

THIS WEEK:

- Right to Counsel; Right to a Fair Trial
- Voir Dire; *Batson*
- Cross-Examination; Prior Consistent Statements
- Probation Revocations; Right to Counsel
- Capacity to be Sued: Municipal Police Departments
- Motions to Withdraw Pleas; Ineffective Assistance of Counsel
- Search Warrants; Confidential Informants

Right to Counsel; Right to a Fair Trial

Dukes v. State, A21A1074 (8/23/21)

Appellant was convicted of criminal attempt to commit murder, kidnapping with bodily injury, and other offenses. Appellant argued that because of a conflict with trial counsel, counsel should have been disqualified from representing him. Specifically, he contended that because “counsel called him a liar in open court,” both counsel and the trial court should have disqualified counsel from further representing him.

The Court noted that although appellant's brief did not explain the reason for his dissatisfaction with trial counsel, he did point to a discussion in the transcript between counsel and the trial court regarding discovery, complaining that he did not have an opportunity to review discovery provided by the State in his case. Trial counsel denied those claims and stated that he provided copies of the discovery to appellant well in advance of trial and reviewed the State's evidence with him in person, discussing trial strategy and potential defenses.

Thus, the Court found, while the record certainly reflected that there was some disagreement between appellant and trial counsel, the trial court was authorized to conclude that appellant's request for a change of counsel was a delay tactic. Appellant did not point to a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between counsel and client that would require dismissal of appointed counsel. The Sixth Amendment guarantees effective assistance of counsel, not preferred counsel or counsel with whom a meaningful relationship can be established. The record indicated that trial counsel represented appellant for approximately 13 months prior to trial but that appellant did not attempt to retain new counsel until after the case was set for trial. Further, the trial court was authorized to believe trial counsel's representations regarding their communication and preparation over appellant's allegations. Accordingly, the Court found this argument was without merit.

Appellant also argued that he was denied a fair trial because he was improperly placed in solitary confinement. The record showed that during jury selection, the State alleged appellant had communicated with a person outside of the jail in an attempt to influence a witness or witnesses in the case, and the State requested that appellant be held in solitary confinement

while at the detention center. Based on those allegations, the court granted the State's motion and ordered that appellant was to have no phone privileges.

The Court noted that once again appellant's brief did not offer any reasoned analysis in support of his argument or otherwise explain how being placed in solitary confinement while at the detention center adversely impacted his right to a fair trial. Appellant did not argue or otherwise identify anywhere in the record where he was denied access to his attorney or legal documents or otherwise denied meaningful access to the courts.

Finally, in addition to being placed in solitary confinement at the detention center, appellant was also absent from the courtroom during various stages of the proceedings; he was held in a holding cell at the courthouse, equipped with audio such that he could hear the proceedings in the courtroom as they were happening. The Court stated that while a criminal defendant has a right to be present during all critical stages of the proceedings, that right belongs to the defendant, and he is free to relinquish it if he so chooses. And here, the Court found, after being instructed of his right to be present, appellant repeatedly announced in open court, during the course of the trial and in the presence of counsel, that he did not want to sit with counsel in the courtroom and elected to sit in a holding cell at the courthouse during the proceedings. Thus, the Court held, to the extent that appellant can be understood to be challenging his absence from the courtroom, he voluntarily waived his right to be present during his trial.

Voir Dire; Batson

Reese v. State, A21A1109 (8/24/21)

Appellant was convicted of rape. The record showed of the 33 prospective jurors who comprised the venire, there were 12 African-Americans and 21 Caucasians. During jury selection, the State used 8 of its 10 peremptory strikes to remove African-Americans from the venire and 7 out of 10 peremptory strikes to remove females from the venire. After appellant made his *Batson* challenge as to race and gender, the trial court agreed that appellant had made a prima facie showing of racial discrimination in the use of the State's peremptory strikes, but did not agree that appellant had made a prima facie showing of gender discrimination.

The State gave the following explanations for its strikes of the prospective African-American jurors: (a) Juror No 1 made statements that she would judge a defendant based on appearance alone; (b) Juror No. 5 stated that she believes that a victim assumes partial blame for an assault if it occurred while the victim was intoxicated, and that she could not understand why a victim of a crime would delay reporting it to the police; (c) Juror No. 8 was an older and very religious woman who would negatively judge a young female who went downtown to consume alcohol; (d) Juror No 11's husband had been convicted of murder by the DA's Office and the juror also had a relative accused of sexual assault; (e) Juror No. 20's brother had been recently accused of statutory rape and because he believed he had been racially profiled by county law enforcement officers; (f) Juror No. 23 believed she and her brother in separate instances had been racially profiled and she also expressed a belief that victims that consume alcohol in excess are partially to blame for sexual assault; (g) Juror No. 27 had been on a jury in a rape case in which no verdict had been reached, she had a previous DUI, and her brother had a previous arrest; and (h) Juror No. 28 did not believe her own daughter's rape outcry, her brother was a registered sex offender, and she believed that alcohol consumption could be a reason why a woman could become a victim of sexual assault.

Here, the Court agreed with the trial court that the State's explanations for striking these jurors were facially race-neutral and therefore, they satisfied the second prong of the *Batson* analysis.

Nevertheless, appellant argued, the trial court failed to complete the third step of the *Batson* analysis because it failed to make an express finding as to whether purposeful discrimination was shown. But, the Court found, a careful review of the record revealed that the trial court did not simply stop at step two of the *Batson* inquiry, but implicitly engaged in the third step. For each of the African-American jurors struck from the venire, the prosecution gave an ostensibly race-neutral explanation for the strike, which completed the second *Batson* step. The trial court then heard arguments from the defense about why the prosecutor's explanation was inadequate as to each juror. After hearing from both the prosecution and the defense, the trial court made its own findings (for each juror separately) about why it believed the prosecution's explanation was "race neutral," citing its own observations of the voir dire process and the jurors' demeanor. Only after hearing from both sides and laying out its own findings on the matter did the trial court deny the *Batson* challenge as to each juror. Thus, although the trial court used the term "race neutral" in its ultimate findings — a term usually employed in connection with the second *Batson* step — the record indicated that the court in fact assessed the totality of the circumstances and found no discriminatory intent in the State's use of the peremptory strikes, thereby completing the *Batson* inquiry.

Finally, the Court found unpersuasive appellant's argument that the trial court erred in conducting the third step of the *Batson* analysis because the State struck African-American jurors while allowing similarly situated white jurors to remain. Appellant pointed to several white prospective jurors who indicated that they believed that being intoxicated is not an excuse for failing to contact law enforcement if a crime is committed against you. However, the Court found, the State set forth a race-neutral reason for striking the African-American prospective jurors who expressed similar beliefs that did not apply to the non-African American prospective jurors: Juror No. 5 did not drink alcohol, Juror Nos. 20 and 23 expressed that they believed they had experienced racial profiling by law enforcement in the past, and Juror No. 28 was related to a registered sex offender and did not believe her daughter's rape outcry.

Cross-Examination; Prior Consistent Statements

Watkins v. State, A21A1126 (8/27/21)

Appellant was convicted of aggravated battery. He argued that the trial court erred by limiting his questioning of a police officer regarding whether the victim had told him that "meth made him do crazy things." However, the Court found, earlier in the trial the victim admitted that he had previously told police officers that he acted "crazy" while under the influence of methamphetamine. As such, it was a prior consistent statement.

The Court stated that a prior consistent statement will be admissible only if: (1) the witness' credibility has been attacked, by some means other than impeachment by evidence of character or prior convictions; and (2) the prior statement logically rebuts that attack. Further, if the attack is by a charge of recent fabrication or improper influence or motive, a prior statement may logically rebut the attack only if it was made before the alleged fabrication, influence, or motive came about.

And here, the Court found, the record revealed that while the victim's credibility was attacked, the prior consistent statement did not logically rebut that attack. Specifically, the victim admitted to the very statement at trial, and no other

evidence was introduced to show that methamphetamine did not make the victim “crazy.” As such, the trial court did not abuse its discretion by holding that the prior consistent statement was inadmissible.

Appellant also argued that the trial court erred by limiting his cross-examination of the victim regarding potential bias. The Court noted that while on cross-examination, defense counsel asked the victim questions about his prior arrest “for meth,” and the victim responded that he was on probation. Defense counsel then asked: “Are you concerned that ... since the State is asking you to testify, that might have an effect on your probation?” The State objected, and the trial court sustained the objection.

The Court stated that a defendant must be allowed to cross-examine a witness about punishment that the witness may have avoided as a result of a deal with the State for his testimony in the prosecution of the defendant. While a trial court has discretion in limiting cross-examination, the trial court abuses its discretion and commits error when it cuts off all inquiry on a subject on which the defense is entitled to reasonable cross-examination. However, trial courts retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

And here, the Court found, the victim was questioned regarding his incarceration for a different offense at time of the trial, and the victim agreed when asked on cross-examination: “when you're talking - - when you're answering these questions and everything, in the back of your mind, you understand that they have you in custody right now?” The victim also agreed that he did not want to be in custody anymore. Further, appellant failed to present any evidence of a deal or potential deal between the victim and the State for his statement or testimony. Thus, the Court concluded, the trial court did not cut off all inquiry into the possible bias of the victim, but rather allowed the cross-examination to proceed while limiting the inquiry into whether he believed his testimony might impact his probation. Therefore, the Court held, the trial court did not abuse its discretion in the limitation of the cross-examination of the victim.

Probation Revocations; Right to Counsel

Torregano v. State, A21A0809 (8/30/21)

The Court granted appellant’s petition for discretionary review to determine if the trial court unconstitutionally deprived appellant of the right to counsel at appellant’s probation revocation hearing.

The record showed that appellant initially elected to appear pro se, but when the trial court inquired as to a public defender, appellant stated that he fired his last public defender but was hoping to get a new public defender to represent him. He was essentially told that he did not get to choose his lawyer unless he could afford one and since he fired his public defender, he had to appear pro se.

The Court stated that there is no Sixth Amendment right to counsel at a revocation proceeding. Instead, a probationer has only a more limited due process right to counsel under the Fourteenth Amendment. Thus, it is only in a revocation proceeding in which fundamental fairness — the touchstone of due process — mandates the appointment of counsel that the State will be required to provide the probationer with legal representation. Necessarily then — since the concept of

fundamental fairness cannot be precisely elucidated and the determination must be made on a case by case basis — there is no precise and detailed set of guidelines to be followed.

However, in *Gagnon v. Scarpelli*, 411 U.S. 788, 790-791 III (93 SCt 1756, 36 LE2d 656) (1973) the United States Supreme Court set forth certain criteria that should be considered in deciding this issue. Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer makes such a request, based on a timely and colorable claim (1) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (2) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. Importantly, in every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record.

Here, the Court found, appellant's limited right to request appointed counsel during the revocation hearing was by no means made clear to him, what was clear was that appellant repeatedly stated that he wanted to have counsel appointed to represent him, and the trial court understood his statements as a clear request for the appointment of counsel. The trial court, however, never made an express determination concerning whether appellant was entitled to have counsel appointed, defaulting instead to the determination that had been made by appellant's previous appointed counsel without making any inquiry into the circumstances surrounding appellant's termination of his previous counsel. In short, the trial court never stated any reasons on the record for not appointing counsel and did not appear to give any consideration to whether, outside of previous counsel's statement that he was not entitled to have another attorney appointed to represent him, Appellant was entitled to appointed counsel considering the relevant criteria. Thus, the Court concluded, in failing to do so, the trial court erred.

Consequently, the Court determined that a remand was necessary for the trial court to consider appellant's request for counsel under the *Gagnon* guidelines.

Capacity to be Sued: Municipal Police Departments

McClain v. Carrollton Police Department, A21A1000 (9/2/21)

Appellant sued the Carrollton Police Department for defamation, malpractice and other claims. The trial court granted the Department's motion to dismiss.

Appellant argued that the trial court erred in determining that the Carrollton Police Department is not an entity that has the capacity to sue or be sued because it was able to retain an attorney and obtain a dismissal of his case. The Court disagreed.

The Court noted that no Georgia court has specifically addressed whether a municipal police department is an entity capable of suing or being sued. However, in *Myers v. Clayton County Dist. Attorney's Office*, 357 Ga. App. 705, 708 (2) the Court noted that it recently determined that county police departments are not separately capable of being sued because,

“as mere arms of such governments, [they] are not generally considered legal entities capable of being sued.” *Myers*, supra, 357 Ga. App. at 709 (2). Thus, the Court concluded, for the reasons set forth in *Myers*, municipal police departments are not separate legal entities subject to suit because they are merely agents or instrumentalities of the municipality. As a municipal corporation, the City of Carrollton itself can sue and be sued only in the manner provided by its charter, and in its appropriate corporate name. A city's police department is an integral part of the city's government and is merely the vehicle through which the city government fulfills its policing functions. Accordingly, the Court held, the trial court correctly dismissed appellant's complaint because the Carrollton Police Department is not a proper party capable of being sued.

Motions to Withdraw Pleas; Ineffective Assistance of Counsel

Cantrell v. State, A21A0828 (9/7/21)

Although charged initially with murder, appellant entered a negotiated plea to attempted murder, terroristic threats, battery, and possession of a knife during the commission of a crime. She then filed a motion to withdraw her plea, alleging that (1) her plea counsel rendered ineffective assistance of counsel by telling her “she would serve only 15 years” in prison, and (2) neither her plea counsel nor the prosecutor informed her that “Georgia law may preclude [her] from parole eligibility.” The trial court denied her motion after a hearing on the matter. The trial court found that even if appellant's plea counsel performed deficiently by advising her that she would serve only 15 to 20 years in prison, appellant failed to demonstrate any prejudice based on this statement.

The Court stated that if a defendant's motion to withdraw is based on an ineffective assistance of counsel claim, the claim must be evaluated under the two-prong test set forth in *Strickland v. Washington*. To prevail on an ineffective assistance of counsel claim, a defendant must show both that his counsel's performance was deficient and that there is a reasonable probability that, but for counsel's errors, the defendant would have elected to proceed to trial rather than enter a guilty plea. To satisfy the prejudice prong of the *Strickland* test, an appellant must set out special circumstances that might support the conclusion that she placed particular emphasis on her parole eligibility in deciding whether or not to plead guilty. Courts should not upset a plea solely because of post hoc assertions from a defendant about how she would have pleaded but for her attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences.

And here, the Court found, appellant offered no evidence warranting reversal of the trial court's judgment. The only basis for her claim of prejudice was her testimony that she would not have pled guilty, but would instead have proceeded to trial, if she knew she would spend longer than 15 to 20 years in prison. However, the Court noted, the trial court's order denying appellant's motion to withdraw her plea found that the transcript “directly conflicts with [appellant's] testimony” that she would have preferred a trial, and the trial court was entitled, as it did, to discredit appellant's testimony. In fact, the Court stated, appellant's negotiated plea represented a compromise of the original murder indictment, and appellant testified that she knew she would not have been eligible for parole for 30 years if she had pled guilty to the original charge of murder. In addition, appellant did not articulate any “special circumstances” that showed she placed any particular emphasis on her parole eligibility in determining whether to plead guilty. Instead, the record showed that at no point during her plea hearing did appellant ever raise the issue of parole eligibility, even after the prosecutor and trial court discussed her sentence and potential term of imprisonment.

Thus, the Court concluded, because the record supported the trial court's factual findings and determinations, the trial court did not clearly err in concluding that appellant failed to meet her burden of showing ineffective assistance of counsel under the *Strickland* test. The trial court, therefore, did not abuse its discretion when it denied appellant's motion to withdraw her guilty plea on the ground that plea counsel was ineffective.

Search Warrants; Confidential Informants

Douglas v. State, A21A0906 (9/8/21)

Appellant was convicted of trafficking in heroin, possession of cocaine with intent to distribute, and possession of a firearm during the commission of a felony. He contended that the trial court erred in denying his motion to suppress because it was undisputed that the search warrant provided an incorrect apartment number. Specifically, the warrant provided that Apartment 1 at 617 Echo Street NW was to be searched. However, the search was conducted of Apartment 4. The Court disagreed.

The Court stated that a search warrant is not necessarily legally insufficient if it contains an incorrect address. Rather, the description of the premises to be searched is sufficient if on its face it enables a prudent officer executing the warrant to locate it definitely and with reasonable certainty. In determining whether the subject place is sufficiently described in the warrant, the warrant must be read as a whole and other evidence, including, but not limited to, the supporting affidavit must be considered.

Here, the Court found, the warrant itself identified the correct apartment building and the correct location of the apartment, on the second floor on the northeast side. The only incorrect information on the warrant was the apartment number. Thus, a prudent officer executing the warrant could have located the apartment on the second floor in the correct corner with reasonable certainty and without depending upon his or her discretion. Accordingly, the Court held that the trial court did not abuse its discretion in denying the motion to dismiss.

Appellant also argued that the trial court erred by denying his motion to reveal the confidential informant's identity. The Court again disagreed.

Here, the Court found, the informant's sole involvement was providing information to the investigating officer and making controlled buys. The police officers relied upon the controlled buys to obtain a search warrant, but did not indict appellant for the sales of drugs. Instead, the State indicted appellant for trafficking in heroin, possession of cocaine with intent to distribute and possession of a firearm during the commission of a felony, based on the drugs and a firearm found during the execution of the search warrant. The informant was not present during the execution of the search warrant. Consequently, relying on *Woodruff v. State*, 339 Ga. App. 707, 709 (2) (2016), the Court held that the trial court was authorized to conclude that the informant was a mere tipster whose identity was privileged. Accordingly, the trial court did not abuse its discretion by denying appellant's motion to reveal the informant's identity.