Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
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Search & Seizure; Good Faith

Lofton v. State, S20A1101 (2/15/21)

Appellant was convicted of malice murder. The evidence showed that in 2013, the victim arranged to buy drugs from appellant through an intermediary. Appellant shot the victim at the arranged drug-buy. On the day of the shooting, a detective obtained from Metro PCS, based on emergency circumstances, subscriber data for the target phone number and call-detail records, including historical cell-site location information ("CSLI"), for the day of the shooting and the three previous days. Appellant contended that the trial court erred in denying his motion to suppress his cell phone records and all of the evidence derived from those phone records.

The Court noted that at the time of appellant's trial in 2014, no appellate precedent binding in Georgia courts held that a request or demand by a governmental entity to a cell phone service provider that the provider produce its records related to a customer's account constituted a search under the Fourth Amendment. Under then existing constitutional doctrine, a person generally lacked a reasonable expectation of privacy in business records owned and maintained by a third-party business. The government's access to such records was not unfettered, however, but was governed by federal and state statutes. Title II of the Electronic Communications Privacy Act of 1986, commonly called the Stored Communications Act ("SCA"), provides some privacy protection for the content of electronic communications and for non-content or transactional records maintained by providers of electronic communications services. The SCA protects the privacy of electronic communications under two paths: by limiting providers' ability to voluntarily disclose a user's information, in 18 U.S.C. § 2702, and by specifying the circumstances in which the government can compel providers to disclose their users' information, in 18 U.S.C. § 2703.

However, a service provider can voluntarily provide non-content records to a governmental entity if the provider has a good-faith belief that an emergency poses a risk of death or serious physical injury that requires disclosure without delay. And here, when requesting appellant's records, the detective attested that an emergency existed that involved immediate danger of death or serious bodily injury to a person. She explained that there was a witness who was known to a murder

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suspect and that the records were needed to apprehend the suspect and to prevent the witness from being harmed. Furthermore, in *Registe v. State*, 292 Ga. 154, 155-156 (2012), the Court approved a law enforcement request under similar circumstances.

Nevertheless, the Court noted, four years after appellant's trial, the United States Supreme Court held that a person has a reasonable expectation of privacy in "the whole of his physical movements" as captured through CSLI, and thus, compelling a cell-service provider to turn over a user's historical CSLI is a search under the Fourth Amendment, at least if the CSLI is for seven days or more, requires a search warrant. *Carpenter v. United States*, U.S. (138 SCt 2206, 201 LE2d 507) (2018). Appellant contended that the Court expand the holding in *Carpenter* to include a request under 18 U.S.C. § 2702 (c) (4) for the voluntary disclosure of records to address an emergency, and from seven days of historical CSLI to four days of historical CSLI.

But, the Court stated, even if it was persuaded that *Carpenter* should be extended in these ways, it would not reverse the trial court's decision to admit the historical CSLI evidence unless exclusion would serve the purpose of deterring future Fourth Amendment violations by law enforcement officers, which is the "sole purpose" of the exclusionary rule. For exclusion of evidence obtained in violation of the Fourth Amendment to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs. When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the benefits of exclusion tend to outweigh the costs. However, when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, then suppression fails to yield appreciable deterrence, and exclusion is clearly unwarranted.

And here, the Court concluded, the detective's communications with MetroPCS supported a good-faith belief that the company's voluntary disclosure of the requested records was authorized under the SCA, 18 U.S.C. § 2702 (c) (4). The Court further concluded that it was objectively reasonable for a law enforcement officer in good faith to rely on this statutory mechanism to request records for a cell phone number used by a murder suspect where the request was made less than a day after the murder while the effort to apprehend the suspect was ongoing. Moreover, the Court concluded, it was objectively reasonable for a law enforcement officer in good faith to rely on binding appellate precedent that at the time did not recognize any reasonable expectation of privacy in non-content cell phone records contained in the business records of a third party and did not differentiate between historical CSLI and other types of non-content cell phone records, as the *Carpenter* Court would later do. Thus, because at the time of appellant's trial, a federal statute, 18 U.S.C. § 2702 (c) (4), and binding appellate precedent, *Registe*, 292 Ga. at 157, authorized the investigatory conduct at issue, reversing the trial court's decision in this case would have little, if any, additional benefit in deterring future violations of the privacy interests recognized in *Carpenter*. Consequently, the Court affirmed the trial court's ruling.

Constitutional Right to Be Present; Bench Conferences

Champ v. State, S20A1552 (2/15/21)

Appellant was convicted of malice murder. During voir dire, the trial court held numerous bench conferences with counsel, but not with appellant. During these bench conferences, many prospective jurors were excused, some with consent of the parties and others by the court sua sponte. Appellant did not raise his constitutional right to be present at these bench

conferences in his motion for a new trial and the court did not rule on the issue. Instead, appellant raised the issue for the first time on appeal in his brief with new counsel he obtained after filing his notice of appeal.

The Court found that the trial transcript indicated that appellant could not hear the bench conferences, and therefore was not "present," for any of the bench conferences at issue. Some portions of the bench conferences might be characterized as discussion of logistical or procedural issues regarding the jury selection process or legal argument about removal of particular prospective jurors (although, it noted, none of its precedents to date have not drawn a distinction between factual and legal issues with regard to a defendant's right to be present during discussions about a juror's removal). Several of the bench conferences, however, involved or related to direct discussions between the trial court and prospective jurors, and the court also made the decision to remove a number of prospective jurors during the bench conferences. And, at least for those bench conferences, the Court found, and the State conceded, appellant had a constitutional right to be present.

But, the Court stated, the right to be present belongs to the defendant, and he is free to relinquish it if he so chooses. A defendant may relinquish his right in several ways: if he personally waives the right in court; if his counsel waives the right at his express direction; if his counsel waives the right in open court while he is present; or, as seen most commonly in our case law, if his counsel waives the right and the defendant subsequently acquiesces to that waiver. Here, however, the Court found that there was no indication in the record appellant personally waived his right to be present for these bench conferences or that his counsel waived that right in appellant's presence or with his express authority. Moreover, the question of acquiescence was unclear.

Normally, the Court noted, if not raised and resolved during trial, a claim that a defendant's right to be present was violated is normally raised in a motion for new trial, which allows the parties to supplement the trial record at the hearing on the motion by calling the defendant's trial counsel, or other witnesses, to testify about what the defendant was told about the proceeding from which he was absent or by presenting other evidence about what the defendant could see and hear during the trial. But that did not occur in this case, because appellant raised his right-to-be-present claim for the first time on appeal.

The Court also noted that it has never directly addressed the proper practice in this situation. Upon reflection, the Court concluded that when a defendant raises a right-to-be-present claim for the first time on appeal, unless that claim can be easily rejected based on the existing record, the case should be remanded to the trial court for a hearing at which the parties have an opportunity to supplement the record with relevant evidence and after which the trial court may make factual findings and issue an order ruling on the claim, which may then be reviewed in a subsequent appeal. Accordingly, the Court vacated the trial court's judgment in part and remanded the case to that court to hold a hearing at which appellant may raise his right-to-be-present claim and the parties may present evidence and argument on the claim, after which the court shall enter an order ruling on the claim.

Voir Dire; Surreptitiously Recorded Conversations

Suggs v. State, S20A1093 (2/15/21)

Appellant was convicted of malice murder and other crimes. Relying on *Lahr v. State*, 239 Ga. 813 (1977), he contended that the trial court erred in denying his pretrial motion to conduct individual voir dire of the prospective jurors one-by-

one or, alternatively, in panels of 12 at a time, thereby forcing him to conduct individual voir dire of all the prospective jurors together. The Court disagreed.

The Court found that the trial transcript showed that the court divided the prospective jurors into groups of 12 and sat them in separate locations in the courtroom for voir dire. After the jury had been selected and the remaining prospective jurors were excused, appellant complained that the court denied him the right to conduct individual voir dire with panels of 12 prospective jurors at a time. The court replied, "You did have that right, sir, you could have done it if you wanted to. They were sitting in panels of 12, if I'm not mistaken. Is that not true? I intentionally sat them in groups of 12," and appellant acknowledged that the jurors were sitting in panels of 12. In its order denying appellant's new trial motion, the trial court stated that appellant "was told that he could question each panel completely before moving to the next panel if he so wished rather than en masse," and found that if appellant questioned all the prospective jurors at one time, "that was a choice he made, not a directive of the court." Thus, the Court concluded, appellant failed to show error.

During the criminal investigation, appellant told the police that after the shooting, he was picked up by an unknown person and driven to his ex-girlfriend's house where he hid in a backyard shed for two full days. However, the police learned, Pridgen, a friend of appellant's, picked appellant up and drove him to Atlanta. Pridgen agreed to go speak with appellant and record him with a device provided by the GBI. Pridgen went to the home of one of appellant's relatives and spoke to appellant, who asked Pridgen what he told the GBI and whether the GBI asked him about a gun. Appellant told Pridgen to contact the GBI and say that he lied about taking appellant to Atlanta after the shooting and that he instead took someone else who had appellant's phone. An audio recording of the conversation was later played for the jury.

Appellant argued that the trial court erred in denying his motion in limine to exclude the audio recording. Appellant relied on OCGA § 16-11-67, which says: "No evidence obtained in a manner which violates any of the provisions of this part [i.e., OCGA §§ 16-11-60 to 16-11-70] shall be admissible in any court of this state except to prove violations of this part." However, the Court found, the provision that governs audio recordings is OCGA § 16-11-62 (1), which says: "It shall be unlawful for . . . [a]ny person in a clandestine manner intentionally to overhear, transmit, or record . . . the private conversation of *another* which shall originate in any private place." (Emphasis added.) It is well established that OCGA § 16-11-62 (1) does not prohibit one party to a conversation from secretly recording or transmitting it without the knowledge or consent of the other party. Thus, the Court concluded, Pridgen did not violate OCGA § 16-11-62 (1) when he made the audio recording of his conversation with appellant.

Cross-Examination; Gang Evidence

Smith v. State, S20A1120 (2/15/20)

Appellant was convicted of felony murder and aggravated assault on two of the victim's family members. The evidence, briefly stated, showed that the victim and his extended family lived next door to appellant. Appellant was out in his yard while the victim and some of his family were out in their yard. Appellant threatened them and then the victim kicked appellant's truck. A physical altercation ensued. The victim's family broke up the fight and, as they began walking back to their house, appellant opened fire, killing the victim.

Appellant contended that the trial court violated his right of confrontation by preventing him from cross-examining members of the victim's family about their alleged involvement in vandalizing his property after the shooting. Appellant argued that cross-examination on this subject was necessary to show the family had a motive—avoiding being viewed by the State as suspects for the vandalism—for testifying favorably for the State. The Court disagreed.

The Court noted that the trial court ruled that cross-examination about the vandalism would be admissible only if appellant could first connect members of the victim's family to the acts of vandalism and present any such evidence outside the presence of the jury. But, appellant never attempted to offer evidence connecting members of the victim's family to the vandalism. He nevertheless speculated that members of the victim's family who testified at trial had a motive to bend their testimony in favor of the State: to avoid being "looked at as . . . suspects" for the vandalism of appellant's property. But without any evidence connecting the victim's family and the vandalism, the Court found that appellant offered nothing more than speculation that the victim's family had a particular motive to testify favorably for the State. Therefore, the Court conclude that the trial court did not abuse its discretion in prohibiting the cross-examination.

Appellant also contended that the trial court erred by not allowing him to inquire into the victim's possible gang affiliation, arguing that the evidence was relevant to his claim of self-defense because it would have shown that his fear of the victim was reasonable. Specifically, the victim had a tattoo of an area code which appellant contended was evidence of the victim's gang affiliation or membership. The trial court ruled that this evidence would be excluded unless the State opened the door to the evidence or unless appellant could offer evidence linking the tattoo to gang membership.

The Court noted that appellant cited no authority for his contention that evidence that the victim was a gang member would have been relevant to his claim of self-defense. But even assuming, arguendo, that his contention was correct, the Court concluded that the trial court did not abuse its discretion. Here, the trial court laid out a process by which appellant could introduce evidence that the victim's tattoo indicated he was a member of a gang, but appellant made no such offer of proof.

Gang Membership; Relevancy

Carston v. State, S20A1157 (2/15/21)

Appellant was convicted of malice murder and related firearm and gang crimes. The evidence showed that appellant, who was 15 years old, was a member of the Bishop Bloods gang. Appellant shot and killed the victim because the victim quit the gang and by killing the victim, appellant would rise in rank in the gang. Appellant contended that the trial court erred by admitting into evidence a video recording of Bishops Bloods members beating the victim. Specifically, he argued, it was not relevant and highly prejudicial because he did not appear in the video. The Court disagreed.

The Court found that the video was relevant and probative to show the existence of the Bishops Bloods gang and, because appellant was sent the video and responded to it on Facebook, it showed appellant's association with the gang. The video also helped to establish appellant's motive to murder the victim. There was evidence that the Bishop Bloods gang had a "blood in, blood out" practice. The video indicated that appellant knew that the victim had been "blood in" with this beating three months before the murder, and supported the State's theory that appellant's killing of the victim served as the "blood out." Thus, the trial court did not abuse its discretion in concluding that the video was relevant.

Nevertheless, appellant argued, the video should have been excluded under OCGA § 24-4-403 ("Rule 403") because its probative value was substantially outweighed by its prejudicial effect. The Court disagreed again. The Court found that the video of the victim's gang "beat in" was highly probative to establish appellant's motive for the murder and its relationship to gang activity. And the video was not *unduly* prejudicial, particularly because appellant himself was not in the video beating the victim. Accordingly, the Court concluded, the trial court did not abuse its discretion in admitting the video.

Search & Seizure; Facebook Accounts

Hurston v. State, S20A1223 (2/15/21)

Appellant was convicted of felony murder and other crimes in connection with the gang-related shooting death of the victim, a rival gang member. Very briefly stated, the evidence showed that appellant, who was then 16 years old, was a member of a gang called "4way." Appellant and 10 members of the gang drove to a park in a caravan of vehicles looking for members of a rival gang. When the rival gang was spotted, shots were fired and appellant was one of the shooters. No one was injured, but one of the vehicles in the caravan was hit by a bullet. To seek revenge for this, the caravan went to the home of a known rival gang member. Appellant and some other members of the 4way gang again opened fire and killed the victim.

Shortly after the shootings, investigators learned through interviews with several witnesses that a person known as "K.J." was involved in the crimes. Five days after the shootings, an investigator obtained a search warrant for a Facebook account that belonged to "John Doe A[K]A 'K.J.'" The search warrant listed the crime of aggravated assault as the basis for the warrant, and an attachment to the warrant described the many things to be seized, which included a wide range of data from the account. The execution of the search warrant revealed Facebook messages between "K.J." and Daniel, appellant's girlfriend, which led investigators to interview Daniel. During the interview, she identified K.J. as appellant, and he was later located and arrested.

Appellant contended that his trial counsel rendered ineffective assistance by failing to obtain a ruling on his motion to suppress evidence derived from a search warrant for appellant's Facebook account. At trial, the court admitted several items of evidence collected as a result of the search warrant for appellant's Facebook account, including the messages between appellant and another gang member about a TEC and pistol on the day of the shootings; messages and photos related to the evidence admitted under OCGA § 24-4-404 (b) showing that appellant asked to borrow a gun to shoot up a house about three months before the murder; and other messages and photos linking appellant to the 4way gang.

Relying on *United States v. Blake*, 868 F3d 960 (11th Cir. 2017), appellant argued that all the evidence garnered from the search warrant should have been suppressed because the warrant was overbroad and therefore violated the Fourth Amendment's particularity requirement. Specifically, he argued that the warrant improperly required the disclosure of virtually all of his Facebook data without the data being limited to the date of the aggravated assault that served as the basis for the warrant. The Court disagreed.

The Court stated that Eleventh Circuit holdings, even on federal law questions, are not binding on Georgia courts. And in any event, *Blake* did not involve circumstances like this case, where a murder suspect's identity and location were unknown to investigators at the time the search warrant was issued. The Court also noted that appellant failed to cite, and the Court did not find, any United States Supreme Court or Georgia appellate precedent that clearly holds that a search warrant requesting a wide range of data from a defendant's social media account violates the Fourth Amendment under these circumstances. Thus, given the lack of binding appellate precedent on this issue, appellant did not carry his burden of showing that his trial counsel's failure to press for a ruling on the particularity of the Facebook search warrant was patently unreasonable, and consequently, his claim failed.

Expert Testimony; *Brady* Violations

Harris v. State, A20A1795 (1/28/21)

Appellant was convicted of rape, child molestation, and false imprisonment. Appellant contended that the trial court erred in allowing a detective — who was not qualified as an expert — to offer expert testimony. During trial, the detective testified that he asked the victim's mother to take the victim to a children's hospital for a specialized medical exam. But the mother took the child to a local doctor instead, and no medical personnel testified at trial. The prosecutor asked the detective: "Based on your experience in sexual assault investigations, is there normally DNA in these cases?" Appellant objected on the basis that medical expertise was required to answer the question. The trial court overruled the objection "to the extent" that the detective had experience, and the detective responded: "In cases where we are within [sic] the 72-hour window, it's rare that we get . . . DNA. Oftentimes, it may be just epithelial or cell DNA. Nothing like the kind that you probably hear about, the sperm or anything like that." The detective was then asked about injuries, and he said injuries were "also something we don't see too often, believe it or not, because of the tissue that is down there[;] it heals rapidly." Again, appellant objected that the detective was offering medical testimony, but the court permitted the testimony to stand.

The Court stated that it has consistently held that a police officer may give opinion testimony regarding his observations if an adequate foundation is laid with respect to his experience and training, even if he is not formally tendered as an expert. Here, the detective testified that he had years of experience as an investigator with the special victims unit dealing with child exploitation, and he testified regarding the procedures employed in investigating child exploitation cases. The questions posed to him pertained to the types of evidence normally collected in prosecuting sex crimes against children. The detective was thus authorized to testify that it was common to have no DNA evidence and for child victims of sex crimes to have no physical injury. And, even if the detective crossed a line into offering medical evidence when he testified that "tissue down there . . . rapidly heals[,]" any error was harmless because the detective was permitted to testify that child molestation victims often had no physical injury. Thus, the Court found, it was highly unlikely that the detective' additional statement regarding the reason for the lack of physical injury contributed to the verdict.

Appellant also argued that that the trial court was required under *Brady v. Maryland* to declare a mistrial based upon the State's failure to provide exculpatory evidence. The record showed that during closing argument, the prosecutor argued that the victim's younger sister had been interviewed, but she did not know anything. The State had not previously disclosed to appellant that the sister had been interviewed. Appellant contended that this evidence was exculpatory because

the victim had said her sister saw him remove the victim's underwear and therefore, the evidence could have been used to impeach the victim's testimony.

The Court stated that to prevail on a *Brady* claim, it must be shown that the State possessed evidence favorable to the defendant, that he did not possess the evidence and could not obtain it himself with reasonable diligence, that the State suppressed the favorable evidence, and that, if the evidence had been disclosed to him, a reasonable probability existed that the outcome of the proceeding would have been different.

And here, the Court found, appellant was unable to meet this burden. Appellant knew that the victim's allegations involved acts of molestation in a room the victim shared with her sister, and the sister had been listed as a potential witness at trial. Nothing prevented appellant from interviewing the sister to ascertain what — if anything — she knew. The fact that the State did not call the sister to testify suggested that the sister knew nothing about the alleged abuse. Thus, where, as here, appellant could have discovered the alleged impeachment evidence through the exercise of due diligence, he has shown no *Brady* violation.

Furthermore, because the State disclosed the information during closing argument, this was not a case in which the evidence was suppressed or in which the jury was unaware of evidence. Consequently, appellant failed to show how the disclosure of the information before trial would have resulted in a different result.

Finally, appellant did not show that he was prejudiced by the State's failure to disclose the evidence sooner. The sister was only five years old when the molestation took place. She may have seen appellant remove the victim's underwear and not recognized the act as sinister. Indeed, the victim testified that she attempted to shield her sister from the abuse in order to protect her. Therefore, the Court concluded, although there was a possibility that the sister's statement may have undermined the victim's credibility, the mere possibility that the evidence might have aided the defense is not sufficient to establish a *Brady* violation.

Judicial Commentary; Motions for Mistrial

Appellant v. State, A20A2009 (2/1/21)

Appellant was convicted of two counts of aggravated sodomy, three counts of aggravated child molestation, two counts of child molestation, and two counts of enticing a child for indecent purposes. He argued that the trial court committed plain error by making an improper reference to his appellate rights during its introductory statements to the jury venire. The Court disagreed.

The record showed that as part of its orientation of the jury venire, the trial court warned those assembled to not independently investigate any facts or visit any scenes depicted in the evidence. The court then mentioned a situation that occurred in a trial in another county in the circuit in which a juror had violated this warning and ended his example by stating, "And, of course, *when it went up on appeal, the [appellate] [c]ourt had to go over it with a fine tooth comb to see what they thought about it.* So it puts everything at risk when that kind of thing is being done." (Emphasis supplied.)

The Court stated that as a general rule, it is error for a trial judge in any criminal case to express or intimate an opinion as to the guilt of the accused. A trial judge's comment concerning the process or availability of appellate review in the case may run afoul of this rule if the jury may infer from the comment that the judge holds an opinion about the defendant's guilt. However, it is not error when the trial court references the appellate courts in a context that does not intimate that the judge holds an opinion on the defendant's guilt or lessen the jury's responsibility in making its decision. And here, the Court found, the trial court's statements were in the context of juror orientation at the start of the trial when no evidence had been adduced and opening statements had not yet been held. None of the trial court's statements even remotely referenced appellant generally or specifically and included no reference to any evidence that may be introduced against appellant. As a result, the Court concluded that the trial court's reference to appellate courts generally did not require reversal.

Appellant also argued that the trial court erred in denying his motion for mistrial after an expert witness testified to the ultimate issue in the case and invaded the province of the jury. The Court again disagreed. The record showed that after the comment was made by the witness, appellant's counsel objected, and a bench conference was held. Appellant's counsel moved for a mistrial and the State argued for a curative instruction. Ultimately, defense counsel and the State agreed to a proposed curative instruction "with the understanding that it's not waiving the original motion for mistrial[.]"

The Court stated that where a defendant objects and moves for mistrial and the trial court denies the motion but takes some corrective action, if the defendant is dissatisfied with that action, he must renew the objection or motion. And here, the Court found, despite his initial motion for a mistrial, appellant's counsel participated in drafting the curative instruction which the trial court ultimately delivered. Thereafter, appellant's counsel did not renew his motion for a mistrial or object to the trial court's curative instruction. Accordingly, the Court concluded that appellant had waived any appellate review of this argument.