

THIS WEEK:

- Motions to Withdraw Guilty Pleas; Negotiated Pleas
- Other Acts Evidence; Units of Prosecution
- Law Enforcement Interrogations; Polygraphs
- *Faretta*; Sovereign Citizen Defense
- Ineffective Assistance of Counsel; Jury Charges

Motions to Withdraw Guilty Pleas; Negotiated Pleas

Jackson v. State, A21A1443 (9/16/21)

The record showed that appellant was charged with two counts of aggravated assault, possession of a firearm during the commission of a felony, and second-degree criminal damage to property. In February 2021, he entered what he believed to be a negotiated guilty plea. The trial court sentenced appellant to more time than he negotiated with the State. The next day, he moved to withdraw his guilty plea. The trial court denied the motion, finding that the plea was nonnegotiated.

Appellant argued that he was entitled to withdraw his plea because the trial court failed to inform him that she intended to reject the negotiated plea as required by Uniform Superior Court Rule 33.10. The Court agreed.

The Court noted that the trial court held that appellant's pleas were not negotiated because he entered it after she had advised him that she was not bound by the sentence recommendation and that he would not be allowed to withdraw the plea. At that juncture, the trial court concluded, the plea of guilty was nonnegotiated. But, the Court stated, a guilty plea is nonnegotiated when there is no agreement between the State and the defendant with regard to the sentence. And here the Court found, the record showed that the State and appellant agreed to the proposed sentence after negotiations; that plea counsel and the trial court referred to the plea as negotiated; that the plea was never referred to as nonnegotiated; and that the trial court stated on the final disposition that the plea was negotiated. Therefore, the Court concluded, the record demonstrated that the plea was negotiated.

And because appellant entered a negotiated plea, the trial court was required to follow the mandates of Uniform Superior Court Rule 33.10, which codified the Supreme Court of Georgia's analysis in *State v. Germany*, 246 Ga. 455, 456 (1) (1980), regarding the trial court's duty to inform the defendant that it intends to reject the negotiated plea and that the defendant has the right to withdraw the plea before the sentence is announced.

The Court found nothing in the record which clearly informed appellant, prior to pronouncement of sentence, that the trial court intended to reject the sentence recommendation made by the State pursuant to the plea agreement and that, given the trial court's intention, he was entitled to withdraw his guilty plea as a matter of right prior to pronouncement of

sentence. The informational requirements of Uniform Superior Court Rule 33.10 must be satisfied by explicit statements, not by vague statements or implication.

Nevertheless, the State argued, appellant waived the right to withdraw his plea because the court had informed appellant that she was not bound by the plea agreement and that he would not be allowed to withdraw his plea since he already had withdrawn a plea months before. But, the Court stated, because the trial court failed to inform appellant that she intended to reject the plea agreement, any waiver of his right to withdraw his plea was not knowing and voluntary. If the trial court intended to reject the terms of the plea agreement, it was required to so inform appellant and to permit him to withdraw his guilty plea. Thus, the Court concluded, under the circumstances, the judgment must be reversed.

Other Acts Evidence; Units of Prosecution

State v. Palacio-Gregorio, A21A0800, A21A0801 (9/16/21)

Appellant was convicted of five counts of sexual exploitation of children. The evidence showed that an officer noticed appellant sitting in his vehicle in the parking lot of a hotel. The officer approached and noticed that appellant was looking at pornographic images of a young girl. Appellant consented to a search of his vehicle and the phone with the pornographic images was found stuffed between the two front passenger seats.

Appellant contended that the trial court erred under OCGA § 24-4-414 (a) by admitting evidence that he previously had sexual intercourse with a child and took partially nude photographs of the same child. But the Court found, appellant's entire defense was that the cell phone containing the pornography was not his. He claimed that the phone belonged to someone else who had ridden in the vehicle earlier in the day and that the phone found in his pocket when he was arrested was his only cell phone. Thus, the fact that appellant previously pled guilty to molesting a child and the victim's testimony that appellant took partially nude photographs of her when she was a child was highly probative of appellant's motive. Under the facts and circumstances of this case and considering the strong presumption in favor of admissibility under both OCGA § 24-4-414 (a) and OCGA § 24-4-403, the Court concluded that the trial court did not abuse its discretion in admitting the other acts evidence.

Next, appellant argued that the trial court erred under Rule 404 (b) by admitting 52 additional images and three videos found on the cell phone. The Court agreed that the trial court erred by admitting the evidence under Rule 404 (b) because the photos and videos were intrinsic evidence and thus not subject to the limitations of Rule 404 (b). The only limitation on the admission of this evidence was that of OCGA § 24-4-403 and according to the facts and circumstances of this case, the Court concluded that the trial court did not abuse its discretion in concluding that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice.

The State cross-appealed and contended that the trial court erred by vacating appellant's sentences on counts 1 through 4.

The Court stated that the issue is whether OCGA § 16-12-100 (b) (8) permits a defendant to be separately convicted and sentenced for each of the pornographic images he possessed. In considering the question of whether a single course of conduct can result in multiple convictions, the doctrine of substantive double jeopardy is implicated, and the "unit of prosecution," or the precise act criminalized by the statute, must be identified. The Double Jeopardy Clause imposes few

limits upon the legislature's power to define offenses. Whether a particular course of conduct involves one or more distinct "offenses" under the statute depends on this legislative choice.

Relying on the Supreme Court's decisions in *Coates v. State*, 304 Ga. 329 (2018) and *Edvalson v. State*, 310 Ga. 7, 8 (2020), the Court held the offense is the possession of any prohibited "material" whether that material included one image or 1000 images. Accordingly, the Court affirmed the trial court's decision to vacate appellant's convictions on Counts 1 through 4.

Law Enforcement Interrogations; Polygraphs

State v. Hill, A21A1184 (9/23/21)

In 2017, Hill was indicted on charges of enticing a child for indecent purposes, child molestation, and sexual battery against a child under sixteen. Hill filed a pretrial motion in limine seeking to exclude his two interviews with law enforcement: an interview with an investigator and a pre-polygraph interview with a GBI polygraph examiner. Hill argued that the recordings of the interviews should be excluded from evidence because both interviewers commented on witness credibility and repeated what other witnesses had said. He also argued that the trial court should exclude any mention of his agreement, and subsequent refusal, to take a polygraph test. The trial court agreed, and the State appealed.

The State contended that the trial court erred in excluding the first interview on the basis that the investigator improperly commented on witness credibility and repeated what others said. The Court stated that police officers' comments during interrogations do not constitute sworn witness testimony. Law enforcement interrogations are, by their very nature, attempts to determine the ultimate issue and the credibility of witnesses. Thus, comments made in such an interview and designed to elicit a response from a suspect do not amount to opinion testimony, even when a recording of the comments is admitted at trial. However, comments ought not to be admitted if, under Rule 403, its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Therefore, the Court concluded, the trial court erred in excluding the interview on the basis that the investigator improperly commented on witness credibility and repeated what others said. Further, because exclusion of the investigator's comments under Rule 403 was not raised or ruled on by the trial court and the Court would not look at this issue in the first instance, the trial court's order was reversed.

The State also contended that the trial court erred in excluding the second interview. Specifically, the State argued (1) that Hill's statements are not subject to exclusion simply because they were made during a pre-polygraph interview and (2) that the trial court should not have excluded the interview based on its conclusion that the examiner improperly commented on witness credibility and repeated what others had said.

The Court noted that the general rule in Georgia is that the results of polygraph tests, whether favorable or unfavorable to an accused, are not admissible in evidence, as they are not considered reliable. However, upon express stipulation of the parties, they will be admissible. But, evidence that a defendant entered into a stipulation to take a polygraph examination but later refused to do so is neither probative nor admissible, and it is error to allow evidence of a defendant's refusal to

submit to a polygraph examination. Accordingly, the Court found, evidence that Hill agreed to take a polygraph examination but subsequently refused to do so is inadmissible at trial. Nevertheless, the Court stated, it does not necessarily follow that Hill's statements made in the course of the pre-polygraph interview also are inadmissible.

The Court noted that in *Drane v. State*, 265 Ga. 255 (1995) overruling *Johnson v. State*, 208 Ga. App. 87, 88 (1993), the Supreme Court held that there was no error in the admission of testimony regarding statements the defendant made to the polygraph examiner prior to commencement of an unstipulated polygraph examination. *Id.* at 258-259 (5). Admissions which are otherwise competent and admissible are not to be excluded simply because the admissions were made before or after the taking of a lie detector test. But the Court further noted, the *Drane* Court also pointed out that the trial court had ordered that there be no comment referring to the polygraph examination. Thus, the Court held, the trial court erred in excluding the entirety of the second interview on the basis that it was part of the polygraph "process" and therefore inadmissible.

The State further argued that the trial court erred by relying on *State v. Parks*, 350 Ga. App. 799, 811 (2019), to exclude the second interview in its entirety based on the GBI polygraph examiner repeating what others had told her about the case, presumably referring to what the alleged victim had reported, and commenting on witness credibility.

In *Parks*, the Court noted, a panel of the Court held that the trial court erred in admitting (1) evidence of the defendant's refusal to take a polygraph test and (2) a recording of the defendant's pre-polygraph interview. As to the recording of the pre-polygraph interview, *Parks* concluded that the interview should have been excluded because the examiner repeated things she heard about the case from other investigators and from reviewing the incident report and had "opine[d] that [the defendant] was lying." *Id.* at 809-810 (1). In so holding, *Parks* repeatedly referred to the examiner's comments during the interview as "testimony," and relied on case law stating that a witness' testimony must be based on firsthand knowledge and that witnesses are not allowed to opine that a party or victim is lying or telling the truth. *Id.* at 808-810 (1).

However, the Court stated, officers' comments during interviews and interrogations do not constitute sworn witness testimony and do not amount to opinion testimony to the extent they are designed to elicit a response from a suspect. Therefore, the Court held, to the extent *Parks* conflicts with this law from both this Court and the Supreme Court of Georgia, it is disapproved.

Accordingly, as to the interview at issue, the exclusion of the examiner's comments under Rule 403 was not raised or ruled on below, and the Court stated, it would not consider the issue for the first time on appeal. Consequently, while the trial court was correct to conclude that evidence of Hill's agreement and subsequent refusal to take a polygraph test is inadmissible, the Court reversed the trial court's order excluding the two interviews in their entirety.

Faretta; Sovereign Citizen Defense

Tariq-Madyun v. State, A21A1037 (9/23/21)

Appellant was convicted of armed robbery. The record showed that after appellant told the court he wanted to represent himself, the court and appellant engaged in the required *Faretta* colloquy. At the end of it, appellant made a statement to the trial court suggesting that he intended to pursue a "sovereign citizen"-type defense and asked the trial court if the court

had "jurisdiction over the matter and person at this point in time[.]" The trial court responded that it did "exercise proper jurisdiction" in the case. Appellant stated that he had no further questions, and the trial court found that he had "freely, knowingly, and voluntarily chosen to waive counsel and represent himself," held that he could proceed pro se, and appointed his former counsel as standby counsel for the trial.

Appellant argued that the trial court erred in accepting his waiver of his right to counsel without first advising him that his "sovereign citizen" defense was meritless. The Court disagreed.

The Court, after reviewing the record, found that the trial court's colloquy with appellant sufficiently apprised him of the dangers and disadvantages inherent in self-representation. Nevertheless, appellant argued, the trial court was also required to tell him that his sovereign citizen defense would not succeed.

And, the Court noted, although appellant acknowledged in his brief that "[t]here is no present case law requiring a specific advisement that sovereign citizen defenses are futile," he asked the Court to extend our existing law to mandate such a bright-line rule. The Court declined to do so. Decisions of our Supreme Court and it have made it clear that the validity of a waiver of counsel is a case-by-case determination, and, in making that determination, the trial court is not required to use any particular language, probe a defendant's case and advise him on legal strategy, make any specific inquiries of a defendant, or apprise a defendant of the specific dangers of self-representation inherent in the defendant's particular case. A defendant's technical legal knowledge is not relevant to an assessment of his knowing exercise of the right to defend himself.

Moreover, the Court found, the record showed that, during the waiver colloquy, the trial court expressly rejected the jurisdictional argument central to a sovereign citizen defense. In response to a question from appellant, the trial court plainly stated that he had jurisdiction over the criminal proceedings against him. This undercut appellant's argument that he did not have the necessary information to waive his right intelligently, freely, and voluntarily to counsel. Therefore, the Court concluded, there was no error in the trial court's acceptance of appellant's waiver of counsel.

Ineffective Assistance of Counsel; Jury Charges

Woods v. State, A21A0803 (9/28/21)

Appellant was convicted of one count of neglect of a disabled person pursuant to OCGA § 30-5-8 (a) (2010). The evidence, very briefly stated, showed that the disabled victim was being cared for in the home of Zenobia. However, in 2009, Zenobia suffered a brain aneurysm. At that time, appellant — Zenobia's son — then came to Georgia from Maryland to assist his mother with her care. In 2010, a family member of the victim came to visit the victim. Eventually, because of the condition of the victim witnessed by the family member, the victim was taken to the hospital and appellant was arrested.

Appellant argued that he received ineffective assistance of trial counsel due to counsel's failure to object to the trial court's sua sponte jury instruction defining "caretaker" when that word was not part of the charging statute. The Court disagreed.

The Court noted that in its ruling on appellant's motion for a directed verdict, the trial court mentioned the definition of "caretaker," noting that "it means a person that has the responsibility for the care of a disabled adult or elderly person as the result of a family relationship, contract, or voluntary assumptions." Based upon evidence that appellant stated that he

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helped with the victim's care, the trial court concluded that a jury question existed “as to whether or not [appellant] had assumed any responsibility.” Then, during the charge conference, the trial court indicated that it would instruct the jury on definitions contained in OCGA § 30-5-3, including “abuse,” “caretaker,” and “disabled adult.” As part of its charge, the trial court instructed the jury, in language that tracked OCGA § 30-5-3 (2) (2010), that “a caretaker is a person who has the responsibility for the care of a disabled adult or elder person ... as the result of a family relationship, contract, voluntary assumption of that responsibility, or by operation of law.” The transcript did not show any discussion concerning the inclusion of the definition of “caretaker,” and trial counsel did not object to the instruction either during the charge conference or at the conclusion of the trial court's charge.

The Court stated that where there is any evidence, however slight, upon a particular point, it is not error to charge the law in relation to that issue. And here, the Court found, appellant did not demonstrate error by trial counsel. Although appellant testified that he “had no obligation to [the victim]” and that he made “no verbal commitment” to care for the victim, he admitted that he transported the victim to the hospital after the decision was made that the EMTs could not transport her without upsetting her. He also stated that he “incidentally” helped his mother care for the victim. Moreover, appellant admitted to a GBI agent that he helped to feed and bathe the victim and launder her clothing. Inasmuch as there was some testimony — from appellant himself — that he had no duty or obligation to care for the victim, the trial court properly charged the jury on the definition of “caretaker” in order to provide the jury with context concerning appellant's alleged duty. And because the charge was proper, trial counsel did not commit error when he did not object to it. Therefore, the Court concluded, trial counsel did not render ineffective assistance.