Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
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Audio and Visual Evidence; Rule 403

Barrett v. State, S21A0788 (10/19/21)

Appellant was convicted of felony murder. The record showed that at trial, the State sought to admit a video recording of appellant's custodial interview. The prosecutor indicated to the court that there were technical difficulties with the recording, namely that the audio and video were not synchronized, "the recording play[ed] at an unnaturally fast speed," and "the voices [were] accelerated[.]" Due to these difficulties, the prosecutor proposed playing only the audio portion of the recording for the jury. In response, appellant argued that the State could instead manipulate the audio, resulting in the video and audio not "match[ing] up," and that playing only the audio would prevent the jury from analyzing body language and related visual factors. Appellant further argued that if the trial court decided to play the recording, then the jury should be informed of the technological modifications and also see the video. The prosecutor then suggested playing the recording for the jury twice, first at a slower speed and then at the accelerated speed caused by the malfunction. Appellant agreed with this suggestion, while still maintaining his earlier objection to the admission of the interview based on Rule 403. The trial court agreed that the State could play the recording twice, while noting that the jury should have some explanation for why the State was doing so. The recording was later played for the jury, first at full speed with audio and video, and then at a slower speed with audio only. The prosecutor explained to the jury that the recording was played twice at different speeds due to technical difficulties with the recording.

Appellant argued that the trial court erred by admitting into evidence the audio and video recording. Specifically, he contended that the jury was unable to gauge his demeanor in the recording and that the probative value of the recording was therefore substantially outweighed by its prejudicial effect under Rule 403. The Court disagreed.

The Court found that the content of the interview was highly probative of appellant's guilt, as it helped to establish his presence at the scene of the murder with the other suspects and the victim and the motive for the crime. Although the recording of the interview may have been more difficult for the jury to understand than if there had been no technical difficulties, the jury had two opportunities to view and evaluate the recording. In addition, the investigator testified at length about the interview and the incriminating statements appellant made in it. The technical difficulties and extra time

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associated with playing the recording of the interview did not deprive the recording of probative value. Nor did it demonstrably create or enhance any improper prejudicial effect. Therefore, the Court concluded, there was no abuse of the trial court's discretion in determining that Rule 403 did not bar the admission of the video recording.

Dismissals for Want of Prosecution; Statute of Limitations

Walker v. State, S20G1471 (10/19/21)

Walker was arrested for DUI on December 30, 2016 and was accused in September 2016. In March 2018, the case was dead docketed on the State's motion, pending a decision in *Elliott v. State*, 305 Ga. 179 (2019). After *Elliott* was decided, the case was taken off the dead docket and scheduled for a bench trial in April 2019. However, at the call of the case, although Walker announced ready, the State announced that the arresting officer was not present, even though he was properly subpoenaed. The trial court gave the State ample time to determine the location of the officer. It appeared that the officer was "on leave and out of town/Georgia." No explanation of the reason for the leave was given. The trial court dismissed the case for want of prosecution. The Court noted that nothing in the record indicated that the State asked for a continuance or requested the entry of an order of nolle prosequi in order to extend the statute of limitation for an additional six months. The State appealed.

The Court of Appeals vacated the dismissal order. See *State v. Walker*, 356 Ga. App. 170 (2020) (en banc). The eight-judge majority opinion relied on the Court of Appeals' recent panel decision in *State v. Banks*, 348 Ga. App. 876, 880-881 (2019), which held that an order dismissing a criminal case for want of prosecution outside the statute of limitation is an impermissible dismissal with prejudice because the State is barred from reaccusing the defendant. The Court granted certiorari to decide whether a trial court's order dismissing a criminal case for want of prosecution, which does not say that it is with prejudice to refiling, nevertheless constitutes an impermissible dismissal with prejudice if the applicable statute of limitation has run.

Initially, the Court found that it has been the law of Georgia for decades (and appears to have been the practice in Georgia courts for much longer) that trial courts have the authority to dismiss criminal cases without prejudice for want of prosecution. The Court also noted that the State and its amici pointed to no statute that purports to eliminate or limit this longstanding practice. Thus, the Court stated, it could not see a compelling reason to disturb the well-established law in this area.

The Court stated that there is no reason to think that the trial court's order dismissing the charges against Walker for want of prosecution was a dismissal with prejudice. The order did not say that the dismissal was with prejudice, and it has been the law of Georgia for more than 40 years that dismissals with prejudice for want of prosecution are not allowed in criminal cases. Moreover, since the early 1990s, the Court of Appeals has construed orders dismissing criminal charges for want of prosecution that do not mention prejudice to be dismissals without prejudice.

But, the Court noted, in *Banks*, the Court of Appeals determined that whether an order dismissing a criminal case for want of prosecution is a dismissal with prejudice, which is not permitted, an appellate court should not be guided by the text of the dismissal order as informed by the background rule against dismissals with prejudice for want of prosecution. *Banks*

instead proposed that the appellate court should look to see if some other source of authority might prohibit further prosecution of the defendant, such as the applicable statute of limitation.

However, the Court found, there is no sound legal reason for adopting that approach. Nothing in the caselaw prior to *Banks* required an appellate court to look beyond the trial court's written ruling to determine whether it is a permissible dismissal without prejudice or instead a dismissal with prejudice, which is not permitted. Moreover, it is not clear how the trial court would ascertain whether some other source of authority would prevent the State from reinitiating the prosecution. For example, it is not clear how a trial court would ascertain if the statute of limitation had been tolled, see, e.g., OCGA § 17-3-2 (excluding certain periods in determining whether statute of limitation has run), or if two indictments charging the same offense or offenses had been quashed, see OCGA § 17-7-53.1. In addition, if a trial court has the authority to dismiss a criminal case without prejudice for want of prosecution, it is unclear why the running of a statute of limitation would suddenly strip the court of that power. In such situations, it is the statute of limitation that prevents the State from recommencing a prosecution against the defendant; the dismissal order itself stands as no barrier. Quoting the dissent in *Banks*, the Court stated that, "The state is barred from bringing the case [against Walker] again, not by operation of the trial court's order, but by operation of the statute of limitation." *Walker*, 356 Ga. App. at 175 (McFadden, C.J., dissenting). Therefore, the Court disapproved of the Court of Appeals' decision in *Banks*.

Thus, the Court held, the Court of Appeals erred in holding that the trial court's order dismissing the charges against Walker for want of prosecution was an impermissible dismissal with prejudice. Accordingly, the Court reversed the Court of Appeals' judgment.

Burglary; Recidivist Sentencing

State v. Stanford, S21G0226 (10/19/21)

Stanford entered a non-negotiated guilty plea to one count of first-degree burglary. He had eight prior felony convictions, five of them for burglary. The State sought recidivist sentencing under OCGA §§ 16-7-1 and 17-10-7 (a) and (c). The trial court sentenced Stanford to 25 years in prison, but suspended the final 20 years of that sentence. The State appealed.

The State argued that OCGA § 16-7-1 (d) prohibited the trial court from suspending any portion of the burglary sentence. But, the Court of Appeals held that *Goldberg v. State*, 282 Ga. 542 (2007) dictated otherwise. It concluded that *Goldberg* "plainly and broadly announced that when a defendant is being prosecuted for burglary and is a habitual felon, as Stanford is, then the recidivist provisions in OCGA § 17-10-7 apply rather than the specific recidivist provisions in the burglary statute." *State v. Stanford*, 356 Ga. App. 594, 595-596 (2020). The Court granted certiorari.

The Court noted that in *Goldberg*, it specifically considered the relationship between OCGA § 17-10-7 (a)'s requirement that recidivist felons be given maximally long sentences and one part of OCGA § 16-7-1 that, at the time, authorized sentences of between five and 20 years for three-time burglars. The Court found that *Goldberg* harmonized the two statutes insofar as the length of sentences is concerned. But it did not address the bar OCGA § 16-7-1 (d) imposes on suspended sentences for defendants like Stanford, who have four or more burglary convictions, nor the deference OCGA § 17-10-7 (a) affords to other laws limiting the suspension of sentences. It was simply silent as to these two points. Because *Goldberg*

did not consider — much less decide — whether the partial suspension of Goldberg's sentence was lawful, that part of the opinion is not a holding on that point.

And in reviewing the statutory provisions at issue here, the Court concluded that they plainly forbid suspending any part of Stanford's sentence. OCGA § 17-10-7 (a)'s authorization of suspended sentences is expressly limited by any restrictions imposed by other laws. Also, OCGA § 16-7-1 (d) prohibits suspended sentences for defendants with four or more burglary convictions. Thus, the Court held, the latter provision, then, controls not in spite of OCGA § 17-10-7 (a), but squarely within the qualification found therein.

Consequently, OCGA § 16-7-1 (d) bars suspension of Stanford's sentence, so the sentence the trial court imposed was void. Neither OCGA § 17-10-7 (a) nor *Goldberg* says otherwise. Accordingly, the Court reversed the Court of Appeals' conclusion to the contrary.

Rule 404 (b); Drug Offenses

Hargrove v. State, A21A0810 (9/8/21)

Appellant was convicted of trafficking in heroin and possession with intent to distribute cocaine. The evidence, very briefly stated, showed that in 2014, the police observed what they suspected were drug deals at a townhome. Over the course of a couple of weeks, the officers made controlled buys from appellant through the use of a CI. The officers then obtained a search warrant. After appellant left the townhouse, they executed the warrant. Cocaine, heroin, scales and other indicia of the drug trade were found throughout the house. Much of the drugs were found in the master bedroom that was occupied by Brittany Patterson, the owner of the townhouse.

Appellant and Patterson were co-indicted but before trial Patterson pleaded guilty and agreed to testify for the State. At trial, appellant contended that the drugs were all Patterson's and he was merely present at the townhome. The State was permitted to present evidence of appellant's prior drug convictions pursuant to Rule 404 (b). Specifically, an August 2004 conviction for possession of cocaine; a June 2004 conviction for possession of cocaine; an October 2004 conviction for possession with intent to distribute cocaine; and a February 2006 conviction for selling cocaine.

Appellant contended that the trial court erred in admitting these other-act evidence because the evidence was irrelevant to any issue other than his character and was improper propensity evidence. The Court disagreed. The Court stated that where extrinsic offense is offered to prove intent, its relevance is determined by comparing the defendant's state of mind in perpetrating both the extrinsic and charged offenses. Thus, where the state of mind required for the charged and extrinsic offenses is the same, the first prong of the Rule 404 (b) test is satisfied. To prove that appellant committed the charged crime of possession of cocaine with intent to distribute, the State had to prove both that appellant had actual or constructive possession of the drugs and that he had the requisite intent to distribute them. Similarly, appellant's convictions for sale of cocaine and sale and delivery of cocaine were relevant to prove the requisite intent to distribute. And the prior convictions for possession of cocaine were relevant to establish Hargrove's intent to possess and control the cocaine and heroin found in the townhome.

Nevertheless, appellant argued, the evidence should have not have been admitted because under Rule 403, its probative value was substantially outweighed by the danger of unfair prejudice. The Court again disagreed. Here, all of the prior drug convictions were either identical or similar to the charged offenses and thus highly probative to show appellant's intent with respect to the charged offenses. While appellant argued that the prior offenses are more prejudicial than probative because they involved a different drug (crack cocaine) than the charged offenses, factual similarity is only one consideration in assessing the totality of the circumstances. Moreover, when other-acts evidence is introduced to prove intent as opposed to identity a lesser degree of similarity between the charged crime and the extrinsic evidence is required.

Also the Court found, as to prosecutorial need, the State needed to overcome appellant's defense that he did not possess the cocaine or heroin and that the drugs belonged to Patterson. Indeed, while the evidence was sufficient to support appellant's convictions, it was entirely circumstantial. Thus, the State's need for evidence that appellant had committed similar crimes was significant, which weighed in favor of admission under Rule 403. As for the lapse in time, the ten-and eight-year intervals between appellant's other acts and the crimes charged in this case were not too remote to erode the probative value of the prior convictions. Thus, the Court concluded, keeping in mind that the exclusion of evidence under Rule 403 is an extraordinary remedy which should be used only sparingly, the Court found that it could not say that the trial court abused its discretion in finding that the probative value of appellant's prior convictions was not substantially outweighed by unfair prejudice.

Jury Instructions; Mistake of Fact

Chambers v. State, A21A1158 (9/14/21)

Appellant was convicted of first degree burglary. Briefly stated, the evidence showed that the victim and appellant had once been friends. Appellant used to work on the residence with the victim, who was remodeling the house and lived elsewhere. The victim stopped using appellant for work on his house because appellant was unreliable. Nevertheless, the victim allowed appellant to park his truck on the property's driveway at night and sleep there.

Appellant contended that the trial court committed plain error in failing to instruct the jury, sua sponte, on the defense of mistake of fact. The Court disagreed. The Court stated that mistake of fact represents an affirmative defense, under which a person shall not be found guilty of a crime if the act constituting the crime was induced by a misapprehension of fact which, if true, would have justified the act or omission. And if the defense was raised by the evidence, including the defendant's own statements, the trial court would have been required to present the affirmative defense to the jury as part of the case in its charge, even absent a request. But, the affirmative defense would not have to be specifically charged if the case as a whole had been fairly presented to the jury. Furthermore, a defendant is not entitled to a jury charge on this defense when the evidence shows that his ignorance or mistake of fact was superinduced by the defendant's own fault or negligence.

Appellant argued that a charge on mistake of fact was warranted because he believed, based on past experience, that the victim had given him permission to enter the house through a window. But, the Court found, this alleged belief was belied by his own admission during his testimony that the victim told him that he was not allowed inside the house. Additionally, the evidence showed that the victim explicitly refused to give appellant a key (despite his request for one), told him that he was not allowed inside the house, and made a point to lock the house and toolshed before leaving each evening regardless

of whether appellant was still on the property constructing pallets. Given these circumstances, the evidence largely contradicted, rather than raised, a mistake-of-fact defense, and, at the very least, made clear that any mistake of fact by appellant resulted from his own fault or negligence. Accordingly, the Court concluded, the trial court did not err—certainly not plainly—when it failed to instruct the jury, sua sponte, on that affirmative defense.

Jury Questions; Responses by Trial Court

Torres v. State, A21A14448 (9/15/21)

Appellant was convicted of making terroristic threats, criminal street gang activity, and three counts of aggravated assault. The record showed that while the jury was deliberating, the jurors sent the following note to the trial court: "Your Honor, We would like the definitions of the charges (18 pg. document)[.]" After discussing the request with the attorneys, the trial court informed counsel, "I'll just read the charges to them again slowly and carefully. All right?" There were no objections to the court's decision.

Appellant argued that the jurors' note requested a complete recharge of *all* the jury instructions and not simply a recharge of the definitions of the offenses. But, the Court found, although the jurors' note contained a parenthetical reference to the "18-page document" that comprised all jury instructions, the note specifically requested "the definitions of the charges." The trial court recharged those definitions and repeatedly ensured that the jurors understood the recharge. In addition, at no point did the jurors ask for additional instructions either during or after the recharge.

Furthermore, the Court stated, where the jury, after having been charged by the court, returns into court and requests an instruction upon a specific question, it is not error for the judge to confine his instruction to the specific point suggested by the jury's inquiry. It is within the court's discretion to recharge the jury in full or only upon the point or points requested.

And here, the Court further found, the jury asked for a charge upon a specific point - the definitions of the offenses - and the jury was charged upon that point. Moreover, appellant made no arguments suggesting that the recharge, as a whole, was an incorrect statement of the law or that it would mislead a jury of ordinary intelligence. Accordingly, the Court concluded, the trial court did not abuse its discretion in its recharge to the jury.

Sentencing; Restitution

Henderson v. State, A21A0916 (9/16/21)

Appellant was convicted of robbery by intimidation as a lesser included offense of armed robbery and acquitted him of carjacking. Immediately after the trial, the court sentenced him based on two prior out-of-state felony convictions.

Appellant contended that the State failed to comply with the notice requirements of OCGA § 17-16-4 (a) (5) and that the trial court therefore could not consider his prior convictions during sentencing. However, the Court found, appellant's argument ignored the fact that the State is not subject to the statutory notice requirements unless the defendant has provided written notice pursuant to OCGA § 17-16-2 (a) that he has elected to participate in reciprocal discovery. And here, the appellate record contained no evidence showing that either appellant or the State opted into the reciprocal

discovery provisions of the criminal discovery statute. Thus, the ten-day time requirement of OCGA § 17-16-4 (a) [(5)] did not apply in this case.

Nevertheless, appellant contended, the trial court erred in considering this evidence because the State was required to provide the court with certified copies of any prior convictions, rather than mere stating-in-place that the convictions existed. But, the Court held, given that appellant failed to object to the State's evidence at the time it was offered, he was barred from raising this issue on appeal.

Finally, appellant argued that the trial court erred in entering a restitution order without holding a hearing or otherwise receiving any competent evidence on the issue of restitution. The Court agreed.

The Court noted that Georgia law permits a trial court to enter a restitution award in an amount not to exceed the victim's damages. Where "the parties have not agreed on the amount of restitution prior to sentencing, the [trial court] shall set a date for a hearing to determine restitution." OCGA § 17-14-7 (b). At such a hearing, the State bears the burden of proving, by a preponderance of the evidence, "the amount of the loss sustained by [the] victim," while the defendant must prove both his financial resources and the financial needs of his dependents. OCGA § 17-14-7 (b). And when determining the amount of restitution to be paid, the trial court should consider the factors set forth in OCGA § 17-14-10 (a) (1)-(8).

But here, the record showed that the trial court entered the restitution order without holding a hearing. Moreover, neither party introduced any evidence at trial or at the sentencing hearing that demonstrated either the amount of the victim's damages or appellant's ability to pay restitution. Given that the restitution award lacked an evidentiary basis and failed to comply with the relevant statutory requirements, the Court vacated the restitution order and remanded the case for a restitution hearing.