talk anymore. I'm sorry." After confirming that Slayton had invoked his Fifth Amendment privilege against self-incrimination, appellant's lawyer moved to strike Slayton's "entire testimony." The State opposed the motion, stating that appellant could "cross-examine [Slayton] on the stuff that he's testified about," but that appellant "just apparently can't go any further, unless [Slayton] chooses to testify further." The trial court told appellant's lawyer: "I will permit you to cross-examine [Slayton] on what he's testified about. But he's indicated he's not going to go further." Appellant's lawyer responded, "Then I don't believe I have any questions." At that point, Slayton left the stand, and the State called its next witness.

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Appellant argued that the trial court's failure to strike Slayton's testimony violated his right to confrontation. The Court disagreed. The Court stated that the main and essential purpose of the right of confrontation is to secure for the opponent the opportunity of cross-examination. Here, the trial court expressly gave appellant the opportunity to cross-examine Slayton about the events to which Slayton testified, but appellant expressly declined to do so. As a result, the Court held, appellant could not show that he was improperly deprived of his right to confront Slayton.

Nevertheless, appellant contended, an attempt to cross-examine Slayton would have been futile. But, the Court found, the record did not clearly show that Slayton would have refused to answer questions on cross-examination about the testimony that he already had given. That testimony dealt primarily with background information and did not delve into the crimes at issue, and there was no indication that Slayton would have refused to answer similar background questions posed by appellant's counsel. Thus, the Court stated, it could not say that an attempt to cross-examine Slayton would have been futile.

Appellant also contended that the trial court erred when it admitted certain evidence obtained from a search of his cell phone. The record showed that after the Ingles robbery, appellant voluntarily came to the police station for an interview, which began shortly after midnight on September 6. While appellant—who was not under arrest at that point—was in the interrogation room, the interviewing officer observed appellant receiving calls or text messages on his iPhone, so the officer asked to see the phone. Appellant handed the phone to the officer, who saw that someone named "Tye" was contacting appellant. At one point, the officer took the iPhone outside the interrogation room and looked at the recent-call log and contact list. Appellant initially had been treated as a victim, but officers began to suspect that he actually was a participant in the robbery based on his calm demeanor (as compared to the other Ingles employee) and certain inconsistencies in his statements. Eventually, at 9:40 a.m., another officer obtained a search warrant for appellant's phone.

Before trial, appellant filed a motion to suppress all evidence derived from his phone, claiming that the pre-warrant search and seizure of his phone during interrogation was illegal and that the warrant itself was invalid because it was issued based on information recovered from the warrantless search of the phone. After a hearing, the trial court granted appellant's motion in part, suppressing "all information and data obtained from [appellant]'s iPhone prior to 9:40 a.m. on September 6, 2010"—i.e., all information obtained from the phone before a search warrant was issued—prohibiting the State "from presenting any witness testimony discussing any of the phone numbers or other data appearing on [appellant]'s iPhone that was collected prior to 9:40 a.m." The trial court also determined, however, that because the search warrant for the phone was valid, it was not the "fruit of the poisonous tree." Thus, the trial court denied appellant's motion to suppress evidence recovered from the post-warrant search of the phone.

Appellant argued that the trial court should have excluded testimony that Adside had called appellant repeatedly after the Ingles robbery because the trial court previously ruled that this evidence was inadmissible because it was obtained from a pre-warrant search of his phone. But, the Court found, although the trial court suppressed the evidence obtained from the pre-warrant search of appellant's phone, the court declined to suppress any evidence retrieved from the phone *after* the issuance of the search warrant. The court also found that Adside's phone number was obtained from a forensic analysis of the phone after the search warrant was issued, and this finding was supported by the investigating officers' testimony. Thus, the Court found, because the evidence about which appellant complained was derived from a post-warrant search of the phone, its admission did not violate the trial court's suppression order.

Appellant also challenged the validity of the search warrant itself, contending that there was no probable cause to issue the warrant for his phone. Specifically, appellant argued that the affidavit used to obtain the warrant failed to specify with particularity the items to be searched, failed to allege a sufficient connection between the phone and the crimes at issue, and improperly relied on tainted information obtained during the illegal search of the phone. The Court disagreed.

The Court concluded that the officer's affidavit provided a "substantial basis" for the magistrate to determine that probable cause existed for the issuance of a warrant for appellant's phone. The affidavit described with sufficient particularity the phone to be seized and the data to be collected from that phone, which was limited to evidence of armed robbery and murder. The affidavit also alleged a sufficient connection between the phone and the crimes at issue. The facts laid out in the affidavit showed that several people were involved in the robbery and that appellant helped the robbers enter the store through the back door. It was reasonable to infer from these facts that appellant likely used his phone to communicate with the other perpetrators.

Finally, the Court found, nothing in the affidavit referenced the information derived from the pre-warrant search of appellant's phone, and so the trial court properly concluded that the evidence obtained pursuant to the warrant was not the "fruit of the poisonous tree." Accordingly, the Court concluded, because the warrant for appellant's phone was sufficiently particularized and supported by probable cause without the use of tainted evidence, the trial court did not err in denying appellant's motion to suppress on this ground.

Possession of Methamphetamine; Sufficiency of the Evidence

Poteet v. State, A20A1728 (1/7/21)

Appellant was convicted of possession of methamphetamine. She contended that the evidence was insufficient to support her conviction. The Court agreed.

The evidence showed that a CI made a controlled by from Cathey inside Cathey's home. The police then executed a search warrant at the home. Appellant was inside Cathey's home at the time. During the search of the home, police located a glass pipe inside a flower pot. The pipe tested positive for methamphetamine. The pipe also had a red tint on it that looked to the police officers like residue from red or purple lipstick. Both Cathey and appellant denied ownership of the pipe. When police and a parole officer at the scene asked appellant if she would pass a drug test for methamphetamine, she responded that she did not know if she would. Specifically, appellant told them that she used methamphetamine approximately three days prior.

The Court noted that it was undisputed that appellant was not in actual possession of the drugs, which were found inside of a flower pot in a residence which was neither owned nor occupied by appellant. The evidence relied upon by the State to connect appellant to the drugs on the pipe, other than her presence in the residence where it was located, was the presence of a substance which may or may not have been lipstick residue on the pipe, appellant's gender, and appellant's admission that she smoked methamphetamine recently enough that she might fail a drug screen.

But, the Court found, there was no evidence that the residue on the pipe was actually lipstick and even if it was assumed the residue was lipstick, there was no evidence that appellant owned any lipstick, let alone the particular lipstick found on

the pipe. The mere presence of a pipe with lipstick on it in the vicinity of a female does not constitute direct evidence of possession by that female, as the State essentially argued. Likewise, nor does the presence of lipstick on a pipe definitively eliminate the possibility that the drugs on the pipe are possessed by a male, particularly when that male is the owner of the residence, as the State also essentially argued. Moreover, there was no evidence as to when the pipe was last smoked, let alone that it was smoked during the time appellant was at Cathey's house. There was also no DNA or fingerprint evidence linking appellant to the drug-laced pipe. Indeed, the Court found, the totality of the evidence against appellant was that she is a female drug user in the vicinity of a pipe in someone else's house that had drug, and potentially lipstick, residue on it. This was insufficient circumstantial evidence to prove appellant's possession of the drugs, as it did not exclude every other reasonable hypothesis - such as that the methamphetamine on the pipe was solely possessed by Cathey, the actual owner of the residence, or that it had been possessed by a different person who was a prior guest in Cathy's home. According, the Court concluded, appellant's conviction must be reversed.

Attempt to Elude; Sentencing

Massengille v. State, A20A2077 (1/8/21)

Appellant was convicted of attempt to elude in violation of OCGA § 40-6-395 (b) (5) (A) (Count 1) as well as other traffic offenses. The trial court sentenced appellant on Count 1 to five years with the first two in confinement and the remainder on probation. Appellant and the State contended that appellant's split sentence of confinement plus probation is not authorized by the applicable statutory language of OCGA § 40-6-395 (b) (5) (A) & (B). The Court agreed.

The Court found that under OCGA § 40-6-395 (b) (5) (A), when a defendant is found guilty of fleeing with a speed more than 20 miles per hour over the speed limit, the sentencing statute authorizes the trial court to impose a fine of $ 5,000 and/or impose a sentence of "imprisonment for not less than one year nor more than five years." Under OCGA § 40-6-395 (b) (5) (B), "[f]ollowing adjudication of guilt or imposition of sentence for a violation of subparagraph (A) . . . , the sentence shall not be suspended, probated, deferred, or withheld. . . ." In other words, a sentence of imprisonment under subsection (b) (5) (A) cannot be "suspended, probated, deferred, or withheld."

But here, the disposition signed by the trial court imposed a sentence of "[five] years with the first [two] years in confinement and the remainder on probation." According to the plain meaning of the language of subsection (b) (5) (A), such a sentence violates that provision's requirement that such a "sentence shall not be … probated." This reading is borne out by the fact that the other subparagraphs in this subsection (e.g. (b) (1) (c)) provide that "[a]ny period of such imprisonment in excess of ten days [or 30 days or 90 days, depending on recidivism] may, in the sole discretion of the judge, be suspended, stayed, or probated." Thus, within this Code section, the legislature made it clear that certain levels of the offense would be subject to a probated term of imprisonment after a certain amount is served. This language is absent from subsection (b) (5) (A), and instead, the legislature added language in subsection (b) (5) (B), stating that sentences under (A) "shall not be … probated." This is a clear and unambiguous expression of legislative intent that those sentences must be for a term of confinement, if any, without probation. Therefore, the Court concluded, the trial court erred by interpreting the statute otherwise. Accordingly, the trial court's sentence was vacated the case remanded for resentencing.