

THIS WEEK:

- Appeals; Transcripts
- Notices of Appeal; Timeliness
- Extrinsic Evidence; In Camera Inspections
- Ineffective Assistance of Counsel; Continuing Witness Rule
- Motion for New Trial on General Grounds; Ineffective Assistance of Counsel
- Waiver of Counsel; Post-Waiver Request for Counsel
- Jury Charges; Sentencing

Appeals; Transcripts

Norman v. State, A20A1995 (3/1/21)

Appellant was convicted of leaving the scene of an accident. Following the denial of her motion for new trial, her counsel filed a notice of appeal, which stated that “[t]he Clerk will transmit to the Clerk of the Court of Appeals the entire record of the case, and not omit any portion of the record and transcript, including the transcript of the hearing on the amended motion for new trial in this case.” Counsel, however, did not make any request for the transcript directly with the court reporter. Over a year later, in September 2019, the trial court sua sponte scheduled a hearing on October 24, 2019, to consider whether the appeal should be dismissed because a transcript of the motion for new trial hearing had not been prepared or filed. After the hearing, the trial court entered an order dismissing appellant's appeal. The trial court found that the delay in the filing of the hearing transcript was caused by her counsel and that the delay was prima facie unreasonable and inexcusable.

The Court noted that OCGA § 5-6-42 provides that a transcript must be filed within 30 days after the filing of a notice of appeal unless an extension of time is requested as provided by OCGA § 5-6-39. The trial court may, after notice and hearing, order an appeal dismissed for a party's failure to file a transcript on time only if the delay was (1) unreasonable, (2) inexcusable, and (3) caused by such party. OCGA § 5-6-48. The Court found that at the hearing, counsel provided no evidence to establish that the delay was justified. Instead, counsel maintained that because he stated in the notice of appeal that the transcript was to be included in the record, he assumed that the trial court or the clerk's office would have notified the court reporter. He further argued that he was not at fault because he never told the court reporter not to prepare the transcript. But, the Court stated, while counsel is not responsible for any delays caused by a court reporter or the clerk's office, it was his duty to properly request the transcript in a timely manner and appellant bears the responsibility for timely filing the transcript.

Nevertheless, appellant argued, because of her indigency, the ultimate responsibility for the production of the transcript was on the court, not her. The Court disagreed. OCGA § 5-6-42 does not distinguish between indigent and non-indigent defendants. The fact that appellant is indigent, and therefore entitled to a transcript at public expense, does not relieve her

of the obligation to properly request the transcript and cause it to be filed. Accordingly, the Court concluded, because appellant's counsel failed to properly request the transcript, and conceded that he did not communicate about the status of the case with the trial court, the State, the clerk's office, or the court reporter for more than a year after filing her notice of appeal, the trial court's dismissal of her appeal was not an abuse of discretion.

Notices of Appeal; Timeliness

Bowman v. State, A20A1930 (3/1/21)

In January 2018, appellant pled guilty to home invasion and other crimes. On May 2, 2019, appellant filed a pro se "Motion For Pro Bono Attorney." Before the trial court ruled on that motion, he filed another motion on June 7, 2019, captioned as a "Motion to Vacate Void Sentence and Grant a Hearing to Withdraw Plea, and Motion for Pro Bono Counsel." On July 16, 2019, the trial court issued an order denying appellant's May 2, 2019 motion for pro bono attorney. Approximately four months later, on November 15, 2019, appellant filed a notice of appeal indicating he was appealing from the judgment denying his motion to vacate void sentence and pro bono attorney entered on July 16, 2019. However, a written order on his June 7, 2019 motion was not entered until May 26, 2020, after appellant filed his November 2019 notice of appeal. The May 26, 2020 order was entitled, "Order Denying Defendant's Motion to Vacate Void Sentence and for Pro Bono Counsel and Order Dismissing Motion to Grant a Hearing to Withdraw Plea."

The State moved to dismiss the appeal because the appeal was untimely. The Court disagreed.

Here, appellant's November 15, 2019 notice of appeal was untimely filed 122 days after the July 16, 2019 order denying his motion for counsel. However, even though appellant's November 15, 2019 notice of appeal indicated he was appealing from the July 16, 2019 order, it also indicated that he was appealing from the denial of his "motion to vacate void sentence [and] pro bono [attorney.]" That motion was still pending in the trial court at the time appellant filed his notice of appeal. An order on that motion was not entered until May 26, 2020.

The Court noted that it is the public policy of this State to consider cases on the merits whenever possible. The Court also noted that the concept of a notice of appeal ripening is well established in the context of appeals from criminal convictions and motions for new trial. Thus, based on the broad applicability of the ripening doctrine and the mandate to liberally construe statutes so as to bring about a decision on the merits of a case whenever possible, the Court concluded that appellant's notice of appeal ripened when the trial court entered its May 26, 2020 order denying his motion to vacate a void sentence, for a hearing, and for a pro bono attorney. Accordingly, the appeal was timely and the State's motion to dismiss was denied.

Nevertheless, after a review of appellant's brief, the Court stated that under its rules, "[a]ny enumeration of error that is not supported in the brief by citation of authority or argument may be deemed abandoned." Court of Appeals Rule 25 (c) (2). And here, the Court found, appellant's brief was wholly inadequate and his failure to comply with the Court's rules precluded it from ascertaining his arguments or determining whether the trial court ruled on and considered them below. His arguments were thus deemed abandoned pursuant to Court of Appeals Rule 25 (c) (2). Accordingly, the Court affirmed the judgment of the trial court.

Extrinsic Evidence; In Camera Inspections

Hartman v. State, A20A1911 (3/3/21)

Appellant was convicted of rape and aggravated sodomy. The evidence, briefly stated, showed that appellant (using the name “Zach Anderson”) met the victim through an online dating service. They met at a bar and when the victim went to use the restroom, appellant put something in her drink. The victim did not remember leaving the bar and the next memory she had was waking up suddenly and scared on the doorstep of her condominium in the middle of the night. She also had bleeding from her vagina and rectum.

At trial, the State offered extrinsic act testimony from six women who met appellant (posing as “Zach Anderson”) through internet dating websites. Two of the women (A. H. and K. C.) asserted that appellant had expressed a desire to have sexual intercourse with a sleeping, immobile woman, and he asked each to help him fulfill that fantasy. Appellant also asked A. H. and K. C. to engage in anal sex with him. In addition, four other women (S. F., E. P., A. B., and K. N.) alleged that appellant had drugged and/or sexually assaulted them. Appellant contended that the trial court erred in allowing this evidence.

The Court noted that trial court admitted evidence of appellant’s interactions with A. H. and K.C. for the limited purpose of showing motive pursuant to Rule 404 (b). Overall similarity between the charged crime and the extrinsic act need not be shown when the act is presented to prove motive. And here, the Court found, the trial court was authorized to find such evidence relevant to appellant’s motive to (1) arrange a date with J. L. under false pretenses; (2) incapacitate her; and (3) engage in vaginal and anal intercourse with her while she was incapacitated. Moreover, given the victim’s memory lapse as well as defense counsel’s extensive attacks on her credibility, the motive evidence provided by A. H. and K. C. was highly important to the State’s case. Specifically, it helped explain why — according to the State — appellant acted as he did. Thus, the Court found, the trial did not abuse its discretion in admitting the evidence relating to A. H. and K. C. under Rule 404 (b) and Rule 403.

Appellant also contended that the trial court erred in admitting the evidence involving S. F., E. P., A. B., and K. N. under OCGA § 24-4-413 (a). Specifically, as to the allegations raised by E. P. and A. B., appellant contended that they did not involve a sexual assault. However, the Court stated, the trial court was not required to make a preliminary determination that a sexual assault actually occurred before admitting the evidence. The key question was whether a jury could find by a preponderance of the evidence that the defendant committed another sexual assault. And here, the Court found, after reviewing the allegations, a jury could make such a finding.

As to the allegation of S. F. and K. N., appellant did not question whether they rose to the level of sexual assault. Instead, he argued that the probative value of this evidence was outweighed by the risk of undue prejudice, confusion of the issues, or misleading of the jury, requiring its exclusion under Rule 403. The Court disagreed. Here, the evidence shows that the victim could not remember what happened to her after she left the restaurant, creating a need for circumstantial evidence. And appellant vigorously challenged the victim’s veracity. Under these circumstances, the trial court, which instructed the jury about the limited nature of the Rule 413 evidence, did not abuse its discretion in finding that the probative value of the evidence outweighed any risk of undue prejudice, confusion, or misleading of the jury.

Well after appellant's trial concluded, post-conviction counsel requested that the trial court examine the victim's psychiatric records in camera and provide the defense with any relevant, non-privileged information that might impeach or call into question the victim's credibility. The trial court reviewed the records, but did not turn any evidence over to appellant, evidently finding nothing exculpatory in the material.

Appellant argued the trial court erred because he "believes" exculpatory evidence exists and that the Court should review the sealed records on appeal. According to appellant, he requested access to the victim's psychiatric information "to determine whether [trial counsel] was ineffective for failing to procure and use these records" at trial. Appellant, however, did not allege on appeal that counsel was ineffective for this reason, and he failed to explain how these records would help him at this stage. More importantly, the Court stated, it will not review an in camera inspection conducted by the trial court based on speculation that there might be additional material which should have been found and produced for the defense. The trial court's discretionary ruling after an in camera inspection that all exculpatory material, if any, has been produced establishes that as a fact absent a countershooting. And here, the Court found, appellant failed to meet this requirement, relying solely on speculation about what *might* be in the psychiatric records. Accordingly, the Court concluded, appellant failed to show that the trial court erred.

Ineffective Assistance of Counsel; Continuing Witness Rule

Pattarozzi v. State, A20A1994 (3/3/21)

Appellant was convicted of two counts of failure to register as a sex offender. The evidence introduced by the State at trial included an annual verification form sent to appellant notifying him that he was due to re-register with the county sheriff's office within 72 hours prior to his September 21 birthday (exhibit 3); a Georgia sex offender registration notification form with a checklist initialed and signed by appellant (exhibit 4); the warrant for appellant's arrest (exhibit 5); and the change of employment information form that appellant completed on December 31, 2018 (exhibit 6). The affidavit supporting the arrest warrant included the following statement: "Subject is registered at the listed address and has not been located there in over 72 hours. Subject was located by Colorado DOC parole [division] to be residing at 1362 Wolff Street, Denver, CO 80204. Subject failed to [register] this address."

Appellant argued that his trial counsel rendered ineffective assistance because he failed to object to exhibits 3, 4, 5, and 6 going out with the jury in violation of the continuing witness rule. The Court stated that the continuing witness rule prohibits writings from going out with the jury when the evidentiary value of such writings depends on the credibility of the maker. Documents that are prohibited by the continuing witness rule from going out with the jury include answers to written interrogatories, written dying declarations, and signed statements of guilt. These documents, which generally contain their makers' assertions of purported truths, are ascribed evidentiary value only to the extent that their makers are credible. On the other hand, the continuing witness rule is inapplicable where the document at issue is original documentary evidence or where the document is non-testimonial in nature because it was not a reduction of or substitute for a person's oral statements or testimony.

The Court noted that at the motion for new trial hearing, trial counsel testified that he was familiar with the continuing witness rule, and that he believed the exhibits at issue, except possibly the arrest warrant, did not violate the continuing witness rule. The Court agreed with trial counsel that exhibits 3, 4, and 6 were not testimonial in nature, and the continuing witness rule was not violated by the jury's possession of these documents during their deliberations. Therefore, because the

trial court properly would have overruled a continuing witness objection, trial counsel was not deficient for failing to raise such an objection, and thus was not ineffective.

Furthermore, premitting whether exhibit 5, the arrest warrant, was testimonial in nature and therefore subject to the continuing witness rule, appellant's trial counsel testified that his decision not to object to the arrest warrant going to the jury "was strategic because my whole argument to the jury . . . was that there was this total lack of evidence, that they heard a rumor that he was in Colorado, checked his house one time and issued a warrant the next morning."

Nevertheless, appellant argued, allowing the arrest warrant to go out with the jury was not a reasonable strategy because it was inconsistent with trial counsel's strategy before and during trial, which included filing a motion in limine to exclude hearsay statements made by "certain persons in Colorado" and objecting to the same statements at trial. However, the Court stated, even assuming trial counsel's decision to allow the arrest warrant to go out with the jury constituted a change in strategy, a decision to change strategy during trial is not necessarily unreasonable. Furthermore, appellant's counsel was not asked about any inconsistency between his decision to challenge hearsay statements made by "certain persons in Colorado" and his decision not to object to the arrest warrant going out with the jury. Consequently, the Court concluded, appellant failed to demonstrate that his trial counsel's performance was deficient.

Motion for New Trial on General Grounds; Ineffective Assistance of Counsel

Bernal v. State, A20A1648 (3/4/21)

Appellant was convicted of rape, child molestation and terroristic threats. The record showed that the judge who presided over the trial retired before the hearing for appellant's motion for new trial, at which the successor judge presided. During the motion for new trial hearing, the successor judge cited OCGA §§ 5-5-20 and 5-5-21 and stated that "it would be inappropriate for this Court to make a ruling sitting as a 13th juror. Because this Court did not conduct the trial, this Court cannot rule on the credibility of the witnesses nor consider . . . the conflicts in the testimony of the witnesses at trial, because I was not the Trial Judge. So I'm not going to consider that ground. I think it would be inappropriate and it would be unfair." However, the successor judge reviewed the trial transcripts and concluded that the jury's verdict was not "contrary to law" and that "[t]here was substantial evidence to support" the verdict. Moreover, the successor judge concluded that "a rational trier of fact could find [appellant] guilty beyond a reasonable doubt of the crimes for which he was charged." As a result, the successor judge denied the motion for new trial as amended.

Appellant contended that the successor judge erred in failing to properly apply OCGA §§ 5-5-20 and 5-5-21. The Court agreed. The Court stated that it is true that where, as here, the judge who hears the motion for a new trial is not the same judge as the one who presided over the original trial, the discretion of the successor judge is narrower in scope. However, after a thorough review of the case, even a successor judge may exercise a significant discretion to grant a new trial on the general grounds. Therefore, since the successor judge specifically rejected any notion that he could exercise discretion in evaluating appellant's general grounds argument, he erred. Accordingly, the Court vacated that portion of the trial court's order denying appellant's motion for new trial on the "general grounds" and remanded the case to the trial court to allow it to exercise its discretion in manner consistent with OCGA §§ 5-5-20 and 5-5-21.

Appellant also argued that he received ineffective assistance of counsel due to counsel's failure to advise him of his right to present evidence at sentencing. However, the Court stated, in view of its decision regarding appellant's motion for new trial, the Court did not need to consider his argument at this time. Nevertheless, after review, the Court affirmed the remainder of the trial court's order on appellant's motion for new trial.

Waiver of Counsel; Post-Waiver Request for Counsel

Wright v. State, A20A1998 (3/8/21)

Appellant was convicted of aggravated assault and family violence battery. Prior to trial, appellant, who had filed numerous pro se motions, maintained that he did not wish to be represented by the public defender, and his attorney filed a motion to withdraw, which the trial court granted. On the first day of trial during jury voir dire, however, appellant and the court had a discussion regarding motions, during which appellant stated, "I got a right to an attorney. Still got a right to an attorney." Voir dire continued, and after recess for lunch, appellant filed a motion for a mental evaluation in which he also requested that the public defender be appointed as his attorney. The transcript of the proceedings does not show that the trial court ruled on this request, and appellant did not make any further request for an attorney.

Appellant contended that the trial court wrongfully denied counsel after he made a post-waiver request for counsel. The Court agreed. Assuming a defendant's waiver of his right to counsel is proper, that right, once waived, is no longer absolute. The right to counsel, however, does not evaporate following a valid waiver, and a defendant may make a post-waiver request for counsel if, for example, he discovers he is overwhelmed by the trial process. Whether to grant or deny a defendant's post-waiver request for counsel is within the broad discretion of the trial court. In considering a post-waiver request for counsel, a trial court may consider, among other things, the timing of the request. As the trial date draws nearer, the trial court can and should consider the practical concerns of managing its docket and the impact that a request may have on its general responsibilities for the prudent administration of justice. The possibility of a disruption of trial proceedings may be diminished, however, if a defendant has had standby counsel and requests that the standby counsel represent him. If an examination of the record reveals that a trial court has abused its discretion in denying a post-waiver request for counsel during trial, it is a structural Sixth Amendment violation, and is not subject to a harmless error analysis on direct appeal. And here, the Court found, appellant made a post-waiver request for counsel during voir dire when he stated, "I got a right to an attorney. Still got a right to an attorney."

Nevertheless, the State argued, this statement was not sufficient to constitute a post-waiver request for counsel. The Court stated that considering this statement alone, it might have agreed with this conclusion; however, the Court found, the same day as this oral request, appellant filed a handwritten "notice" with the trial court, which was accepted and bears the trial judge's signature. The document was styled a "Notice of Intent of Defense to Raise Issue of Insanity or Mental Incompetence." In the notice, appellant stated that he was giving notice that he intended to seek an insanity defense, requested "an evaluation," and asked for "Mr. Frankie W. Hicks to be appointed as counsel." The request was filed with the court after a continuance for lunch. At that time, voir dire (during which appellant had made the oral request) and opening statements were completed, and the State's first witness had testified. The State would go on to call 12 more witnesses after the notice was filed. Nevertheless, there was no indication that the trial court ruled on appellant's written or oral request for reappointment of counsel.

The Court further stated that it was not unmindful that appellant was antagonistic toward his appointed attorneys prior to trial and during post-trial proceeding, and he filed multiple pro se motions prior to trial. Nevertheless, the failure to appoint counsel post-waiver may constitute structural error, which can never be harmless, and a trial court's failure to exercise its discretion is in itself an abuse of discretion. Thus, although appellant did not request a ruling on his written motion for reappointment for counsel, it was the second request for reappointment made by appellant at that point. Consequently, considering that most of the trial remained to be conducted, the trial court's failure to consider and rule on the motion was error. Accordingly, appellant's convictions were reversed.

Jury Charges; Sentencing

Seals v. State, A20A1955 (3/8/21)

Appellant was convicted of stalking and attempting to influence a witness. He contended that the trial court violated his due process rights by instructing the jury with the statutory definition of attempt to influence a witness instead of giving a charge that tracked the indictment. The Court disagreed.

The Court stated that due process requires that, in criminal cases, jury instructions must be tailored to fit the allegations in the indictment and the evidence admitted at trial. If a jury charge recites the entire definition of a crime and the indictment does not, there is a reasonable probability that the deviation violated the accused's due process rights by resulting in a conviction of a crime committed in a manner not charged in the indictment. Thus, the Court noted, it has reversed convictions where the indictment specified that the offense was committed one way and the court charged the jury that it could be committed in two ways without giving a limiting instruction.

Here, the Court noted, the indictment alleged that appellant, with intent to deter the victim from testifying freely against him, "communicate[d] a threat of injury to the person of [the victim.], by threatening to kill her if she testified against him." But the trial court gave the jury the statutory definition of OCGA § 16-10-93 (a): "A person who, with intent to deter a witness from testifying freely, fully[,] and truthfully to any matter pending in court or before a grand jury communicates, directly or indirectly, to such witness any threat of injury or damage to the person of the witness, shall be guilty of influencing a witness."

The Court stated that if the indictment charges a defendant committed an offense by one method, it is reversible error for the court to instruct the jury that the offense could be committed by other statutory methods with no limiting instruction. The defect is cured, however, if the court provides the jury with the indictment and instructs jurors that the burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt.

And here, the Court found that the trial court read the indictment to the jury, instructed that the State had the burden "to prove every material allegation of the indictment" beyond a reasonable doubt," charged the jury that it could only convict appellant if it found beyond a reasonable doubt that he committed the charged offenses "as alleged in the indictment," and sent the indictment back with the jury during deliberations. Under these circumstances, the trial court's curative and limiting instructions, coupled with providing the jury with the indictment, fairly instructed jurors that they could convict appellant of attempt to influence a witness only as charged in the indictment.

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 30, 2021

Issue 18-21

Appellant also argued that the trial court erred by sentencing him to serve five years for attempting to influence a witness. The State and Court agreed. The indictment tracked the language of OCGA § 16-10-93 (a), and the trial court instructed the jury on the influencing a witness charge by reading the language of OCGA § 16-10-93 (a). The sentencing range for influencing a witness in violation of OCGA § 16-10-93 (a) is one to five years, and a conviction for attempt allows for half of the sentencing range. Therefore, the range for this charge was one to two- and-a-half years. Accordingly, the Court vacated appellant's sentence and remanded the case for resentencing.

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