

THIS WEEK:

- Destruction of Evidence; Police Department Procedures
- Out-of-Time Motions to Withdraw Guilty Pleas
- Rule 404 (b); Drug Offenses
- Jury Instructions; Mistake of Fact
- Jury Questions; Responses by Trial Court
- Sentencing; Restitution

Destruction of Evidence; Police Department Procedures

Ash v. State, S21A0771 (11/2/21)

Appellant was convicted of malice murder and other crimes. The record showed that the lead investigator interviewed appellant a few weeks after the murder. Among other stories about the night of the victim's shooting, appellant told the detective that he had an alibi in the form of a photograph taken at a nightclub that night. Appellant then showed the detective a photograph he "had received" which he said was taken at the club that night. Appellant was arrested after the interview and his phone seized incident to arrest. Pursuant to police department procedures, the detective generated a bar code for the phone, but he did not turn the phone over to the department's property control unit until over three months later, in apparent violation of police department guidelines. The detective also designated the phone as "property" rather than "evidence." Under police department guidelines, "property" was to be retained by the police department for at least 90 days before being destroyed, based on the date listed with the bar code, and police personnel were to, "if possible," contact the property owner and notify the owner that the property could be picked up at the property control unit.

The detective later obtained a search warrant for the phone but never filed a return. A month after turning the phone over to the property control unit, the police department sought court permission pursuant to OCGA § 17-5-54 (e) to destroy appellant's cell phone, and a court order granting such permission was shortly thereafter. Appellant's cell phone was destroyed sometime approximately two months later. A notation on the document showing the chain of custody of the phone indicated that the phone was destroyed before the police notified appellant that the phone could be picked up.

Appellant argued that his right to due process was violated when the State "improperly destroyed evidence it knew to be exculpatory." The Court stated that in evaluating whether the State violated appellant's due process rights, it must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence. To meet the standard of constitutional materiality, the evidence must possess an exculpatory value that was apparent before it was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. This test is ordinarily applied when State officials dispose of potential evidence that was previously in the State's actual or constructive possession.

First, the Court found that appellant failed to show that the photograph's exculpatory value, if any, was apparent before it was destroyed. That a piece of evidence may be "potentially useful" in a defendant's attempt at exoneration is insufficient to sustain a claim that the defendant has suffered an abridgment of due process due to the evidence's destruction or loss. The key is the evidence's "apparent exculpatory value" before its destruction or loss, and the Court noted, it has defined "apparent" in this context as "readily seen; visible; readily understood or perceived; evident; obvious." And here, the Court found, the evidence presented at the hearing on the motion for new trial suggested that the detective never believed the photograph to be exculpatory and that other police personnel never examined the phone to determine whether it contained exculpatory evidence. Consequently, the trial court did not err in determining that the exculpatory value of the evidence was not apparent.

Second, the Court found that the police did not act in bad faith. Specifically, the Court agreed with the trial court that there was no evidence that any member of the police department who handled appellant's cell phone after it was confiscated believed there was exculpatory evidence on the phone. Only the detective was aware that appellant even claimed to have potentially exculpatory evidence on the phone.

Nevertheless, appellant argued, bad faith was shown through evidence that the detective and other members of the police department appeared to have violated a number of department policies in the handling and disposition of the phone, particularly the detective's lengthy delay in turning the phone over to the property control unit, his "mislabeling" of the phone as "property" rather than "evidence," and the destruction of the phone before notifying appellant that it could be picked up. However, the Court stated, even assuming that the State's handling of the phone indicated careless, shoddy and unprofessional investigatory procedures, it did not indicate that the police in bad faith attempted to deny appellant access to evidence that they knew would be exculpatory.

Moreover, the Court found, appellant presented no evidence that the detective's actions or the police department's eventual destruction of the cell phone were motivated by a conscious desire to deny appellant the use of the photograph or other evidence connected with the phone, including metadata associated with the photograph, or that anyone in the chain of custody was even aware that the phone contained allegedly exculpatory evidence. Instead, the police department's actions were best characterized as an unfortunate series of mishandlings, mistakes, and negligence, which cannot support a claim that appellant's right to due process was violated. Accordingly, the appellant's due process rights were not violated.

Out-of-Time Motions to Withdraw Guilty Pleas

Schoicket v. State, S21A0840 (11/2/21)

In October 2016, with the assistance of counsel, appellant pleaded guilty to felony murder and other charges. More than a year later, in December 2017, appellant filed a pro se motion for an out-of-time appeal. She subsequently amended that motion and also filed a pro se motion to withdraw her guilty plea. After being appointed new counsel, appellant moved for leave to file a motion to withdraw her guilty plea. Following a hearing, the trial court granted appellant's motion for an out-of-time appeal, but denied the motion for leave to withdraw her guilty plea. Despite that ruling, appellant's counsel filed a motion to withdraw the guilty plea the day after the hearing. The trial court denied the motion.

The Court noted that motions to withdraw a guilty plea must be filed in the term of court in which the defendant was sentenced, the time period under the common law during which trial courts could generally reconsider their judgments. When a defendant seeks to withdraw her guilty plea after the expiration of that term of court, she must pursue such relief through habeas corpus proceedings. Applying this traditional rule, appellant's motion to withdraw her guilty plea, as a stand-alone motion, would be barred as untimely because it is undisputed that she sought to file it more than a year after the term of court in which the judgment of conviction was entered.

Nevertheless, appellant argued, the out-of-time appeal she was granted meant that the trial court should have granted her motion for leave to file an otherwise untimely motion to withdraw her guilty plea. Specifically, she contended that *Collier v. State*, 307 Ga. 363 (2019), recognized that it would be a "logical extension" of our case law to permit the filing of such a motion, because the Court stated that the grant of an out-of-time appeal starts the post-conviction process "anew." In a 7-2 decision, the Court disagreed.

The Court stated that it ignored contrary precedent and statutes in creating out of whole cloth the motion for out-of-time appeal in the trial court, which is the procedural vehicle that forms the foundation of the case law on which appellant relied. And following the Court's decision in *Collier*, the Court noted it has retreated from broad statements about the effect of a granted out-of-time appeal in order to avoid dispensing unwarranted windfalls to defendants. A defendant is granted an out-of-time appeal when she shows that her counsel's ineffective assistance frustrated her right to timely appeal by unprofessionally failing to advise her of that right or by failing to file an appeal she desired. Allowing such a grant to then permit the movant to file a motion to withdraw a guilty plea would be an unwarranted windfall with potentially profound consequences for our criminal justice system.

Therefore, the Court held, a granted motion for out-of-time appeal does not confer a right to file an otherwise-untimely motion to withdraw a guilty plea. According, the Court concluded, the trial court did not err in denying appellant's motion for leave to file a motion for an out-of-time motion to withdraw guilty plea. Furthermore, the Court denied appellant's request to remand the case for consideration of the merits of her motion to withdraw. Instead, the Court stated, her remedy, if any, lies in habeas corpus.

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-acts 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 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 were 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. 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 Court found, 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.