Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING NOVEMBER 5, 2021
Issue 45-21

THIS WEEK:

- Equal Protection; Resentencing
- Jury Deliberations; *Allen* Charges
- Voir Dire; Juror Misconduct
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- Prosecutorial Misconduct; Jury Charges

Equal Protection; Resentencing

Parrott v. State, S21A0753 (10/5/21)

In 2014, appellant pled guilty to six traffic-related offenses, including being a "habitual violator" under OCGA § 40-5-58 and felony fleeing or attempting to elude a police officer, in violation of OCGA § 40-6-395 (b) (5). In accordance with a negotiated plea agreement, the trial court sentenced him to five years, with two to serve in prison, for the habitual violator offense, and a consecutive sentence of five years' probation, plus a $5,000 fine, for felony fleeing. After he completed his first sentence and began serving the consecutive sentence for felony fleeing, appellant moved to vacate as void the probation portion of that sentence, arguing that the applicable statute, OCGA § 40-6-395 (b) (5), did not authorize probation. The trial court agreed and announced it would resentence him on all the offenses. When appellant objected, the trial court allowed him to withdraw his plea, but appellant declined. The trial court then sentenced him to five years in prison, without a fine.

Appellant contended that OCGA § 40-6-395 (b) (5) is unconstitutional under the Equal Protection Clause. Specifically, he argued that the statute treats him differently than others in a similar situation because that provision mandates prison time for indigent defendants—like himself—who are unable to pay the $5,000 fine, whereas those who can afford the fine can avoid a prison sentence. However, the Court found, nothing in the plain language of OCGA § 40-6-395 (b) (5) conditions the imposition of a fine on the defendant's ability to pay or otherwise treats indigent defendants differently from those who are not indigent. Moreover, nothing in the record indicated that the sentencing court imposed a prison term on him because he could not afford to pay a $5,000 fine, or that he could have averted a prison sentence if he had demonstrated an ability to pay a fine. Accordingly, the Court held, the trial court properly overruled appellant's objection to resentencing based on equal protection grounds.

Appellant alternatively contended that, when the trial court resentenced him for felony fleeing, it imposed multiple punishments for a single crime in violation of the constitutional prohibition against double jeopardy. But, the Court stated, appellant did not receive "multiple punishments for the same offense" simply by virtue of being resentenced. A trial judge has the authority to correct a void sentence at any time, and a sentence is void if the court imposes punishment that the law does not allow. And here, the Court noted, neither party disputed that appellant's original sentence of five years' probation for felony fleeing was void, and the Court agreed with that conclusion based on OCGA § 40-6-395 (b) (5)'s

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express textual prohibition on the imposition of probation for a violation of that statute. Thus, the trial court was authorized to correct the void sentence it previously imposed, including by resentencing appellant on that count.

Moreover, the Court stated, the mere fact that appellant's new sentence was more severe than the original sentence also does not violate double jeopardy protections. In the multiple-punishment context, the Double Jeopardy Clause of the Fifth Amendment protects a defendant's legitimate expectation of finality in his original sentence, but a convicted defendant, like appellant, has neither a vested right to nor a reasonable expectation of finality as to a pronounced sentence which is null and void.

Nevertheless, appellant contended, the trial court was not authorized to resentence him because a $5,000 fine by itself, without imprisonment, is a legal sentence for felony fleeing. Thus, he argued, the trial court was required under Georgia law to vacate only the void portion of the sentence (i.e., probation) and leave the valid portion (the fine) as the sole remaining sentence. In other words, appellant argued that the trial court was required to do nothing more and nothing less than excise the void portion of the sentence. The Court disagreed.

Generally speaking, the Court stated, Georgia law gives trial judges great discretion in imposing a sentence within statutory parameters. But, the Court acknowledged, its handling of sentences that could be characterized as partially void may appear to be inconsistent. For example, in several cases where part of a sentence—such as a parole condition—was deemed void, it held that only the void part (i.e., the improper parole condition) needed to be vacated. In other, substantially similar cases, the Court vacated an entire sentence and remanded for resentencing. Yet in neither line of cases, did the Court hold that a particular approach was the exclusive approach a trial court must take to appropriately exercise the broad discretion it is generally afforded in resentencing.

Thus, the Court stated, it could not say that a trial court abuses its discretion when it corrects a "partially void" sentence on a particular count by vacating that sentence in its entirety and imposing a new sentence on that count within the statutory parameters. Consequently, the Court concluded that the trial court did not abuse its discretion when it corrected appellant's partially void sentence for felony fleeing by vacating that sentence in its entirety and imposing a new sentence on that count within the parameters of OCGA § 40-6-395 (b) (5).

Jury Deliberations; *Allen* Charges

Hughs v. State, S21A0970 (10/5/21)

Appellant was convicted of felony murder. The record showed that the jury began its deliberations at 3:45 p.m. and that the jurors were sent home at 6:00 p.m. that evening after requesting to be released for the night. The jury returned at 10:00 a.m. the next morning and continued deliberating. That morning, the jury was allowed to review a portion of appellant's video-recorded statement in the courtroom. Then, at 11:35 a.m., the jury foreman sent a note to the trial court stating, "Judge, we have no way of coming to an agreement. At this time we are 11 to 1 and the one person does not want to have any further discussions." The trial court then discussed the option of giving an *Allen* charge with the parties. Defense counsel objected, arguing that the trial court "should just inquire would any more deliberation help them before actually giving that particular *Allen* charge." The trial court disagreed and gave the Georgia pattern modified *Allen* charge. See Ga.

Suggested Pattern Instructions, Vol. II: Criminal Cases § 1.70.70 (4th ed. 2007) (Jury (Hung)). The jury returned to deliberate at 11:45 a.m. and arrived at a verdict at 1:05 p.m.

Appellant argued that the modified *Allen* charge was unduly coercive, not because it was legally inaccurate, but because the jury had not spent enough time deliberating prior to the trial court giving the charge. The Court disagreed. The decision of whether to give an *Allen* charge is within the discretion of the trial court, and a trial court's instruction is not coercive simply because the instruction compelled the jury to continue deliberating after it reported a deadlock. Instead, the issue in reviewing an *Allen* charge is whether the instruction is coercive so as to cause a juror to abandon an honest conviction for reasons other than those based upon the trial or the arguments of other jurors. And here, the Court found, the modified *Allen* charge read by the trial court was an accurate statement of the law and not coercive.

Nevertheless, appellant argued, the amount of time the jury deliberated before and after the modified *Allen* charge was given is enough to demonstrate coercion. But, the Court stated, while contextual factors, like timing, may play a role in determining coerciveness where there is a possibility that the charge could be coercive, the length of deliberations alone cannot render a non-coercive charge coercive. Thus, the Court concluded, because appellant did not show that the modified *Allen* charge was even potentially coercive, he could not show that the trial court abused its discretion by giving the *Allen* charge during jury deliberations.

Voir Dire; Juror Misconduct

Tyson v. State, S21A0774 (10/5/21)

Appellant was convicted of felony murder and cruelty to children in the first degree in the beating death of a 22-month-old. The victim was the daughter of Bradley, appellant's girlfriend. Appellant contended that he was denied a fair trial based on juror bias, because the jury foreman worked at Bradley's place of employment and knew her. He argued that the juror deceitfully concealed his knowledge of Bradley during voir dire and that the juror was biased in favor of Bradley. The Court disagreed.

The Court noted that although voir dire was not taken down, the juror testified at the hearing on appellant's motion for new trial. On voir dire, the juror was asked where he was employed, and responded, "Quiet Oaks Health Care." He was asked if he knew the parties involved, and testified in individual voir dire questioning that he "was aware of Ms. Bradley, that I had worked with her, and I knew her." The juror was asked during voir dire if he had formed any opinion of the guilt of the accused, and he responded that he had not done so. He also was asked in voir dire whether he had any bias or prejudice and responded that he had none. The juror further testified that he and Bradley were not close friends and did not socialize outside of work, and that he had no knowledge of her reputation as a mother. In its order denying appellant's motion for new trial, the trial court specifically found that the juror "disclosed his knowledge and work relationship with the victim's mother."

The Court stated that in order to obtain a new trial based on juror misconduct in voir dire, he must show that (1) the juror failed to answer honestly a material question on voir dire and (2) a correct response would have provided a valid basis for a challenge for cause. Here, the Court found, appellant did not show that the juror in question concealed his relationship with Bradley. While appellant asserted that the trial court's finding with respect to the juror's disclosure was

"conclusory," it was directly supported by the juror's testimony at the hearing on appellant's motion for new trial. Appellant contended that the trial court gave no reason in its order for discounting his trial counsel's testimony that he would have struck any prospective juror who knew Bradley or was familiar with the nursing home at which she worked. But, the Court stated, the credibility of the witnesses at the motion for new trial hearing was for the trial court to determine.

Furthermore, the Court noted, the trial court made a specific factual finding, and it could not say that the trial court clearly erred in crediting the direct and positive testimony of the juror, rather than relying on trial counsel's testimony to reach the indirect and speculative conclusion that, because counsel would have struck any juror who had a relationship with Bradley or with the nursing home, the juror therefore must have deceptively failed to reveal such a relationship.

Thus, the Court concluded, because appellant failed to demonstrate that the juror answered questions dishonestly during voir dire, he failed to meet the requirements of the first prong of the two-pronged test for determining whether a defendant is entitled to a new trial for juror misconduct — that the juror failed to give honest answers to voir dire questions. Accordingly, the trial court did not err in denying the motion for new trial on this ground.

Venue; Pre-trial Publicity

Overstreet v. State, S21A0712 (10/5/21)

Appellant was convicted in Ben Hill County of malice murder and other offenses. He contended that his trial counsel was ineffective for failing to move for a change of venue. He argued that had such a motion been filed, it would have been granted. The Court disagreed.

The Court noted that jury selection for appellant's trial was conducted by questioning of panels of 14 potential jurors at a time. The jury was selected after both the prosecution and defense questioned three such panels.

The prosecutor acknowledged during jury selection that there had been local news coverage of the case and that there had been posts about the case on various social media. Each of the prospective jurors who were interviewed acknowledged that they had heard about the case in some way, either by reading about it in the newspaper or on social media, watching local television reports, or hearing friends, neighbors, or others discussing the case. Several prospective jurors indicated that they knew the victims, potential witnesses, appellant's co-defendants, or family members of the witnesses or co-defendants. The record also showed that the wife of one prospective juror had been on the jury when one of appellant's co-defendants was tried. The prosecutor, defense counsel, and several prospective jurors acknowledged that the case was "sad" and "emotional."

However, the Court found, the record also showed that only one prospective juror was excused for cause based upon her pre-trial knowledge of the case that she could not set aside. Each of the remaining prospective jurors explained to the parties and the trial court that they could set aside their prior knowledge of the case and their familiarity with people associated with the case, decide the case based upon the evidence, and be fair and impartial to both appellant and the State. Each member of the jury that was empaneled reaffirmed this statement under oath.

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Thus, the Court determined, based on the record, appellant did not demonstrate that the setting of the trial in Ben Hill County was inherently prejudicial such that a motion for new trial would have been granted had his trial counsel filed one. Although there was evidence of press coverage and other publicity surrounding the case, appellant did not establish that what he characterized as widespread pre-trial publicity that contained information that was unduly extensive, factually incorrect, inflammatory or reflective of an atmosphere of hostility. In so holding, the Court noted that appellant's trial counsel was not called to testify at the hearing on the motion for new trial, and other than the prospective jurors' general responses to questioning during jury selection, appellant offered no evidence that the pre-trial publicity was so pervasive as to render the trial setting inherently prejudicial.

The Court further found that appellant failed to establish that, due to pre-trial publicity, holding the trial in Ben Hill County actually prejudiced him such that a motion for change of venue would have been granted had counsel filed one. Here, although each prospective juror had heard about the case in some way prior to jury selection, each of the jurors who were ultimately empaneled affirmed during voir dire that they could set aside what they had learned about the case outside the courtroom and render a verdict based solely on the evidence presented. The only juror who expressed any sort of "fixed bias" regarding the case was excused for cause. Thus, the Court concluded, because appellant presented no evidence suggesting that the jurors decided the case based on something other than the evidence presented at trial, he could not establish that he was actually prejudiced by being tried in Ben Hill County. And because he could not establish that a motion to change venue would have been granted, he therefore could not establish that trial counsel performed deficiently by failing to file one. Accordingly, appellant's claim of ineffective assistance of counsel failed.

Prosecutorial Misconduct; Jury Charges

Collins v. State, S21A0627, S21A0628, S21A0629 (10/5/21)

Collins, Burdine, and Love were tried together and convicted of murder and other offenses in the shooting death of Kelley. The evidence, very briefly stated, showed that two women, Smallwood and Pearce, agreed to give Collins and Love a ride in Smallwood's car to purchase some marijuana, and they saw Collins or Love with a handgun. Burdine followed in Collins's pickup truck, giving Collins and Love directions to Kelley's house. The women waited for the men to return and then gave them a ride back to where the apartment where the men were living and the two women were visiting others.

Burdine contended that his trial counsel was ineffective because counsel failed to object or move for a mistrial with respect to certain allegedly improper comments by the State. The Court noted that the allegedly improper comments fit into two categories. First, Burdine contended that certain comments made during the prosecutor's opening statement "lumped" all three co-defendants together, but that the comments were false as they pertained to Burdine. Specifically, he argued that these comments were of an "inappropriate legal nature." Burdine contended that "the prosecutor introduce[d] legal principles to the jury" about *Bruton* that were "addressed by the [trial] court and the State, but were inappropriate to mention to the jury."

However, the Court found, the record belied Burdine's claim. Instead, the record showed that the prosecutor's comments during his opening statement and during his direct examination of the detective accurately paraphrased the *Bruton*-related limiting instructions the trial court gave the jury before the detective's testimony and again before jury deliberations. It also showed that the prosecutor did not suggest that the trial court had made any determination about the reliability or

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credibility of the evidence or whether the co-defendants had committed the acts in question. Thus, the Court found, because the prosecutor's comments were not of an "inappropriate legal nature" such that an objection on that basis would have been meritorious, defense counsel did not perform deficiently in failing to object.

Next, with respect to his *Bruton* claim, Burdine contended that the prosecutor's comments during his opening statement and his direct examination of the detective violated *Bruton* by creating a false impression that each of the co-defendants had given statements implicating the other co-defendants. The Court noted that under *Bruton*, a defendant's Sixth Amendment right of confrontation is violated when co-defendants are jointly tried and the testimonial statement of a co-defendant who does not testify at trial is used to implicate another co-defendant in the crime. However, *Bruton* excludes only the statement of a non-testifying co-defendant that standing alone directly inculpates the defendant.

And here, the Court stated, even assuming (without deciding) that Burdine could have challenged under *Bruton* comments the prosecutor made during opening statements, any such challenge would have failed. The record showed that the prosecutor did not say during his opening statement that Collins or Love had said anything about Burdine or a person whom the jury could infer to be Burdine, much less that Collins or Love directly inculpated Burdine. The record showed the same with respect to the prosecutor's direct examination of the detective. Accordingly, the Court held that the prosecutor's comments about what the detective was allowed to say regarding the co-defendants' statements did not constitute the type of clearly inculpatory information about Burdine that could amount to a *Bruton* violation.

Collins contended that the trial court committed plain error when it gave the jury an inapplicable pattern instruction excluding certain witnesses from the definition of "accomplice." The Court noted that at the charge conference, the trial court decided to give the pattern jury instruction on "unknowing participants" because of the evidence that had been presented about Smallwood and Peace giving Collins and Love a ride to purchase marijuana. After instructing the jury on the legal requirement that the testimony of an accomplice be corroborated, the trial court added the following: "However, a witness is not an accomplice if the participation by the witness in the criminal enterprise was unknowing. There is no legal requirement of corroboration of a witness whose participation was unknowing." See Suggested Pattern Jury Instructions, Vol. II: Criminal Cases, § 1.31.94 (4th ed. 2007, updated through January 2021) (unchanged since the 2013 trial). Collins conceded on appeal that the charge was a correct statement of law.

The Court noted that to support his argument that the evidence "mandate[d] a finding" that Smallwood and Peace "knowingly participated in th[e] entire criminal enterprise" of "the armed drug deal" and therefore "were accomplices for OCGA § 24-14-8 purposes," Collins pointed to evidence presented at trial that Smallwood and Peace were involved with Collins and Love in the criminal enterprise of purchasing marijuana, knew that Collins and Love possessed at least one gun when exiting Smallwood's car to buy marijuana, waited for Collins and Love to return, smoked marijuana with them, discussed Kelley's killing, and not only did not report their knowledge of the homicide to police, but also initially lied to officers during their investigation. But, the Court stated, even assuming that there was at least slight evidence presented that Smallwood and Peace were accomplices whose testimony required corroboration — which would have supported the instruction that the trial court gave the jury regarding the legal requirement that the testimony of an accomplice be corroborated — the provision of an accomplice-corroboration jury instruction did not preclude the trial court from also giving a jury charge on a witness's unknowing participation if slight evidence was also introduced to support that theory. And here, the State introduced at least slight evidence that Smallwood and Peace were unknowing participants: the testimony of Smallwood and Peace, together with one of Love's statements, authorized the jury to conclude that

Smallwood and Peace knew only about a plan to purchase marijuana that evening, saw one of the co-defendants with a firearm only before giving them a ride and did not think anything of it, later smoked a small amount of marijuana with the co-defendants, were not initially honest with law enforcement officials but later cooperated with them, and were not present for the crimes and did not know that a robbery, felony drug deal, any other felony, or any use of a firearm was planned. This evidence (even if inconsistent with some other evidence) amounted to at least slight evidence supporting the theory that — although Smallwood and Peace were aware of a planned misdemeanor purchase of marijuana — neither of them shared in the co-defendants' criminal intent to commit a felony or to use a firearm and, therefore, neither Smallwood nor Peace was a party to any of the felonies charged in the indictment. And because there was at least slight evidence that Smallwood and Peace did not have the knowledge necessary to be accomplices, the Court concluded that the trial court did not err — let alone plainly err — in giving the jury the pattern charge on unknowing participants.